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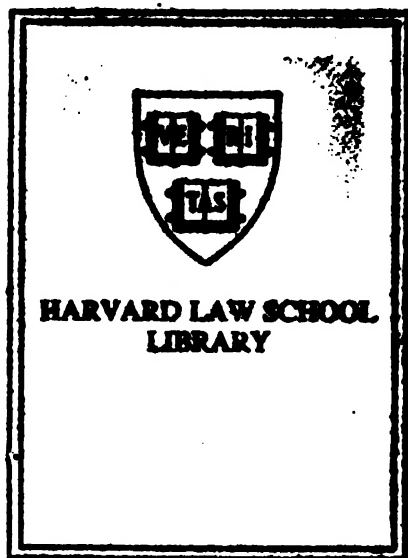
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14	1	14	59	14	89	14	149	14	198	14	231	14	287	14	339	14	390
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**LOUISIANA
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OF

CASES ARGUED AND DETERMINED



IN

THE SUPREME COURT

OF

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FOR THE YEAR

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JUDGES
OF
THE SUPREME COURT,
DURING THE TIME OF THESE REPORTS.

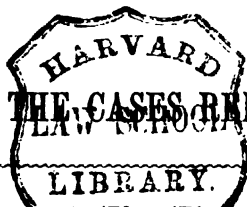
HON. E. T. MERRICK, *Chief Justice.*

HON. A. M. BUCHANAN, HON. C. VOORHIES, HON. J. L. COLE, HON. T. T. LAND, HON. A. VOORHIES,*	}	<i>Associate Justices.</i>
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E. WARREN MOISE, *Attorney General.*

* The Hon. ALBERT VOORHIES was elected on the 1st Monday of April, 1859, in the place of Hon. C VOORHIES, whose term had expired. The latter name was inadvertently inserted in the place of the former, in the list of Judges who presided at Monroe, Alexandria and Opelousas.

TABLE OF THE CASES REPORTED.



Adams, Smith v.	409	Blunt, Pierce v.	345
Adams, State v.	620	Boether v. Wade.	695
Alexandrie, Crawford v.	708	Boehner, Hanney v.	859
Alexandrie v. Saloy.	327	Bogart and Toby, Scott v.	261
Alford v. Hughes & Randolph.	727	Boggus, Hickman v.	609
Alter, Ridge v.	866	Boissac v. Petit.	565
Amonett v. Young & Bemiss.	175	Bordelon, Joffrion v.	618
Anderson, Frelsen, Stevenson & Co. v.	65	Bordelon v. Weymouth.	93
Anderson v. Joliett.	614	Borgereau v. Guéringer.	478
Andrews v. Executor of Beard.	121	Borren v. Mertens.	306
Andrew & Sireau v. Keenan.	705	Boudreaux, State v.	88
Angelo, McCutcheon v.	34	Boudro, New Orleans v.	303
Armant, D'Aquin v.	217	Bourg, Wallace v.	104
Armant, Mayor v.	181	Bourke, Waterhouse v.	358
Armorer, Late v.	826	Boutin, Roquest v.	44
Arrowsmith v. Durell.	849	Bowers v. Hale.	419
Atkinson v. Rogers.	633	Bowman v. McKleroy & Bradford,	587
Austin v. Vaughan and Hill.	43	Boyce, Maillon v.	621
Ayraud, Hache v.	178	Boyd v. Frantom.	691
		Box, Key v.	497
Babin, Hereford v.	333	Bradford, Union Bank v.	159
Babin, Ruys v.	95	Brand & Adams v. West & David-son.	187
Babineau, Fuselier v.	764	Breaux v. Gallusseau.	233
Babineau v. LeBlanc.	729	Brentel, Foss v.	798
Bacas v. Klein.	407	Bridge, Jamison v.	31
Badon, State v.	783	Bridge, Williams v.	721
Ballard, Edwards v.	362	Bright, Sharp v.	390
Ball v. Greaud.	305	Bringier v. Gordon.	274
Bank of Louisiana v. Satterfield.	80	Broadwell v. Kelly.	456
Bank of Louisiana, Vanbibber v.	481	Brooks v. Wigginton.	676
Bantz v. Price.	191	Broom, Succession of.	67
Barbet v. Roth.	381	Brother v. Canal Bank.	475
Barrelli v. Szymanski.	47	Brown v. Bark Laura Snow.	848
Barnes, Lyman & Co. v. Wayland & Co.	791	Brown, Chiapella v.	189
Barr, Heirs of, Elam v.	671	Brown v. Duplessis and N. Orleans,	842
Barriere v. Psychaud.	370	Brown, Eager v.	684
Barrow v. Robicheaux.	207	Brown v. Raby.	41
Barstow v. Murison.	335	Brown, Robert v.	597
Bartchy, Zimmerman v.	526	Brown v. Roberts.	259
Beard, Executor of, Andrews v.	121	Brown, Winn v.	642
Beauvais v. Wall.	199	Bryan, Whitfield v.	600
Bell, Hunter v.	142	Byrne, Vance & Co. v. Prather.	653
Bell v. Massey & Poultney.	831	Buchanon, Carroll & Co. v. Switzer.	495
Bell, Moore v.	388	Buckley v. Lacroix and N. Orleans,	29
Bell, New Orleans v.	214	Buford, Goode v.	102
Bemiss, Noland and Morancy v.	49	Bunger, State v.	461
Bennett v. New Orleans.	120	Bussy, Lassiter v.	699
Bennett, State v.	651	Butman, Richard v.	144
Bergeron, Lebeau v.	489		
Beste v. His Creditors.	516	Cady & Holmes, Green, Harding & Co. v.	828
Bienvenu v. Her Husband.	336	Cahawba, Steamer, Edwards v.	224
Bisland v. Provosty.	169	Cahill v. Connolly.	280
Blanchard, Dutillet v.	97	Caillateau v. Ingouf.	623
Bloom, Foster v.	194	Cain, Sage v.	192

Calder, Surgi <i>v.</i>	336	Crosely, Police Jury of West Ba-	
Caldwell, Robertson <i>v.</i>	864	ton Rouge <i>v.</i>	164
Calhoun, Sutton <i>v.</i>	209	Crozier, Hawley <i>v.</i>	304
Calloway, Taylor <i>v.</i>	688	Cuillé <i>v.</i> Gassen.....	5
Calmes <i>v.</i> Duplantier.....	814	Cummings <i>v.</i> Erwin.....	315
Cambot, Moodie <i>v.</i>	153	Cummings <i>v.</i> Harsabrauch.....	711
Cameron, Lee <i>v.</i>	700		
Canal Bank, Brother <i>v.</i>	475	Daily <i>v.</i> Newman.....	580
Cannon, McDermott <i>v.</i>	313	Daly, Succession of, Edwards <i>v.</i> ...	384
Cannon, Porée <i>v.</i>	501	Daniell, Wailes <i>v.</i>	578
Capperton & Weeks, Jones <i>v.</i> ...	698	D'Aquin <i>v.</i> Armant.....	217
Cardenas, Tallamon & Dessommes <i>v.</i>	509	David and Livaudais <i>v.</i> Municipal-	
Cardona, Succession of.....	356	ity No. 2.....	872
Carlin, Tucker <i>v.</i>	734	Davidson, Brand & Adams <i>v.</i>	187
Carprette, Shiff <i>v.</i>	801	David, Succession of.....	730
Carriere <i>v.</i> Labiche.....	211	Davis <i>v.</i> Grailhe.....	338
Carrington, Cheatham <i>v.</i>	696	Davis <i>v.</i> Millaudon.....	808
Carroll, Saunders <i>v.</i>	27	Davis <i>v.</i> Millaudon.....	868
Castille, Lobit & Charpentier <i>v.</i> ...	779	Davis, Rice <i>v.</i>	435
Castille, Louaillier <i>v.</i>	777	Davis <i>v.</i> Robertson.....	281
Cater <i>v.</i> Merrell & Co.....	375	Davis, State <i>v.</i>	678
Cazenave, White & Trufant <i>v.</i> ...	57	Delacroix <i>v.</i> Lacaze.....	519
Caze <i>v.</i> Robertson.....	232	Delaporte, Michel <i>v.</i>	91
Chamberlin, Young <i>v.</i>	687	Delespare <i>v.</i> Warner.....	413
Charles, a slave, State <i>v.</i>	649	Deloach <i>v.</i> Elder.....	662
Charles Morgan, Ship, Port War-		Demouy, George <i>v.</i>	145
dens <i>v.</i>	595	Denson <i>v.</i> Stewart.....	703
Cheatham <i>v.</i> Carrington.....	696	Derosier, State <i>v.</i>	736
Cherry, Drawn <i>v.</i>	694	Desban, Hallet <i>v.</i>	529
Chexnaidre, Saloy <i>v.</i>	567	Deshotels, Soileau <i>v.</i>	745
Chiapella <i>v.</i> Brown.....	189	Deslondes <i>v.</i> New Orleans.....	552
Clark <i>v.</i> Hebert.....	183	Desobry, Nicholson <i>v.</i>	81
Clark <i>v.</i> Holbrook.....	573	Dixey, Murrell <i>v.</i>	298
Clark, Twitty <i>v.</i>	503	Dix <i>v.</i> Tully.....	456
Clement, Comaux <i>v.</i>	184	Dodd <i>v.</i> Succession of Orillion....	68
Clinton and Port Hudson Railroad		Dodeman <i>v.</i> Judge 4th Dist. Court,	60
Company <i>v.</i> Eason.....	816	Dohan <i>v.</i> Wilson.....	353
Close, Williams <i>v.</i>	737	Doiron, Comaux <i>v.</i>	184
Cohn & Bruen <i>v.</i> Levy.....	355	Dorsey, Hulse <i>v.</i>	302
Cole <i>v.</i> Langley.....	770	Drawn <i>v.</i> Cherry.....	694
Coleman <i>v.</i> Haight.....	564	Drew, Dyer & Stevenson <i>v.</i>	657
Coleman, School Directors <i>v.</i> ...	186	Dubois & Mish <i>v.</i> Xiques.....	427
Collins <i>v.</i> McDonald.....	735	Dubuisson <i>v.</i> Judge 2d Dist. Court,	240
Comaux <i>v.</i> Doiron and Clement....	184	Duchamp, Sainet <i>v.</i>	539
Connell, McKnight <i>v.</i>	396	Dudley <i>v.</i> Tilton.....	283
Connelly, Cahill <i>v.</i>	280	Dugan <i>v.</i> Fulton.....	418
Constantin, Harry <i>v.</i>	782	Dugas <i>v.</i> Truxillo.....	201
Converse, Kennett & Co. <i>v.</i> Hill..	89	Duplantier, Calmes <i>v.</i>	814
Coons <i>v.</i> Stringer.....	726	Duplessis and N. Orleans, Brown <i>v.</i>	842
Cooper <i>v.</i> Cooper.....	665	Durell, Arrowsmith <i>v.</i>	849
Cordeviollé & Lacroix <i>v.</i> Judge of		Dutcher, Funkhouser <i>v.</i>	494
the 5th District Court.....	323	Dutillet <i>v.</i> Blanchard.....	97
Cornelius, Kemp <i>v.</i>	301	Dyer, Dyke <i>v.</i>	701
Corner <i>v.</i> Zantz.....	861	Dyer & Stevenson <i>v.</i> Drew.....	657
Costello, New Orleans <i>v.</i>	37	Dyke <i>v.</i> Dyer.....	701
Crawford <i>v.</i> Alexander.....	708	Dyson <i>v.</i> Phelps.....	722
Crawford <i>v.</i> Puckett.....	639		
Crescent Mutual Ins. Co. State, ex		Eager <i>v.</i> Brown.....	684
rel. J. H. Hanau, Jr., <i>v.</i>	825	Ealer <i>v.</i> McAllister.....	821
Crescent Mutual Insurance Compa-		Eason, Clinton and Port Hudson	
ny, Hyde & Mackie <i>v.</i>	264	Railroad Company <i>v.</i>	816
Crescent Newspaper, N. Orleans <i>v.</i>	804	Edwards <i>v.</i> Ballard.....	362
Crocker, Succession of.....	94	Edwards <i>v.</i> Steamer Cahawba.....	224
Crockett, Ross <i>v.</i>	811	Edwards <i>v.</i> Succession of Daley...	384

TABLE OF THE CASES REPORTED.

ix

Elam v. Heirs of Barr.....	671	Gilbert v. Hollinger.....	441
Elder, Deloach v.....	662	Gilkinson v. Steamboat Scotland..	417
Elkin v. New York and New Orleans Steamship Company....	647	Gleisses v. McHutton and Romagosa	560
Elvers, Bojé & Co., Kuenzi v....	391	Goldsmith, Haber & Co., Keane v.	349
Emanuel v. Mann.....	53	Goode v. Buford.....	102
Emerson, Price v.....	141	Gordon, Bringier v.....	274
Emmerling v. Graham.....	389	Gordon, Estate of, Moore v.....	388
Emswiler, Richardson v.....	658	Gouaux & Viala, Vignié v.....	344
Erwin, Cummings v.....	315	Graham, Emmerling v.....	389
Erwin, Yeatman, Woods & Co. v..	149	Grailhe, Davis v.....	338
		Grant, Succession of.....	795
		Graugnard v. Lombard.....	234
Fabre v. McRae.....	648	Graves, Powell v.....	860
Fassman & Yancey, New Orleans v.	865	Greand, Ball v.....	305
Faulk v. Hough.....	659	Green, Gauthier v.....	788
Faurès, Parlange v.....	444	Green v. Green.....	39
Favaron v. Rideau.....	805	Green, Harding & Co. v. Oady & Holmes.....	828
Fenner, Kearney v.....	870	Green, Harding & Co. v. Relf.....	828
Fernot, Knabe v.....	847	Green, Harding & Co. v. Sykee...	828
Fisk, New Orleans v.....	862	Gribble v. McKleroy & Bradford..	793
Fisk v. Parker.....	491	Grieff v. McDaniel & Watson....	160
Fisk, Todd v.....	13	Guéringer, Bogereau v.....	478
Flatboats, Schwartz v.....	243	Guillotte, Heirs of, New Orleans v.	875
Fluker, McCaleb v.....	316	Guillotte, Municipality No. 2 v....	297
Fontenelle v. Smith.....	368	Guillotte, Pigrau v.....	297
Ford v. Morancy.....	77	Gunny, Giannoni v.....	632
Ford v. Newcomer.....	706	Gurney, Succession of.....	622
Foree v. McIntyre.....	158		
Forno, State v.....	450	Haase, State v.....	79
Fortnich v. New Orleans.....	115	Hache v. Ayraud.....	178
Foss v. Brentel.....	798	Haight, Coleman v.....	564
Foster v. Bloom.....	194	Hale, Bowers v.....	419
Franklin v. Woodland.....	188	Hale v. Saunders.....	642
Frantom, Boyd v.....	691	Hallett v. Desban.....	529
Frellsen, Stevenson & Co. v. Anderson.....	65	Hall & Hildreth, Pope v.....	324
Frellsen, Stevenson & Co. v. Stewart.....	832	Hall & Hildreth, Profilet v.....	524
Freret, Gaiennie v.....	488	Hamilton, Mast v.....	774
Frisby, Late v.....	826	Hampton, State v.....	679
Frost v. White.....	140	Hampton, State v.....	725
Fulford, McLean v.....	711	Hampton v. Watterston.....	239
Fuller, State v.....	667	Hansa v. Crescent Mutual Insurance Company.....	825
Fuller, State v.....	720	Hancock, Taylor, Knapp & Co. v.	693
Fuller, State v.....	726	Hanney v. Boehner.....	859
Fulton, Dugan v.....	418	Hanney v. Healy.....	424
Funkhouser v. Dutcher.....	494	Harbour, Haynes v.....	237
Fuqua v. Young & Knighton....	216	Hardy v. Voorhies.....	776
Fury, Bridget, State v.....	827	Harrell, Morris v.....	185
Fuselier v. Babineau.....	764	Harrell, Wood v.....	61
		Harris, Vienne v.....	382
Gaiennie v. Freret.....	488	Harry v. Constantin.....	782
Gails v. Schooner Osceola.....	54	Hart, New Orleans v.....	803
Gallusseaux, Breaux v.....	233	Harsabrauch, Cummings v.....	711
Gardiner v. Thibodeau.....	732	Hauley v. Crozier.....	304
Garret, Van Wickle v.....	106	Hausa, bark, Rochereau v.....	431
Gassen, Cuillé v.....	5	Hawkins v. McVea.....	339
Gauche v. Storer.....	411	Hawkins, Scully v.....	183
Gaudet v. Gaudet.....	112	Hawthorn, Williams v.....	615
Gauthier v. Green.....	788	Haynes v. Harbour.....	237
George v. Demony.....	145	Haynes v. Pipes.....	248
German Evangelical Congregation v. Pressler.....	799	Hays, Jackson v.....	577
Giannoni v. Gunny.....	632	Hays, Young v.....	654
		Healy, Hanney v.....	424

TABLE OF THE CASES REPORTED.

Hébert, Clark <i>v.</i>	183	Judge 3d Dis. Court, Hickman <i>v.</i> ..	504
Helme <i>v.</i> Middleton, Harper & Co.	484	Judge 4th Dis. Court, Dodeman <i>v.</i> ..	60
Helme <i>v.</i> Pollard.....	306	Judge 5th Dis. Court, Cordevioille	
Henderson, Matta <i>v.</i>	473	& Lacroix <i>v.</i>	323
Hereford <i>v.</i> Babin.....	333	Judge 8th Judicial District, State <i>v.</i>	486
Hernandez <i>v.</i> His Creditors.....	337		
Hickman <i>v.</i> Boggus.....	609	Keane <i>v.</i> Goldsmith, Haber & Co..	349
Hickman <i>v.</i> Judge 3d Dist. Court,	504	Kearney <i>v.</i> Fenner.....	870
Hickman, Logan <i>v.</i>	300	Kearney, Judd Oil Company <i>v.</i> ...	352
Hickman, West <i>v.</i>	610	Kearney, Perry <i>v.</i>	400
Hicks <i>v.</i> Weems.....	629	Kearns, Scully <i>v.</i>	436
Hiestand <i>v.</i> New Orleans.....	137	Keenan, Andrew & Sireau <i>v.</i>	705
Hiestand <i>v.</i> New Orleans.....	330	Keller, Satterfield <i>v.</i>	606
Hill, Austin <i>v.</i>	43	Kelly, Broadwell <i>v.</i>	456
Hill, Converse, Kennett & Co. <i>v.</i> ..	89	Kelly <i>v.</i> Wiseman & Hinson.....	661
Hill, Whipple <i>v.</i>	437	Kemp <i>v.</i> Cornelius.....	301
Holbrook, Clark <i>v.</i>	573	Kemper, Pochelu <i>v.</i>	308
Hollinger, Gilbert and Krebs <i>v.</i> ...	447	Kennedy, Mock <i>v.</i>	32
Hommerich <i>v.</i> Hunter.....	225	Kercheval, Succession of.....	457
Hopson, Powell & Hopkins <i>v.</i>	666	Ker, Newton <i>v.</i>	704
Horton <i>v.</i> Thornhill.....	142	Kessee <i>v.</i> Mayfield & Cage.....	90
Hough, Faulk <i>v.</i>	659	Key <i>v.</i> Box.....	497
Howes, Thompson <i>v.</i>	45	Kilcrease, Thompson <i>v.</i>	340
Hubert, Pauline <i>v.</i>	161	King <i>v.</i> Neely.....	165
Hughes <i>v.</i> Hughes.....	85	King <i>v.</i> New Orleans.....	389
Hughes, Hyllested & Co. <i>v.</i> Kling-		King <i>v.</i> Wartelle.....	740
gender.....	52	Kirk, Zacharie <i>v.</i>	433
Hughes, Hyllested & Co. <i>v.</i> Kling-		Klein, Bacas <i>v.</i>	407
gender.....	845	Kleinwort & Cohen <i>v.</i> Klingender..	96
Hughes & Randolph, Alford <i>v.</i> ...	727	Klingender, Hughes, Hyllested &	
Hughes, Succession of.....	863	Co. <i>v.</i>	52
Hughes, Vallette & Co. <i>v.</i> Waldo		Klingender, Hughes, Hyllested &	
& Hughes.....	348	Co. <i>v.</i>	845
Hulse <i>v.</i> Dorsey.....	302	Klingender, Kleinwort & Cohen <i>v.</i>	96
Hunter <i>v.</i> Bell.....	142	Knabe <i>v.</i> Fernot.....	847
Hunter, Hommerich <i>v.</i>	225	Knox <i>v.</i> Pulliam.....	123
Hunter, State <i>v.</i>	71	Kock, India Bagging Association <i>v.</i>	168
Hyde & Mackie <i>v.</i> Crescent Mutu-		Krebs, Hollinger <i>v.</i>	441
al Insurance Company.....	264	Kron <i>v.</i> Watson.....	432
Hyde <i>v.</i> Mississippi Sound Co....	492	Kuenzi <i>v.</i> Elvers, Bojë & Co....	391
India Bagging Association <i>v.</i> Kock,	168	Labiche, Carrière <i>v.</i>	211
Inge <i>v.</i> Police Jury of Tensas....	117	Lacapère, Underwood <i>v.</i>	276
Ingouf, Cailleteau <i>v.</i>	623	Lacaze, Delacroix <i>v.</i>	519
Jack, a slave, State <i>v.</i>	385	Lacroix, Buckley <i>v.</i>	29
Jackson <i>v.</i> Hays.....	577	Lallande <i>v.</i> Jones.....	714
Jackson <i>v.</i> Jones.....	230	Lambert, New Orleans <i>v.</i>	247
Jackson & Van Pelt <i>v.</i> Moore.....	213	Langley, Cole <i>v.</i>	770
Jackson, Riddell <i>v.</i>	135	Lassiter <i>v.</i> Bussey.....	699
Jackson <i>v.</i> Schmidt.....	806	Late <i>v.</i> Armorer and Frisby.....	826
Jackson, Shaffet <i>v.</i>	154	Laura Snow, bark, Brown <i>v.</i>	848
Jamison <i>v.</i> Bridge.....	31	Laurent, Meissonier <i>v.</i>	14
Joffrion <i>v.</i> Bordenon.....	618	Layster <i>v.</i> Petrovie.....	601
Johnston <i>v.</i> Pike.....	731	Lea, New Orleans <i>v.</i>	197
Joiiett, Anderson <i>v.</i>	614	Lebeau <i>v.</i> Bergeron.....	489
Jones <i>v.</i> Capperton & Weeks.....	698	Leblanc, Babineau <i>v.</i>	729
Jones, Jackson <i>v.</i>	230	Leblanc <i>v.</i> Ludrique.....	772
Jones, Lallande <i>v.</i>	714	Leblanc, Williams <i>v.</i>	757
Jones, Story <i>v.</i>	73	Leckie, C. S., State <i>v.</i>	636
Jones, White <i>v.</i>	681	Leckie, W. R., State <i>v.</i>	641
Jourdan, Moore <i>v.</i>	414	Ledoux <i>v.</i> Murray.....	613
Judd Oil Company <i>v.</i> Kearney....	352	Lee <i>v.</i> Cameron.....	700
Judge 2d Dis. Court, Dubuisson <i>v.</i>	240	Leftwitch <i>v.</i> Mayor and Selectmen	
		of the town of Plaquemine... 152	

TABLE OF THE CASES REPORTED.

xi

Letcovich v. New Orleans.....	115	McDougall, Scott v.....	309
Levee Commissioners, Selby v....	434	McHatten, Gleisses v.....	560
Levy, Cohn & Bruen v.....	355	McIntyre, Force v.....	158
Levy, Rowland v.....	223	McKeen, Vicksburg, Shreveport & Texas Railroad Company v..	724
Lewis v. Morgan.....	401	McKleroy & Bradford, Bowman v.	587
Lewis v. Williams.....	625	McKleroy & Bradford, Gribble v..	793
Lindsey, State v.....	42	McKleroy & Bradford v. Southern Bank of Kentucky.....	458
Livaudais v. Municipality No. 2..	872	McKnight v. Connell and Parker..	396
Lobit & Charpentier v. Castille...	779	McLaughlin, Succession of.....	398
Locke v. Mackinson & Murphy...	361	McLean v. Fulford.....	711
Lockhart v. Wall.....	273	McMichael's Heirs v. Raoul.....	307
Locke, New Orleans v.....	854	McRae, Fabre v.....	648
Logan v. Hickman and Robertson..	300	McRae v. His Creditors.....	229
Lombard, Graugnard v.....	234	McRae, Lyons v.....	423
Lombas v. Robichaux.....	105	McRae, Lyons v.....	438
Lombas, Simpson v.....	103	McVea, Hawkins v.....	339
Louaillier v. Castille.....	777	Meissonier v. Laurent.....	14
Louisiana Mutual Insurance Com- pany, Shearer v.....	797	Melpomene Street, Certain inhabi- tants of, v. New Orleans....	452
Love, Savage & Co. v. McComas & Cloon.....	201	Merrell & Co., Cater v.....	375
Low & Whitney v. Proctor & Tho- mas.....	373	Merriam v. New Orleans.....	318
Loyd v. Mortée.....	107	Mertens, Borron v.....	306
Ludrique, Leblanc v.....	772	Métayer, Morgan v.....	612
Lynch, Succession of.....	235	Michel v. Delaporte.....	91
Lyons v. McRae.....	423	Middleton, Harper & Co., Helme v.	484
Lyons v. McRae.....	438	Millaudon, Davis v.....	808
Mackinson & Murphy, Locke v...	361	Millaudon, Davis v.....	868
Maillon v. Boyce.....	621	Miller, Robinson v.....	222
Maitremme, State v.....	830	Mississippi Sound Co., Hyde v...	492
Major v. Tardos.....	10	Mock v. Kennedy.....	32
Mallory, Ruddock v.....	314	Moodie v. Cambot.....	153
Mann, Emanuel v.....	53	Moore v. Estate of Gordon, and Bell.....	388
Manouvrier, Marvel v.....	3	Moore, Jackson & Van Pelt v...	213
Marcy v. Sun Insurance Company of New York.....	264	Moore v. Jourdan.....	414
Marigny, Morales v.....	855	Moore, Porche v.....	241
Martha J. Ward, Ship, Port War- dens v.....	289	Moore, Swan v.....	833
Martin v. His Creditors.....	393	Morales v. Marigny.....	855
Marshall v. Parish of Morehouse..	689	Morancy v. Bemiss.....	49
Marvel v. Manouvrier.....	3	Morancy, Ford v.....	77
Mason, State v.....	505	Morehouse, Parish of, Marshall v..	689
Massey & Poultney, Bell v.....	831	Morgan, Lewis v.....	401
Mast v. Hamilton.....	774	Morgan v. Métayer.....	612
Mathews, Succession of, Price v..	11	Morgan v. Nye.....	30
Matta v. Henderson.....	473	Morris v. Harrell.....	185
Mavor v. Armant.....	181	Morrison v. Wimberly.....	713
Mayfield & Cage, Kessee v.....	90	Mortée, Loyd v.....	107
McAllister, Ealer v.....	821	Mosely, Tillman v.....	710
McAlpin, Succession of.....	617	Moussier v. Zuntz.....	15
McCaleb v. Fluker.....	316	Mullen, State v.....	570
McClelland, Succession of.....	762	Municipality No. 2, David and Li- vaudais v.....	872
McComas & Cloon, Love, Savage & Co. v.....	201	Municipality No. 2 v. Guillotte..	297
McCormick, Riviere v.....	139	Munzenheimer, Wolf v.....	114
McCulloch v. Weaver.....	33	Murison, Barstow v.....	335
McCutcheon v. Angelo.....	34	Murphy v. Simonds.....	322
McDaniel, Grieff v.....	160	Murrell v. Dixey.....	298
McDermott v. Cannon.....	313	Murray, Ledoux v.....	613
McDonald & Coon v. Vaughan...	716	Neely, King v.....	165
McDonald, Collins v.....	735	Neveu v. Voorhies.....	738
		Neville, Orman v.....	392

Newcomer, Ford v.....	706	Penny, Succession of.....	194
Newman, Daily v.....	580	Perry v. Kearney.....	400
New Orleans v. Bell.....	214	Peter, a slave, State v.....	521
New Orleans, Bennett v.....	120	Petit, State v.....	565
New Orleans v. Boudro.....	303	Petrovic, Layster v.....	601
New Orleans, Brown v.....	842	Petrovic, Parnell v.....	601
New Orleans, Buckley v.....	29	Peychaud, Barrière v.....	370
New Orleans, Certain Inhabitants of Melpomene street v.....	452	Phelps, Dyson v.....	722
New Orleans v. Costello.....	37	Picket v. Vance.....	668
New Orleans v. Crescent Newspaper.....	804	Pierse v. Blunt.....	345
New Orleans, Deslondes v.....	552	Pigrau v. Guillotte.....	297
New Orleans Draining Company, matter of, Surgi v. Roselus...	263	Pike, Johnston v.....	731
New Orleans v. Fassman & Yancey,	865	Pipes, Haynes v.....	248
New Orleans v. Fisk.....	862	Pitkin v. Rousseau & Jaufrean...	511
New Orleans, Fortunich v.....	115	Pittman & Barrow v. Robicheaux...	108
New Orleans v. Heirs of Guillotte,	875	Plaquemine, Mayor and Selectmen of the town of, Leftwich v....	152
New Orleans v. Hart.....	803	Pochelu v. Kemper.....	308
New Orleans, Hiestand v.....	137	Pointe Coupée, Police Jury of, Stewart v.....	69
New Orleans, Hiestand v.....	330	Police Jury of West Baton Rouge v. Crosely.....	164
New Orleans, King v.....	389	Pollard, Helme v.....	306
New Orleans v. Lambert.....	247	Pollard, Sowle & Ward v.....	287
New Orleans v. Lea.....	197	Pool, Succession of.....	677
New Orleans, Letcovich.....	115	Pope v. Hall & Hildreth.....	324
New Orleans v. Locke.....	854	Porche v. Moore.....	241
New Orleans, Merriam v.....	318	Porée v. Cannon.....	501
New Orleans v. Poutz.....	853	Porterfield, Snapp v.....	405
New Orleans, Sarpy's Heirs v....	311	Port Wardens v. Ship Charles Morgan.....	595
New Orleans, Staganoviciche v....	115	Port Wardens v. Ship Martha J. Ward.....	289
New Orleans, St. Martin v.....	113	Powell v. Graves.....	860
Newton v. Ker.....	704	Powell & Hopkins v. Hopson....	666
Newton, Wade v.....	271	Powell, Succession of.....	425
New York and New Orleans Steam- ship Company, Elkin v.....	647	Poutz, New Orleans v.....	853
Nicholson v. Desobry.....	81	Prather, Bryne, Vance & Co. v....	653
Nicholson v. Pelanne.....	508	Préjean, Heirs of, v. Robin.....	788
Nicholson, State v.....	785	Pressler, German Evangelical Con- gregation v.....	799
Nimmo v. Walker.....	581	Price, Bantz v.....	191
Noble, Sampson & Keene v.....	347	Price v. Emerson.....	141
Noland & Morancy v. Bemiss....	49	Price v. Ray.....	697
Nye, Morgan v.....	30	Price v. Succession of Mathews...	11
Orillion, Succession of, Dodd v....	68	Proctor & Thomas, Low & Whit- ney v.....	373
Orman v. Neville.....	392	Proflet v. Hall & Hildreth.....	524
Ory, Weber v.....	537	Provosty, Bisland v.....	169
Osceola, Schooner, Gails v.....	54	Provosty, Tenny v.....	221
Parker, Fisk v.....	491	Puckett, Crawford v.....	639
Parker, McKnight v.....	396	Pulliam, Knox v.....	123
Parker v. Robertson.....	249	Purnell, White v.....	232
Parlange v. Faurès.....	444	Quirk, Shift v.....	801
Parnell v. Petrovic.....	601	Raby, Brown v.....	41
Patterson, State v.....	46	Raiford v. Wood.....	116
Payne & Harrison v. Scott.....	760	Ramsey, White v.....	329
Payne & Harrison, Sleade v.....	453	Raoul, McMichael's Heirs v.....	307
Paysen, Williams and Shepherd v..	7	Rayne v. Taylor.....	406
Pauline v. Hubert.....	161	Ray, Price v.....	697
Peele v. Louisiana Mutual Ins. Co.	797	Red Bill, State v.....	446
Peet, Simms & Co. v. Whitmore..	408	Roding, Pasteur & Co. v. Ridge..	36
Pelanne, Nicholson v.....	508		
Pelanne, Tircuit v.....	215		
Pendarvis v. Wall.....	449		

TABLE OF THE CASES REPORTED.

xiii

Relf, Green, Harding & Co. v.	828	Scotland, Steamboat, Gilkinson v.	417
Rembert v. Whitworth & Poag.	608	Scott v. Bogart and Toby.	261
Rentford, State v.	214	Scott v. McDougall.	309
Reonnals, State v.	278	Scott, Payne & Harrison v.	760
Reynolds, Sheldon v.	692	Scuddy v. Shaffer.	569
Reynolds v. Stille.	599	Scuddy, Shaffer v.	575
Rice v. Davis.	435	Scully v. Hawkins.	183
Rice, Succession of.	317	Scully v. Kearns.	436
Richard v. Butman.	144	Selby v. Levee Commissioners.	434
Richardson v. Emswiler.	658	Shaffer, Scuddy v.	569
Richardson, Succession of.	1	Shaffer v. Scuddy.	575
Riddell v. Jackson.	135	Shaffet v. Jackson.	154
Rideau, Favaron v.	805	Sharp v. Bright.	390
Ridge v. Alter.	866	Shearer v. Louisiana Mutual Insu-	
Ridge, Reding, Pasteur & Co. v.	36	rance Company.	797
Rist, Van Wick v.	56	Sheldon v. Reynolds.	692
Rivière v. McCormick.	139	Shelton, Robson & Allen v.	712
Robert v. Brown.	597	Shelton, Wallace v.	498
Roberts, Brown v.	259	Shepherd v. Payson.	7
Robertson v. Caldwell.	864	Sheriff, The, Sturges v.	231
Robertson, Caze v.	232	Shiff v. Carprette and Quirk.	801
Robertson, Davis v.	281	Shouse, Todd v.	426
Robertson, Logan v.	300	Simonds, Murphy v.	322
Robertson, Parker v.	249	Simon, Taylor, Hadden & Co. v.	351
Robichaux, Lombas v.	105	Simpson v. Lombas.	103
Robichaux, Barrow v.	207	Sleade v. Payne & Harrison.	453
Robicheau, Pittman & Barrow v.	108	Smith v. Adams.	409
Robin, Heirs of Préjean v.	788	Smith, Fontenelle v.	368
Robinson v. Miller.	222	Smith v. Taylor.	663
Robson & Allen v. Shelton.	712	Smith, Wilson's Heirs v.	368
Rochereau v. Bark Hausa.	431	Snapp v. Porterfield.	405
Rogers, Atkinson v.	633	Soileau, Deshotels v.	745
Rollaud, State v.	40	Southern Bank of Kentucky, Mc-	
Romagosa, Gleisses v.	560	Kleroy & Bradford v.	458
Roquest v. Boutin.	44	Southern Bank v. Wood & Champ-	
Roselius, Surgi v.—Matter of the		lin.	554
New Orleans Draining Co.	263	Sowle & Ward v. Pollard.	287
Rose & McCarthy v. Whaley &		Stagancovich v. New Orleans.	115
Edwards.	374	State v. Adams.	620
Ross v. Crockett.	811	State v. Badon.	783
Ross, State v.	364	State v. Bennett.	651
Roth, Barbet v.	381	State v. Boudreaux.	88
Rousseau & Jeanfrau, Pitkin v.	511	State v. Bunger.	461
Routh, Walworth v.	205	State v. Charles, a slave.	649
Rowland v. Levy.	223	State, ex rel. J. N. Hanau, Jr. v.	
Ruddock v. Mallory.	314	Crescent Mutual Ins. Co.	825
Ruys v. Babin.	95	State v. Davis.	678
		State v. Derosier.	736
Sadler v. White.	177	State v. Forno.	450
Sage v. Cain.	192	State v. Fuller.	667
Sainet v. Duchamp.	539	State v. Fuller.	720
Saloy, Alexandrie v.	327	State v. Fuller.	726
Saloy v. Chexnaide.	567	State v. Haase.	79
Salter v. Sun Ins. Co. of N. York	264	State v. Hampton.	679
Sampson & Keene v. Noble.	347	State v. Hampton.	725
Sanford v. Waggaman.	852	State v. Hunter.	71
Sarpy's Heirs v. New Orleans.	311	State, ex rel. Dubuieson, v. Judge 2d	
Satterfield, Bank of Louisiana v.	80	District Court.	240
Satterfield v. Keller.	606	State, ex rel. Hickman, v. Judge 3d	
Saunders v. Carroll.	27	District Court.	504
Saunders, Hale v.	643	State, ex rel. Dodeman, v. Judge	
Schmidt, Jackson v.	806	4th District Court.	60
School Directors v. Coleman.	186	State, ex rel. Cordevielle & Lacroix,	
Schwartz v. Flatboats.	243	v. Judge 5th District Court.	323

TABLE OF THE CASES REPORTED.

State v. Judge 8th Judicial Dist.	486	Switzer, Buchanan, Carroll & Co. v.	495
State v. Jack, a slave.	385	Sykes, Green, Harding & Co. v.	828
State v. C. S. Leckie,	636	Szymanski, Barelli v.	47
State v. W. R. Leckie,	641		
State v. Lindsey.	42	Taliaferro v. Steele.	656
State v. Maitremme.	830	Tallamon & Dessommes v. Carde- nas.	509
State v. Mason.	505	Tardos, Major v.	10
State v. Mullen.	570	Tardos v. Ship Toulon.	429
State v. Nicholson & Wilson.	785	Taylor v. Calloway.	688
State v. Patterson.	46	Taylor, Hadden & Co. v. Simon.	351
State v. Peter, a slave.	521	Taylor, Knapp & Co. v. Hancock.	693
State, ex rel. Boissac, v. Petit.	565	Taylor, Rayne v.	406
State v. Rentiford.	214	Taylor, Smith v.	663
State v. Reonnals.	278	Tenny v. Provosty.	221
State v. Rolland.	40	Tensas, Police Jury of, Judge v.	117
State v. Ross.	364	Thibodeau, Gardiner v.	732
State v. Swift, <i>alias</i> Bridget Fury,	827	Thompson v. Howes.	45
State v. Ward.	673	Thompson v. Kilcrease.	340
State v. Wilson, <i>alias</i> Red Bill.	446	Thompson, Succession of.	810
Steele v. Taliaferro.	656	Thornhill, Horton v.	142
Stewart, Denson v.	703	Tillman v. Mosely.	710
Stewart, Frellsen, Stevensen & Co. v.	832	Tilton, Dudley v.	283
Stewart v. Police Jury of Pointe Coupée.	69	Timmons v. White.	151
Stille, Reynolds v.	599	Tircuit v. Pelanne.	215
St. Martin v. New Orleans.	113	Toby, Scott v.	261
Storer, Gauche v.	411	Todd v. Fisk.	13
Story v. Jones.	73	Todd v. Shouse.	426
Stringer, Coons v.	726	Toulon, Ship, Tardos v.	429
Sturges v. The Sheriff.	231	Toy, Succession of.	536
Succession of Beard.	121	Truxillo, Dugas v.	201
Succession of Broom.	67	Tucker v. Carlin.	734
Succession of Cardona.	356	Tully, Dix v.	456
Succession of Crocker.	94	Twibill, Succession of.	645
Succession of Daley, Edwards v.	384	Twitty v. Clark.	503
Succession of David.	730	Underwood v. Lacapère.	276
Succession of Gurney.	622	Union Bank v. Bradford.	159
Succession of Grant.	795		
Succession of Hughes.	863	Vanbibber v. Bank of Louisiana.	481
Succession of Kercheval.	457	Vance, Pickett v.	668
Succession of Lynch.	235	Van Wickle v. Garret.	106
Succession of Mathews, Price v.	11	Van Wick v. Rist.	56
Succession of McAlpin.	617	Vaughan & Hill, Austin v.	43
Succession of McClelland.	762	Vaughan, McDonald & Coon v.	716
Succession of McLaughlin.	398	Ventress, Weems v.	267
Succession of Orillion, Dodd v.	68	Vicksburg, Shreveport and Texas Railroad Company v. McKeen,	724
Succession of Penny.	194	Vienne v. Harris.	382
Succession of Pool.	677	Vignié v. Gouaux & Viala.	344
Succession of Powell.	425	Voorhies, Hardy v.	776
Succession of Rice.	317	Voorhies, Neveu v.	738
Succession of Richardson.	1		
Succession of Thompson.	810		
Succession of Toy.	536	Wade, Boatner v.	695
Succession of Twibill.	645	Wade v. Newton.	271
Succession of Woodruff.	295	Waggaman, Sanford v.	852
Sun Insurance Company of New York, Marcy and Salter v.	264	Wailles v. Daniell.	578
Surgi v. Calder.	336	Waldo & Hughes, Hughes, Vallette & Co. v.	348
Surgi v. Roselius—Matter of the New Orleans Draining Co.	263	Walker, Nimmo v.	581
Sutton v. Calhoun.	209	Walker, Under-tutor of.	631
Swan v. Moore.	833	Wall, Beauvais v.	199
Swift, <i>alias</i> Bridget Fury, State v.	827	Wall, Lockhart v.	273
		Wall, Pendarvis v.	449

TABLE OF THE CASES REPORTED.

xv

Wallace v. Shelton.....	498	Whitworth & Poag, Rembert v. . .	608
Walling v. His Creditors.....	670	Wiggington, Brooks v.....	676
Wallis v. Bourg.....	104	Williams v. Bridge.....	721
Walworth v. Routh.....	205	Williams v. Close.....	737
Ward, State v.....	673	Williams v. Hawthorn.....	615
Warner, Delespare v.....	413	Williams v. Leblanc.....	757
Wartelle, King v.....	740	Williams, Lewis v.....	625
Waterhouse v. Bourke.....	358	Williams and Shepherd v. Payson,	7
Watson, Grieff v.....	160	Wilson, Dohan v.....	353
Watson, Kron v.....	432	Wilson's Heirs v. Smith.....	368
Watterson, Hampton v.....	239	Wilson, <i>alias</i> Red Bill, State v. . .	446
Wayland & Co., Barnes, Lyman & Co. v.....	791	Wilson, State v.....	785
Weaver, McCulloch v.....	33	Wimberly, Morrison v.....	713
Weber v. Ory.....	537	Winn v. Brown.....	642
Weems, Hicks v.....	629	Wiseman & Hinson, Kelly v. . . .	661
Weems v. Ventress.....	267	Wolf v. Munzenheimer.....	114
West Baton Rouge, Police Jury of, Crosely v.....	164	Wood & Champlin, Sout'n Bank v.	554
West and Davidson, Brand & Adams v.....	187	Wood v. Harrell.....	61
West v. Hickman.....	610	Wood, Raiford v.....	116
Weymouth, Bordelon v.....	93	Woodland, Franklin v.....	188
Whaley & Edwards, Rose & Mc- Carty v.....	374	Woodruff, Succession of.....	295
Whipple v. Hill.....	437	Wright, Williams & Co. v. White.	583
White, Frost v.....	140	Xiques, Dubois & Mish v.....	427
White v. Jones.....	681	Yeatman, Woods & Co. v. Erwin.	149
White v. Purnell.....	232	Young & Bemiss, Amonett v. . . .	175
White v. Ramsey.....	329	Young v. Chamberlin.....	687
White, Sadler v.....	177	Young v. Hays.....	654
White & Trufant v. Cazenave....	57	Young & Knighton, Fuqua v. . . .	216
White, Timmons v.....	151	Zacharie v. Kirk.....	433
White, Wright, Williams & Co. v.	583	Zimmerman v. Bartchy.....	520
Whitfield v. Bryan.....	600	Zuntz, Corner v.....	861
Whitmore, Pect, Simms & Co. v. .	408	Zuntz, Moussier v.....	15

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

NEW ORLEANS.

JANUARY, 1859.

JUDGES OF THE COURT.

HON. E. T. MERRICK, *Chief Justice.*

HON. A. M. BUCHANAN,	}	<i>Associate Justices.</i>
HON. J. L. COLE,		
HON. C. VOORHIES,		
HON. T. T. LAND.		

SUCCESSION OF ROBERT RICHARDSON.

14	1
46	247
14	1
48	760
14	1
119	46

Where the widow has caused an inventory to be taken of her deceased husband's estate, she has the privilege of renouncing the community, as long as the creditors have taken no steps to compel her to accept or renounce.

She cannot be charged as partner in the community as long as she has the right to renounce.

The wife has no privilege on the movables of the husband's estate for the restitution of her paraphernal funds.

Where the husband applied for and obtained insurance on his life, accompanying the application with a transfer of the policy, when issued, to his wife, to whom he was indebted for her paraphernal funds received by him—*Held*: That the wife was entitled to the amount of the policy on the death of her husband.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
J. A. Rozier, for opponent and appellant. *L. Castera*, for appellee.

MERRICK, C. J. The widow of the deceased has filed an account and tableau of distribution, in which she has set herself down as privilege creditor to the amount of \$9,907 62, for paraphernal funds received by her husband, subject to a credit of \$5,000, the amount collected by her upon an insurance upon the life of the deceased.

The opponent denies that the intestate received and appropriated to his own use, the amount of paraphernal funds claimed. On this part of the case, the proof shows that the deceased received only \$7,907 62, instead of the amount claimed by the administratrix.

It is next contended, that inasmuch as the widow has not renounced the community, she is presumed to be a partner in it, and is not permitted to apply the

SUCCESSION OF
RICHARDSON.

partnership assets to her individual claims, to the prejudice of creditors. In support of this position, appellant's counsel relies on the decision in the case of *De-jean*, 5 An. 594.

In the present case, it appears that the widow caused an inventory to be taken, and as the creditors have taken no steps to compel her to accept or renounce, we think she still has the privilege of renouncing the community. But this privilege would be of no value, unless she had the right of enforcing her paraphernal claims against the estate of her husband in the interim. So long as she has a right to renounce, she cannot be charged as a partner. C. C. 1043, 1048, 2383 ; C. P. 980, 982.

It is further contended by appellant, that the wife has no *privilege* on the movables for the restitution of her paraphernal funds. This position is undoubtedly correct. 3 Rob. 272 ; 2 An. 789, *Friend v. Fenner* ; C. C. 2355, 2367.

It is further urged, as a ground of reversal, that the transfer of the policy of insurance to the wife was invalid.

The policy of insurance was filled up as of the 18th day of April, 1853, for \$5,000, payable to *Robert Richardson*, his executors, administrators and assigns, and was to continue for seven years, on the payment of the annual sum of \$90 25. The domicile of the company, the Mutual Life Insurance Company of New York, appears to be the city of New York, and the policy purports to be signed by the President and Secretary of the company.

The policy bears the following endorsement, viz :

"For value received, I hereby transfer and set over all my right, title and interest, in and to the within policy of insurance on my life, to my well beloved wife, *Emma Richardson*, daughter of *Alexander Lesseps*, and *Manette Trémé*, his wife.

New Orleans, 17th May, 1853.

(Signed)

ROBERT RICHARDSON.

Witness : W. A. BARTLETT,
J. METEYE."

It has been much discussed whether the husband and wife could enter into a contract in this form, by which a policy of insurance could be transferred.

It does not appear to us important to decide the question, and we will concede the benefit of it to the opposing creditor. C. C. 1784, 2421.

It may be fairly presumed, that a policy of insurance was negotiated in this city, and that it was filled up as of the date of the application by the agent here, and that some time was taken up in the correspondence. *Kennedy v. New York Life Insurance Company*, 10 An. 809.

Now the witness, who acted as the sub-agent here, and who consequently has the best means of knowing, and testifies in regard to a matter he would be most likely to recollect, swears, after examining the copy of the policy, as follows, viz :

"I received the application from *Mr. Richardson* for an insurance on his life in the month of April, 1853. He wished the policy for \$5,000. I forwarded the the application to the parent office in New York, and the policy was issued. Accompanying this application was the transfer of the policy to the wife of *Robert Richardson*, *Mrs. Emma Richardson*. The transfer was approved and entered in the office. The first and second annual payments were made on the policy. The policy remained in the name of *Mrs. Richardson*, at the time of her husband's death."

It thus appears, that the policy was issued originally in the name of the wife, for it was forwarded to the office in New York, accompanied by the transfer, and there issued in this form. It was then precisely the same it would have been, if her name had been inserted in the policy with the written approbation of her husband. For her incapacity to contract with the insurance company, may be considered as removed by the written transfer of the husband.

The interest of the wife was manifest. Her husband had her estate, and she was dependent on him for support. Reynolds Life Insurance, 51, 54. The insurance company paid over the sum agreed upon without question.

It is contended, also, that the wife is concluded by the inventory, which is an authentic act, and embraces the amount due upon the policy as a part of the assets of the estate. It cannot conclude the wife, because it copies her title at full length, and it may be presumed that she relied upon her title as evidence of her claim, when she signed the inventory.

It is, therefore, ordered, that the judgment of the lower court be so amended as to reduce the claim of the administratrix from \$4,907 62 to 2,907 62, and from a privilege debt to a debt secured by a tacit mortgage, to be paid out of the proceeds of the slaves after the payment of the general privileges, and to receive its *pro rata* for the residue as an ordinary debt, if any thing shall come into the hands of the administratrix to distribute among the same. And it is further ordered, that the judgment of the lower court be in all other respects affirmed; the administratrix and appellee paying the costs of the appeal.

SAME CASE—ON RE-HEARING.

MERRICK, C. J. A petition for re-hearing has been filed in this case. The main ground relied on is the alleged error of this court in giving too much weight to the testimony of the witness, *Bartlett*. We have re-examined the testimony. We do not find the testimony of the other witnesses necessarily irreconcilable with that of this witness. The testimony of the latter being direct, positive and unimpeached, must prevail.

Re-hearing refused.

M. D. MARVEL v. A. G. MANOUVRIER.

A judgment will be annulled, which was rendered against a party on whom no service of the petition and citation was made, but for whom an answer was filed by an attorney at law without authority. By our law, which differs from the common law, the attorney in such a case is responsible to the plaintiff for having undertaken without authority to represent him in a court of justice.

14	3
50	1100

APPEAL from the Sixth District Court of New Orleans, *Howell, J.*
R. Waples, for plaintiff. *A. W. Jourdan*, for defendant and appellant.

MERRICK, C. J. The defendant was the holder of a promissory note drawn by one *Engman* to the order of *M. D. Marvel*, the plaintiff. The note was indorsed by *Marvel* and protested for non-payment by the holder.

MARVEL
v.
MANOUVRIER.

Thereupon, the defendant filed his petition in the Sixth District Court of New Orleans, against the maker and indorser to recover judgment and enforce payment of the note.

Citations were made out by the Clerk, and also copies of the petition. These, instead of being served, appear to have been handed to *Engman*. *Engman* took the two copies of the petition to a member of the bar, (who supposed he had authority for that purpose,) and employed him to defend the action both for himself and the indorser. In pursuance of this retainer, the attorney filed an answer for both defendants. The case was tried upon the issue thus formed, and judgment rendered in favor of *Manouvrier*, the plaintiff in that action.

The first intimation *Marvel* had of the proceedings, as it appears by the record, was the seizure of his property upon execution. He thereupon enjoined the execution and instituted the present action of nullity against the judgment, on the ground that he was never cited and that he had never authorized the attorney to represent him in the suit. His petition is accompanied by the proper affidavit, and its allegations, as to the absence of authority in the attorney, are supported by the testimony of the lawyer who filed the answer, the same being received without objection.

No improper motives are imputed to the attorney. The production by *Engman* of the two copies of the petition, coupled with the fact that it is usual for the makers of accommodation notes to employ counsel to defend the indorsers as well as themselves, was well calculated to deceive the most cautious.

From a judgment perpetuating the injunction and annulling the decree against *Marvel*, *Manouvrier* prosecutes this appeal.

The ground on which he expects a reversal of the judgment, is thus stated by his counsel : " The question is not, whether the citation and petition were served on *Marvel*, for it is not contended that such was the case ; but, that the service was waived by the answer ; that if the answer were signed by *Marvel*, he could not allege a want of service, nor can he now, that an attorney of this court has answered for him, unless he can show that he did not authorize him to appear, coupled with the further fact that he had a good defence, or that fraud was practiced upon him."

In support of this position, sundry decisions of the common law courts are cited, some *dicta* of this court in cases supposed to be analogous, and the case of *Walworth v. Henderson*, 9 An. 339. This last case supports fully the doctrine contended for by defendant, but then, the reasoning of the court is all in reference to a judgment rendered in the State of Mississippi, upon the appearance entered by an attorney there, and the court was only considering the effect of such appearance at common law. It can have no application to a case arising in our own courts. Such a case must be settled by the laws of Louisiana.

In this case, judgment has been rendered against a party, without service of petition and citation, and without any authorized appearance by any one on his behalf. Whilst the proceedings were all fresh in the minds of the parties, and in less than three months from the date of filing the petition, the month following the rendition of the judgment, and immediately on the service of the notice of seizure, this suit was instituted, thus placing it in the power of the defendant to show the authority, if any existed.

The case is, therefore, free from the suspicion which necessarily attaches to the disavowal of the acts of an attorney many years after they were performed, and after the proof of the authority has been rendered difficult. It presents under the

proof the simple question, whether, in the absence of service of petition and citation, a party can be bound by an appearance entered and answer filed by an attorney at law, without authority. We think it is clear under our law, that he cannot be so bound.

MARVEL
v.
MANOUVERIER.

It is *the attorney of the defendant*, that is, some one whom he has retained and employed, who is by Art. 177 of the Code of Practice authorized to acknowledge that the petition has been duly served. No other person is by law authorized to perform this act for defendant. See 8 N. S., 234; 1 An. 398; 2 An. 840.

In this, as in the case of the returns of Sheriffs, our law appears to differ from the common law. At common law, the return of the Sheriff cannot be contradicted by the parties to the suit. 9 An. 340. Under our law, such return, even in regard to citations on which judgments have been rendered, may be shown to be false. *Sloan v. Menard*, 5 An., 219; *Delogny v. Smith*, 3 L. R. 422; 3 L. R. 476, 1 An. 297, 2 An. 846, 16 L. R. 441.

At common law, it seems the unauthorized entry of appearance by an attorney will bind the party, provided the attorney is able to respond in damages to the extent of the injury suffered by the defendant. Under our law, the plaintiff is left to his remedy against the attorney who, without authority, undertakes to appear for and represent another in a court of justice, (Pothier, *Cour de Mandat.*, § 130, vol. 5, p. 274,) and the proceeding is treated as voidable, if not void. 5 An. 219, *Sloan v. Menard*, already cited. The party is not bound to show that he had a defence to the action. He may do that when he is cited.

The judgment appealed from must, therefore, be affirmed.

Judgment accordingly.

J. CUILLÉ et al. v. J. B. GASSEN et al.

When the widow in the community, and natural tutrix of her minor children, having the possession and administration of the property of her deceased husband's succession during her life, enters into a partnership with the heirs who are of full age, and slaves and other property of the succession are employed and used by the partnership—*Held*: that the minor heirs were not, and could not be made by their natural tutrix, members of the partnership, and consequently, after her death, have the right to sue for, and recover from the surviving partners, a debt due them by the partnership, before a final settlement and liquidation of the partnership affairs. *Held* also: that the hire of the slaves was a debt due the succession by the partnership, and that the minor heirs are entitled to recover from the surviving partners the portion of the hire of the slaves due them, less the portion which was extinguished at the death of their mother by confusion, on their becoming her beneficiary heirs.

A PPEAL from the District Court of the Parish of Jefferson, *Burthe, J.*
J. Magne, for plaintiffs. *Michel & Kountz*, for defendants and appellants.

LAND, J. *Antoine Gassen* died in July, 1848, leaving a widow in community, five children, and a succession inventoried at over \$19,000, including several slaves.

One of his children, *J. B. Gassen*, was of age, another, *Cothilde*, was emancipated by marriage to *Louis Gordon*, and the other three, *Jeannette*, *Adelaide* and *Antoine*, were minors.

In August, 1848, the widow, the natural tutrix of the minors, retaining the possession and administration of the property of the succession, entered into a partnership with her son, *J. B. Gassen*, and her son-in-law, *Louis Gordon*, for the

CUTLER
v.
GASSEN.

purposes of keeping a ferry, running a schooner, and carrying on respectively the business of a cigar manufactory, grocery, and the keeping of horses at livery.

Three of the slaves belonging to the succession were constantly employed by the partnership in keeping the ferry, up to the time of the death of the widow, in July, 1852.

This suit is brought by the minor heirs, to recover from the surviving partners, *J. B. Gassen* and *Louis Gordon*, the value of the services of these slaves and the fruits and revenues of other property belonging to the succession, during the continuance of the partnership, so far as they were entitled to the same, as heirs at law of *Antoine Gassen*, deceased.

The defendants excepted to the plaintiffs' demands, on the ground that the matters and facts contained in their petition, pertain to a partnership formerly existing between themselves and the widow of *Antoine Gassen*, and can only be adjudicated upon, on a settlement of the partnership affairs.

The exception was overruled, and the defendants pleaded a general denial, admitting however the partnership.

The question therefore presented, is, whether the plaintiffs, heirs at law at the time of the institution of this suit, of both *Antoine Gassen* and his widow, can recover a debt due by the partnership, from the surviving partners, before a final settlement and liquidation of its affairs.

The plaintiffs were not members of the partnership, nor had their natural tutrix the right to make them such, and subject their interests in the succession of their father to the hazards of trade or speculation. The widow was a partner in her individual capacity, and on her personal responsibility, and not as the tutrix or representative of the minors. And the partnership could as validly have become the debtors of the minors, by the use and appropriation of their property, as they could have become the debtors of other parties.

The minors were third persons as to this partnership, and have a right to sue for a debt due them, before a final settlement and liquidation of its affairs.

The plaintiffs are the beneficiary heirs to the succession of their mother, and are only liable for her debts, to the amount of assets that may come from her succession into their hands. These assets are subject to the demands of the defendants, if, on a final settlement of the partnership affairs, the widow should be indebted to them; but beyond the amount of these assets, the defendants can have no recourse against her heirs, and are bound to pay the debts sued for, although the succession of the widow *Gassen* should be insolvent.

The debt sued for is not an asset of the mother's succession.

It is, therefore, clear, that there can be no legal reason for the suspension of the plaintiffs' demand until a settlement of the partnership affairs.

The remaining question, therefore is, what interest had the minors in these slaves, and what amount the surviving partners owe for their services during the continuance of the partnership.

The widow was the owner of an undivided half interest, by virtue of her community rights; *J. B. Gassen* and the wife of *Louis Gordon* were owners of two-fifths of the other half, and the plaintiffs the remaining three-fifths.

The evidence sufficiently shows, that the services of the slaves were worth \$600 per annum, and that the partnership enjoyed the benefit of their labor for four years. Of this amount, the widow was entitled to \$1200; *J. B. Gassen* and *Mrs. Gordon* were entitled each to \$240, leaving due to the plaintiffs, from the partnership, \$720.

This debt was due by the partners *in solido*; but the plaintiffs having become heirs at law to the widow *Gassen*, one-third of this debt became extinguished by confusion, to the benefit of which her co-partners are entitled. C. C., Art. 2215; Pothier on Obligations, p. 332.

It, therefore, appears, that the defendants are indebted to the plaintiffs, as heirs of *Antoine Gassen*, for a partnership debt, in the sum of \$480.

The plaintiffs also claim of the defendants the value of the services of the same slaves, and the fruits and revenues of other property, after the dissolution of the partnership. The evidence is, however, insufficient to enable the court to render a judgment on this part of their demand. Their rights, however, will be reserved.

The plaintiffs failed to prove that the partnership enjoyed the fruits and revenues of any other property belonging to the succession of *Antoine Gassen*, except the labor and services of the three slaves.

It is, therefore, ordered, adjudged and decreed, that the judgment be reversed. and that the plaintiffs, as heirs at law of *Antoine Gassen*, recover of the defendants *in solido*, the sum of four hundred and eighty dollars, with legal interest from judicial demand; and that defendants pay the costs of the lower court, and the plaintiffs pay the costs of this appeal. And it is further ordered and decreed, that the rights of the plaintiffs, as heirs of *Antoine Gassen*, against the defendants, accruing subsequently to the dissolution of the partnership between the widow *Gassen* and said defendants, be reserved; and that the rights of plaintiffs as heirs of the widow *Gassen*, be reserved generally against the defendants, so far as they have not been determined in this suit.

CÉLÉ
v.
GASSEN.

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JAMES B. WILLIAMS and JOSEPH SHEPHERD v. ASA PAYSON et al.

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No pre-existing commission of Branch Pilot for the port of New Orleans, is vacated by the Act of the 15th of March, 1857, entitled "an Act relative to Pilots," until the Governor has complied with the provision of the second section of the Act, and fixed, by proclamation, the number of Pilots for the port of New Orleans, and appointed the number so fixed, from among the commissioned Branch Pilots, as required by the Act.

Section 15th of this Act is declared unconstitutional, as it relates to an object not expressed in the title. When the title of an Act is simple, all those sections which are covered by it, fulfill the requirements of Article 115 of the Constitution; and only those portions are held to be void for unconstitutionality, which are not covered by the title.

**A**PPPEAL from the District Court of the Parish of Plaquemines, *Foulhouze*, J. *G. L. Bright and Moise & Randolph*, for plaintiffs. *C. Roselius and Colledge & Wooldridge*, for defendants and appellants.

BUCHANAN, J. The plaintiffs aver in their petition that they have been commissioned as Pilots for the port of New Orleans, under the Act of March 13th, 1857, entitled "an Act relative to Pilots." That the defendants, who have not been appointed Pilots under that law, are performing the duties and receiving the emoluments of Pilots, to the prejudice of petitioners. They pray for an injunction to restrain defendants from piloting vessels over the bar at the different mouths of the Mississippi river.

The defendants, in their answer, styling themselves Branch Pilots of the port of New Orleans, plead a general denial; and further plead, that the petition discloses no cause of action.

WILLIAMS  
v.  
PATSON.

There can be no doubt that an injunction is a proper remedy to prevent a person from doing an act which may be injurious to another, or which impairs a right claimed by that other. C. P. 296.

The occupation of a Pilot for the port of New Orleans, is lucrative, and is restricted by law to persons specially designated by the Governor of the State. It is, therefore, evident, that the exercise of this business by a person not legally appointed, may be prejudicial to each and every one who is so appointed. The petition, therefore, discloses a sufficient cause of action.

Upon the merits, we are of opinion that the plaintiffs have failed to make out their case. For a proper understanding of the subject, it is necessary to take a connected view of the several Acts of the Legislature in relation to Pilots.

By the Act of the 13th of March, 1837, (Session Acts, p. 101,) the Governor was authorized to appoint as many persons to be Branch Pilots for the port of New Orleans, as he may deem necessary, not exceeding fifty in number, including those already appointed.

By the Act of 15th of March, 1855, "relative to Pilots," (Session Acts, page 372,) the number of Branch Pilots for the port of New Orleans, was increased; the Governor being directed to appoint not less than sixty-five, nor more than seventy-five such Branch Pilots.

The last Act on the subject is that of the 13th of March, 1857. Session Acts, page 88.

The first section of that Act repeals the Act "relative to Pilots," approved March 15th, 1855.

The second section enacts that "it shall be the duty of the Governor to appoint from among the present Branch Pilots of the port of New Orleans, such a number of Pilots as the interest of commerce may demand, and from time to time hereafter increase the same, should an increase be deemed by him important." All of the defendants were Branch Pilots of the port of New Orleans at the time this Act of the Legislature was passed. The plaintiffs were also Branch Pilots at the same time; and it is shown that they (the plaintiffs) have received from the Governor new commissions since the passage of the law. It is also admitted that defendants and appellants have not received such new appointments. From this state of facts, it is argued that the defendants are out of office. But this does not appear necessarily to follow from the terms of the Act under the evidence before us.

The repeal of the Statute of 1855, expressed in the first section, if unexplained by the context, would probably have abolished the office of Branch Pilot *in toto*, with all its emoluments and responsibilities, and consequently have vacated all the commissions of the Branch Pilots in office, under that Act. But the second section qualifies the first, and distinctly recognizes the continued existence of the office, until the Governor shall have performed the "duty" imposed upon him by the said second section. See State Const. 125; Acts 1855, p. 350, sec. 2; Rev. Stat. p. 395; *Holmes v. Wiltz*, 11 An. 439.

What was that duty?

To appoint (from among the *present* Branch Pilots of the port of New Orleans) such a number of Pilots as the interest of commerce may demand. Has the Governor yet performed that duty? There is no proof before us that he has done so. It is proved, indeed, that the two plaintiffs, *Williams* and *Shepherd*, have been commissioned since the Act of 1857 went into operation; and we may infer from the testimony, that an indefinite number of other persons,

WILLIAMS  
v.  
PATSON.

whose names are not given, have been similarly commissioned. But this showing is immaterial to the issue, which is, whether or not the defendants are out of office. The Act of 1837, as we have seen, fixed the number of Branch Pilots at fifty. The Act of 1855 increased that number to a minimum of sixty-five and a maximum of seventy-five. The Act of 1857 left it to the Governor to fix the number of Pilots according to his views of the exigencies of the commerce of this port; and after so fixing the number, the Governor was further authorized to increase (not to diminish) that number, from time to time, should an increase be deemed by him important. There is no evidence in the record, direct or indirect, that the Governor has ever determined, under this law, what number of Pilots for the port of New Orleans, is required by the interests of commerce. Whenever he shall do so, should the number determined to be necessary fall short of the number of Branch Pilots in commission, when the Act of 1857 was passed, the new appointments made, which fill up the number thus determined, will necessarily have the effect of vacating all old commissions beyond that number. But until the Governor has performed his duty of fixing the number of Pilots under the new law, which we think should be done by proclamation, it cannot be said that any preëxisting commission of Branch Pilot is vacated; because it cannot be known, that there is any reduction in the number of Pilots for the port, below that fixed by the law of 1855; and because the Governor was bound by the law to make the new appointments within the existing corps of Branch Pilots.

The learned counsel of defendants has argued, that the law of March 13, 1857, violates the Article 115 of the State Constitution, because the section 15th of the law relates to an object not expressed in the title. The title of the law is "an Act relative to Pilots." The 15th section relates to salvage on cables and anchors taken up by any person in the river Mississippi. This seems, in fact, entirely foreign to the object specified in the title of the Act. But the whole Act is not thereby rendered void.

When the title of the Act is simple, as in this case, all those sections which are covered by the title, fulfill the Article of the Constitution, and only those portions are held to be void for unconstitutionality which are not covered by the title. *State v. Harrison*, 11 An. 722.

Judgment reversed; injunction dissolved; and judgment against plaintiffs, as in case of nonsuit; plaintiffs and appellees to pay costs in both courts.

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#### SAME CASE—ON RE-HEARING.

BUCHANAN, J. In refusing the re-hearing in this case, it has been deemed by the court proper to give an explanation of a matter of fact.

It is incorrectly stated in the petition for re-hearing, that there is no proof in the record that *Falcony* and *George Chism* were ever Branch Pilots. See particularly testimony of *Francis Williams*, *Hinton* and *Arroyo*.

Besides, the brief of plaintiffs' counsel, filed in argument, admitted (p. 2) that all the defendants had been commissioned Branch Pilots previous to the Act of 1857.

Re-hearing refused.

## ETIENNE MAJOR V. J. &amp; J. TARDOS.

When a party in settlement of a debt pays, through error, compound interest in addition to the amount and interest really due—*Held*: That he is entitled to recover the difference between the amount really due and the debt at compound interest as collected.

**A** PPEAL from the Third District Court of New Orleans, *Duvigneaud, J. C. Dufour*, for plaintiff. *J. Magne*, for defendants and appellants.

MERRICK, C. J. The defendants, residents of New Orleans, held a judgment against the plaintiff, in the District Court for the parish of Pointe Coupée, for \$627 31, bearing ten per cent. interest from April 1st, 1844. In March, 1855, they sent up a statement of debt and *interest compounded*, to *Mr. Mahondeau*, their attorney, for a settlement with the plaintiff. The debt, as calculated to March, 1856, amounted to \$1916 25. The plaintiff having inquired of *Mr. Mahondeau* whether the account and calculations were correct, and, being answered in the affirmative, gave his draft, payable one year after date, for the amount.

The present suit is brought to recover of the defendants the difference between the amount really due upon the judgment and the debt at compound interest as collected.

There was judgment in the court below in plaintiff's favor, and defendants appeal. They contend that the taking of compound interest is not *malum in se*, but is merely *malum prohibitum*. That, by the very terms of Art. 1934 C. C., the debtor cannot be compelled to pay compound interest, but, if he do consent to pay it, it is well paid, and if it be included in a new contract the debtor is bound to pay it; and, inasmuch as there was a natural obligation to pay the compound interest, when once paid it cannot be recovered back.

The error in this reasoning appears to us to lie in the postulate, that there was a natural obligation resting on the plaintiff to pay compound interest. From what did such obligation arise? The use of the money. It might as well be assumed that there was a natural obligation to pay interest at the rate of 500 or 1000 per cent. as to pay ten per cent. compound interest. There being no other promise proven than that contained in plaintiff's original obligation novated by the judgment, his natural and civil obligations were the same, viz: to pay the amount promised, as liquidated by the judgment. The proof satisfies us that the plaintiff paid the excess over the simple interest in error. It is well known with what confidence suitors rely upon statements of counsel, even where charged with the collection of debts against them, and the instances in which such confidence has been misplaced are extremely rare. In the case before us, we have not heard improper motives imputed to the counsel who made the settlement, still, we think, his statement led the plaintiff into error, and that the plaintiff is entitled to recover. C. C. 1934, 2280, 2281, 2282, 2129; C. P. 18.

Judgment affirmed.

JOHN W. PRICE v. SUCCESSION OF LEONARD MATHEWS.—G. C. LAWRA-  
SON, Administrator.

The private memoranda or projets of an agreement, unsigned and retained by the writer of them are not evidence of a contract obligatory upon him or his representatives, unless corroborated by other testimony.

The heirs of a deceased partner are not bound by the rigid rules as to notice of dissolution of the partnership applicable to the withdrawal of a partner from the firm, who would still be liable if he permitted his name to remain in the partnership.

The continuance of the deceased partner's name, as part of the firm name, is not of itself a cause of continuing liability on the part of the heirs.

**A**PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*L. M. Day*, for plaintiff. *P. E. Bonford*, for defendant and appellant.

*COLE, J.* Plaintiff seeks to render the estate of *Mathews* liable for the amount of a balance due on a deposit account kept by him with the banking-house of *Mathews, Finley & Co.*

It is admitted that the deposits on which the above balance arises were made subsequent to *Mathews'* death.

The defendant is sought to be made liable in his representative capacity, upon the allegation that the partnership was not dissolved by the decease of *Leonard Mathews*, but continued, notwithstanding that event, between the surviving partners and the heirs of the decedent, under an express clause to that effect in the original contract of partnership.

In support of this allegation plaintiff introduced in evidence two documents, produced from the custody of the defendant under a subpoena *duces tecum*.

Each of these contains a sketch, in the handwriting of the decedent, of partnership articles; the two sketches varying from each other in some slight particulars. They are not signed by any one, and the record contains no evidence that they ever passed out of the possession of the decedent, among whose papers they were found after his death.

Their introduction as evidence was resisted, and a bill of exceptions was reserved to the ruling of the District Court admitting them.

These private memoranda or projets of an agreement, unsigned and retained by the drawer of them are not evidence of a contract obligatory upon him or his representatives, unless corroborated by other testimony.

Plaintiff sought to give efficacy to these memoranda by the following notice, published in the "*Picayune*" of New Orleans:

"Saturday, January 14th, 1854, Notice—The death of our senior, *Mr. Leonard Mathews*, will cause no interruption to our business. The articles of copartnership provide for its continuance to a period (yet remote) therein stated.

MATHEWS, FINLEY & Co."

It is not shown that this notice was given by the direction of any one authorized to act in the name of *Mr. Mathews'* succession, nor that the notice was brought to the knowledge of any of the parties interested in the estate, except the two surviving partners of the firm of *Mathews, Finley & Co.* who may be supposed to have caused the notice to be inserted in the gazette. On the contrary, it appears that *Mrs. Mathews* spent the summer of 1854 at Pass Christian, and went there, as one of the witnesses thinks, in January, 1854.

PRICH  
v.  
MATHEWS.

*Pauline Mathews*, one of the heirs, was a minor at the time of the decease of her father, *L. Mathews*.

The other heirs were *William Wilson Mathews*, a member of the firm, *Mary Mathews*, wife of *Hugh Wilson*, and *Lydia Mathews*, wife of *L. A. Finley*, a member of the firm.

Even if *Mrs. Mathews* and the other heirs, not parties to the copartnership, had seen the notice, this could not alone render them liable, for there is no legal presumption that they were cognizant of all of the provisions of the act of copartnership existing between *L. Mathews* and the other members thereof, and they may well have presumed from the allusion in the notice to the articles of copartnership, that they really provided for the continuance of the copartnership after the decease of one of its members.

It may also be observed that the reference to the articles of copartnership in the published notice was sufficient to awaken the attention of those who might deal with the firm subsequent to the death of *Mr. L. Mathews*, and they could have required an exhibition of the act of copartnership before having any more business with the firm.

Not having done so must be deemed a laches on their part, and does not justify a departure from the rigid rules of evidence in order to decree that the partnership was continued by a clause in the act of copartnership, although presumed to have been terminated by the decease of one of its members.

As the memoranda create no obligation against the estate, the acts of the surviving partners who are third persons, so far as relates to the succession, cannot produce any legal obligation against it.

It is also averred that the name of the decedent was left on the door of the office, and his name was permitted to continue in the firm. When it is remembered that the heirs of *Mr. L. Mathews* are all females with the exception of the son, who was one of the firm, and the liability of whose share after the payment of the debts is not disputed, these omissions, if they be such, do not appear to be of much weight, and we would here observe that it is by the omissions on the part of the heirs, and not by their acts, that the unsigned memoranda are sought to be corroborated.

The heirs of a deceased partner are not bound by all the rigid rules as to notice which apply to the dissolution of a copartnership, by the mere withdrawal of a partner, or by limitation; in which case the retiring partner may render himself liable, by permitting his name to remain in the partnership, thus imparting to it a credit it might not otherwise have obtained. The death of one of the partners is presumed to have dissolved the partnership. Those who deal with it are not supposed to do so on the credit of the name of the deceased partner, unless there is legal and satisfactory proof that the partnership was to continue, notwithstanding the decease of one of the partners.

We would also observe, that the continuance of the name of a deceased partner, as a part of the name of the firm, is of frequent occurrence, and, also, that a particular business, when once established and flourishing under a particular firm name, has been conducted under the same designation, after the original parties have abandoned the firm, and when the name of no one of those actually interested figures in the style of the firm. Such continuance of the decedent's name, as a part of the firm name, is not of itself considered a cause of continuing liability on the part of the heirs.

Judge Story says, that a curious question has arisen, whether the right to use

the firm name is a part of the good-will belonging to the partnership, or whether, in case of the dissolution, by the death of the partner, it belongs to the survivors. He further remarks, that it has been thought that this right does not fall within the nature of good-will, but belongs to the surviving partner. Story on Partnership, sec. 100, p. 142, (Ed. 1841.)

The same remarks will apply to the omission of the heirs to take immediate steps to have a liquidation and partition of the partnership effects. Their action would not have been prescribed for some time, and as nothing indicated the necessity of more urgent action, their inaction cannot be considered a convincing proof of the continuance of the partnership, notwithstanding the death of *Mr. L. Mathews*.

Plaintiff has called our attention to a bill of exceptions taken by him to the ruling of the District Judge.

He offered one of the surviving members to prove that it was stipulated by and between all the partners that the partnership was to continue for five years, and was not to be dissolved by reason of the death of one or more of the partners.

The Judge did not err in excluding the testimony of the partner on this point. He has an interest to divide his liability by increasing the number of his co-debtors.

Our view of the testimony renders it unnecessary to express any opinion upon the point raised by defendant, that, assuming there was an agreement, the partnership should continue, notwithstanding the death of one or more of the copartners, how far is such an agreement binding upon the heirs, representatives or surviving widow in community of the deceased, without express ratification on their part of the contract so intended to bind them. *Louisiana Bank v. Kenner's Succession*, 1st La. 385.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and there be judgment for defendant against the claim of plaintiff, and that plaintiff pay the costs of both courts, and that his right of action be reserved against other parties who may be legally liable to him for his claim or any part thereof.

### J. P. TODD v. F. M. FISK.

An injunction cannot issue to stay an execution on grounds which might have been pleaded in defence before judgment.

**A**PPEAL from the Fourth District Court of New Orleans, *Price, J.*  
*Race & Foster*, for plaintiff and appellant. *Clarke & Bayne*, for defendant.

**MERRICK, C. J.** The plaintiff has enjoined an execution issued upon a final judgment affirmed by this court on appeal.

The plaintiff in injunction claims to be the holder of a promissory note against the judgment creditor, exceeding the amount of the judgment, and that the same is therefore extinguished by compensation by operation of law.

A motion to dissolve on the face of the papers, on the ground that the petition did not show that the note pleaded in compensation had been acquired by *Todd* since the rendition of the judgment, was sustained, and plain-

TODD  
v.  
FISK.

tiff appears before us as appellant. He contends, that the judgment of the lower court is erroneous, because defendant contested *Fisk's* right to recover, and could not therefore be held to admit the same by pleading compensation in the original suit, even if he were owner of the note at that time; and furthermore, that he is not too late after judgment to set up the note by way of compensation.

The case of *Ridell v. Gormley*, 4 An. 140, is cited in support of this position.

The Reporter's note to this decision does indeed countenance the doctrine contended for; but we have looked into the record, and find some facts which distinguish it from the present. The purchase at the probate sale of *Schager*, was made by *William Gormley*, December 4, 1832. The suit brought on *Schager's* indorsement was brought by *William Gormley* and *John P. Miller* against *John H. Holland*, the dative tutor to *Schager's* minor heir, and judgment rendered in their favor generally, in October, 1836.

*Miller's* half of the judgment having been paid, the execution was taken out against the plaintiff, then representing *Schager's* succession, by the widow of *William Gormley*, for the remainder.

It is clear, therefore, that compensation by operation of law did not take place at the time the judgment was rendered in favor of *Miller & Gormley* against *John H. Holland*, tutor; for *Gormley* was never the debtor of *Schager*, but of, the representative of his succession, and compensation could only take place when such representative had consented that the sum so due should be used to extinguish a like amount of indebtedness from *Schager's* estate to *Gormley*. If the court presumed from the circumstances of the case, that such consent had been given after the judgment was rendered and *Gormley's* interest in it ascertained, the case then is not in conflict with the other decisions of the court. At all events, it must not be considered as overturning the well settled principle of law, that an injunction cannot issue to stay an execution, on grounds which might have been pleaded in defence before judgment. See 2 N. S., 135; *Benton v. Roberts*, 3 Rob. 226; *Kennard v. Henderson*, 9 Rob. 166; *Morgan v. Driggs* 3 An. 125; *Crow v. Watkin's Heirs*, 12 An. 845; *Donnell v. Parrott*, 13 An. 251.

We do not think the supposed incompatibility of the plea of compensation with the defence to the note sued on in the original suit, an exception to the general rule so well established. Parties must select their defences to an action while it is pending. After judgment, it is too late to remedy defects from a failure of proof upon the original pleas.

Judgment affirmed.

#### WIDOW MEISSONIER, Executrix, v. CHARLES LAURENT.

The functions of an executor are not limited to the execution of the legacies contained in the will, but extend also to the payment of the debts of the deceased.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.* *Budd & Lambert*, for plaintiff. *C. Dufour* and *H. R. Grandmont*, for defendant and appellant. *R. H. Browne*, attorney for absent heirs.

*LAND, J.* *Annette Bizouard* in her last illness made her will, in which she

instituted the plaintiff her universal legatee and executrix thereof, and declared that *Charles Laurent*, the defendant in this suit, was indebted to her in the sum of \$1700.

This suit is for the recovery of the sum declared to be due in the will. The plaintiff sues as executrix, and not as universal legatee.

The defendant pleaded a general denial and a claim in reconvention against the plaintiff personally, which it is unnecessary to notice, as it was abandoned in this suit.

The defendant afterwards filed a peremptory exception to the plaintiff's right and capacity to prosecute this suit, on the grounds that she had filed in court a formal renunciation of her rights as universal legatee under the will of *Annette Bizouard*, and that said will was thereby virtually of no effect.

The functions of an executor are not limited to the execution of the legacies contained in the will, but extend also to the payment of the debts of the deceased. *Succession of Dupuy*, 4 An. 571. As the record discloses the fact that there are debts due by the testatrix, the exception was properly overruled. *Succession of Boyd*, 12 An. 612.

On the trial of the case on its merits, the plaintiff was offered as a witness, and was objected to by the defendant, on the ground of interest in the result of the suit. The objection was overruled and the defendant excepted.

It is not material to decide the question of competency raised by the bill of exceptions, for the reason that the demand is sufficiently established, independently of the testimony of the plaintiff.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.

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S. MOUSSIER v. J. E. ZUNTS et al.

The acknowledgement by a married woman in an act of mortgage of her indebtedness, does not estop her from denying that the debt which her mortgage was given to secure had enured to her separate benefit.

The creditor is bound to show affirmatively that mortgage notes signed by a married woman were given for a debt which had enured to her benefit, in order to render her liable.

The burden of proof in such case rests on the creditor, although the wife is separated of property from her husband.

A married woman, when properly authorized, may become security for any other person than her husband.

A PPEAL from the District Court of the Parish of Plaquemines, *Rousseau, J. M. M. Cohen and J. Foulhouze*, for plaintiff and appellant. *H. D. Ogden and P. E. Bonford*, for defendants.

MERRICK, C. J. Although the re-hearing was granted generally in this case the re-examination of it has been confined chiefly to two or three branches of the controversy.

We have considered the opinion of Mr. Justice Buchanan as conclusive upon the question, whether the mortgage was absolutely void, as having been extorted by fear and threats, and also on the question of damages for the alleged wrongful acts of the Sheriff in executing the writ, and on the right of the plaintiff in the

MESSONIER
v.
LAURENT.

14	15
51	1107
14	15
108	689
14	15
111	929

MOUSSIER
v.
ZUNTZ.

executory process to seize the property attached to the plantation, and thus made part thereof for the working of the same.

The questions which have occasioned us the most trouble in the decision of the cause are the following : On whom is the burden of proof? Ought the plaintiff to be charged with the sum of \$10,000 paid *Mrs. White*? Could she bind herself *in solido* for all the debts of the Bellevue plantation, her sister's debt as well as her own, and was that her intention?

From the synopsis of the plaintiff's petition made by Mr. Justice Buchanan in his opinion, it appears that one of the grounds of injunction is, that there is a failure of consideration in this, that the mortgage notes were given for the balance of an account, but that the same did not enure to the benefit of the plaintiff, she being a married woman.

The defendant, in making up the issue upon this branch of the case, avers "that the said act of mortgage and the notes sued on were given voluntarily for valuable consideration for moneys advanced and paid by the said *Maunsel White* for the payment and liquidation of debts due by the said petitioner in injunction and her sister, *Miss Marie Emma Cornen*, and for supplies for the plantation belonging to said *Mrs. Moussier*, plaintiff in injunction, and said *Miss Cornen*," and after setting out plaintiff's title, the defendant further alleges "that, in the aforesaid divers acts of transfer and sale, mortgage notes had been given for the same, and said *Mrs. Moussier* and *Miss Emma Cornen* were bound to pay, and did assume the payment thereof; that the consideration for which the mortgage and mortgage notes sued on were given, was the advances made by said *Maunsel White* and *Maunsel White & Co.*, for the payments for the aforesaid mortgaged notes given for the said property, and assumed as aforesaid, and for the sum and price of \$10,000, paid said *Mrs. Maunsel White*, and the amount advanced and paid to the Union Bank, and for supplies and expenses to the said plantation, all of which facts will more fully appear by accounts-current and copies of the notarial acts hereto annexed, and made part of this petition, and referred to for a full and complete detail, and for greater certainty."

This being the issue on this branch of the case, the question then arises on whom is the burden of proof? The plaintiff, to show failure of consideration, or the defendant, to show that the consideration which has set forth enured to the benefit of the plaintiff, a married woman. The question is by no means a new one.

The case of *Eliza J. Erwin v. James McCalop et al*, 5 An. 173, is somewhat similar. In that case, "the plaintiff enjoined an order of seizure and sale sued out by the defendant, *McCalop*, upon a mortgage given by her to secure the payment of her promissory note in his favor, on the ground that the debt was originally her husband's, and that she is not responsible for it.

"The answer" was, "that the debt enured to the benefit of the plaintiff, and that, if it was a debt of her husband, it was contracted under circumstances which render her liable for it."

The court says "it is not necessary to notice the bill of exceptions taken by defendant's counsel, for if all the facts which he offered to prove were admitted, they would not show that this particular debt enured to the benefit of the plaintiff. This fact must be shown affirmatively by the defendant, in order to make the debt binding upon her; her being separated of property does not throw the burden of proof on her, nor is she estopped from setting up this defence by her acknowledgment of indebtedness in the act of mortgage. *Dranguet v. Proud-homme*, 3 L. R. 74; *Pascal v. Sauvinet*, 1 An. 428, and cases there cited."

The subject was again considered in the case of *Patterson v. Fraser* and the doctrine in the case of *Brandigee v. Kerr*, 7 N. S. 64, that it is of the essence of the obligation that the wife should have a separate advantage in the contract, was reviewed and affirmed. It is there said, that "to permit the naked acknowledgment of the wife to bind her without other proof, is inconsistent with the spirit and policy of our laws and jurisprudence. The influence of the husband will readily obtain from the wife such declaration."

These cases were again reviewed in the case of *Beaurgard v. Her Husband*, 7 An. 294.

The court again says, it is a principle which has come down to us from the laws of Spain, that he who contracts with a married woman must show affirmatively that the contract turned to her advantage." The exception was when the wife renounced the 61st law of Toro, but this exception no longer exists. The Act of 1855, p. 254, authorizes the wife to bind herself as a *femme sole* for her separate debts, but this Act has no application to the present case. Revised Statutes, p. 560, sec. 1, 2 and 3.

The case at bar, however, differs from the cases cited in this, that the wife alone signs the promissory note authorized by the husband. But this can make no difference, as has been repeatedly remarked by this court, for the husband would only have to change the form of the contract and authorize the wife to sign, to evade the provisions of Article 2412 Civil Code altogether. 7 N. S. 66.

The burden of proof was, therefore, upon the defendant, and he has alleged that \$10,000, the amount of the purchase of the plantation from *Mrs. White*, was advanced by him. He must prove it; and how does he make this proof? He says that the deed from *Mrs. White* to *Mrs. Moussier* establishes the fact when taken in connection with the mortgage.

But before we can consider these two instruments the deposition of *Miss Emma Cornen* must be disposed of, for she is a witness introduced by the defendant himself, and she has sworn that *Mrs. White* was actually paid the \$10,000 specified in the act of sale in money from her savings, and some money which her sister, the plaintiff, had. To this it is replied that the witness is mistaken, as it is evident from her letters that she and her sister were both without means in money at that time. But these letters were objected to, and a bill of exception taken to their introduction. They were inadmissible to impeach the testimony of the witness, for she was defendant's witness. They were inadmissible to charge plaintiff with any indebtedness, for they were merely the acknowledgments of a third person in a correspondence. 1 Greenleaf, secs. 442, 443. The only purpose for which they were admissible, was to show the indebtedness of *Miss Emma Cornen* herself, for whom, it is asserted in argument, *Mrs. Moussier* became security,

They can have no effect upon the indebtedness of *Mrs. Moussier*, but when offered for the purpose for which they were admissible, they create a doubt whether the witness may not be mistaken as to the payment by *Mrs. Moussier*, and we prefer considering the question without reference to this testimony.

Then, when we place the act of sale from *Mrs. White* to *Mrs. Moussier* and *Miss Cornen*, by the side of the act of mortgage from the latter to *Mrs. White*, we find in one instrument the receipt of \$10,000 acknowledged as paid at the execution of the act, and, as a consequence, in the presence of the notary, to *Mrs. White*, and in the other an acknowledgment of indebtedness of \$43,362 53 to

MOUSSIER
v.
WHITE

Maunsel White. How can this court presume from these two acts that the \$10,000 acknowledged to have been paid in lawful current money was not paid, but formed a part of the \$43,362 53. There is nothing from which it can be inferred. The burden of proof is upon the defendant, and the comparison of these instruments does not furnish the proof which he was bound to administer. But it is said the proof results from a ratification of the account which contained this as one of the items as testified to by *Kohn*. The testimony of *Kohn* is rebutted by that of *Reese*, and we have not discovered any proof in the record which shows that *Mrs. Moussier* ratified the account containing this item; if, indeed, she could be concluded by such ratification.

We think, therefore, the defendant has failed in his proof to the extent of one-half of the debt for one-third of the plantation bought of *Mrs. White*, viz: \$5000.

By the same reasoning it is shown he has failed in his proof for one-half of the debts due by *Mrs. White*, and the plaintiff is not bound for *Moussier's* drafts and the other items of the account not proven. The one-half of the latter amounts to \$2362 56, and the whole being deducted from \$24,863 14 leaves \$20,136 01; the one-third of which would be *Mrs. White's* share, and one-half of one-third, \$3356 33, improperly charged to *Mrs. Moussier*, without proof, as part of the price of *Mrs. White's* interest.

The following items, therefore, are unsustained by proof, viz: one-half of the price of *Mrs. White's* interest. \$5,000 00

One-half of *Moussier's* drafts and other items not proved. 2,362 56

One-half of balance of *Mrs. White's* indebtedness. 3,356 33

\$10,718 89

The next question to be considered is, whether *Mrs. Moussier* could bind herself in *solido* with her sister as her surety?

At the execution of the act of mortgage, *Mrs. Moussier* (with the exception of 7-240 parts, as shown by Mr. Justice Buchanan), was the owner of five-sixths of the plantation, and *Miss Emma Cornen* one-sixth. But in buying the one-third from *Miss Cornen* on the 3d of March, 1849, *Mrs. Moussier* assumed one-third of the mortgages remaining upon the plantation unpaid.

Miss Cornen at the time she executed the notes and mortgage was *sui juris*. She could bind herself as a *femme sole* for her own debts, and as surety for her sister. But as surety for the latter she would not be bound for anything more than the amount for which her principal was bound. C. C. 3006. The obligations of *Miss Cornen* subscribed by her, stand upon a different ground from those of *Mrs. Moussier*. The burden of proof is upon her to show the failure or want of consideration. And as against her the mortgage and notes corroborated by the letters must stand, unless they are shown to be erroneous.

The mere failure of proof on the part of the defendant will not release her from her portion of the promissory notes.

On a review of the authorities, we find that it has been decided that a married woman may become a security for a third person. See *Ferrell v. Yoe*, 2 An. 903; *Roberts v. Wilkinson*, 5 An. 369. It is with some hesitation, however, that we admit the doctrine in the present case, where the wife binds herself in *solido* with a third person, and the contract is not one of suretyship purely, although by her act of purchase from that person she had bound herself for certain mortgages upon the property. But giving the benefit of this construction of the law to the

defendant, it will leave the one undivided half of said notes subject to the payments, in full force and vigor; for, the surety cannot question an obligation which her principal has not the means of showing to be erroneous.

As it respects the claim for dividends upon bank stock, the plaintiff fails in her proof, and has not the proper parties before us for relief.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment heretofore pronounced by this court be set aside, and that, as heretofore decreed, the judgment of the lower court be avoided and reversed, and now proceeding to pronounce such decree as ought to have been pronounced, it is ordered, adjudged and decreed by the court, that the said mortgage notes upon which said order of seizure and sale issued be credited, upon the principal thereof, one-fourth upon each note, as of the day of their date, with the sum of \$10,718 89 in favor of the plaintiff, as improperly charged to her in the consideration of said notes, and that said mortgage note which fell due in April, 1851, be further credited with the payment of \$5057 08, as of the 4th day of April, 1851, and that the further sum of \$3600 be credited as of February 15th, 1853, *pro rata*, upon the mortgage notes then due, and that the injunction issued in this case be perpetuated for the said three several sums herein allowed as credits, and that the same be dissolved as to the residue of said writ of seizure and sale, the plaintiff herein paying the costs of appeal, and the defendant the costs of the lower court, it being understood that this decree does not prejudice any claim the plaintiff may have against the proper parties on account of said Union Bank stock.

LAND, J. I concur in the decree prepared by C. J. Merrick.

BUCHANAN, J., dissenting. The question of suretyship does not seem to me properly to arise in this case. The only case mentioned in the Code in which one creditor *in solido* is considered as the surety of the other creditor, is that put in Article 2102, which is not applicable to the contract now under consideration.

Again, a distinction is made in the opinion prepared by the Chief Justice, between *Mrs. Moussier* and *Miss Cornen*, as to the burden of proof. But it is not necessary to make any such distinction. This is a suit to which *Mrs. Moussier* alone is a party plaintiff, and in which she enjoins an order of seizure and sale, on the ground, among others, that the balance of accounts, for which the notes held by plaintiff were given, was erroneous. The principal error alleged was an item in the account to the debit of the Bellevue plantation, of ten thousand dollars, for so much paid by *Maunsel White*, or *M. White & Co.*, to *Mrs. White*, for her third of the plantation sold *Mrs. Moussier* and *Emma Cornen*. With regard to this item, which is the only one upon which any difference of opinion really exists, the original opinion of the court treated the burden of proof as being upon the plaintiff in injunction, *Mrs. Moussier*, and not upon the defendant in injunction, *Mr. Zuntz*. And *Mrs. Moussier* was found to have proved the error by evidence of no less authority than the declaration of *Maunsel White* and of his wife, the vendor, in the authentic act of sale of *Mrs. White's* third of the plantation referred to in this item of the account. The defendant in injunction endeavored to rebut this affirmative proof of error, but unsuccessfully. The reasoning and conclusions of the original judgment upon this head seem to be entirely concurred in by the opinion prepared by the Chief Justice, on the rehearing; and it does, therefore, appear to me incorrect to say, as is said in the opinion, that there is simply a failure of proof on the part of defendant, of the correctness of the account. On the contrary, every cent of deduction that was

MOOREHEAD
v.
ZOWIE.

made by the original judgment of this court, was so made upon affirmative proof administered by the plaintiff in injunction.

I think our former judgment ought to remain undisturbed.

OPINIONS ON RENDERING THE ORIGINAL JUDGMENT.

BUCHANAN, J. The plaintiff, a married woman, enjoins the execution of a mortgage by authentic act, granted by her upon her separate estate. Her grounds of action are various, and are substantially :

1st. That the mortgage was extorted by fear and by threats.

2d. That the mortgage was given for a balance of account-current, in which there are many errors to her prejudice.

3d. That many of the items to her debit in said account did not enure to her benefit, but were advances made to her husband.

4th. That the sum of three thousand six hundred dollars has been paid by her, on account, which is not credited upon the writ of seizure and sale.

5th. That the advertisement of sale includes three horses, fifteen mules, six working oxen, one cow, eight sheep and lambs, ten carts, and a lot of farming utensils, which were not mentioned in the writ of seizure and sale.

6th. That plaintiff has suffered twenty thousand dollars damages, by acts of waste and trespass on the part of the Sheriff's keeper, who was in charge of the property from the 30th January to the 28th February, 1855, such as "forcing plaintiff's servants out of her employ, ruining her fields by mismanagement, preventing plaintiff from cultivating the same, and from planting therein the canes which she had prepared and matrassed for the purpose, starving her cattle, destroying her poultry yard, cutting down fruit trees," &c.

I. The petition does not explain in any manner what was the nature or degree of the fear of plaintiff, or by whom inspired. The only evidence on the subject, is that of two witnesses, who testify that the plaintiff's husband expressed great anxiety that she should sign this mortgage, which she was unwilling to do ; and even threatened to go to California, unless she signed the same. This is not such a threat as can have the effect of invalidating the contract, under Article 1845 of the Civil Code. It is also to be observed, that the mortgagee had no share in these threats, such as they were, nor any knowledge of them. There was also another apparent cause for the mortgage than the threats of plaintiff's husband. C. C. 1852, 1853.

II. In examining this ground, we must commence by a chronological retrospect of the origin and changes of ownership of the property mortgaged, and of the relations of the mortgagee thereto, as illustrating the correctness of the manner in which the accounts have been kept, upon which the present mortgage is based ; and of the balance of account which is represented by the notes, which this mortgage has been given to secure.

Marie Genevieve Garel, wife separated in property of *Jean Marie Cornen*, of the parish of Plaquemines, died possessed, in her own right, of a tract of land of fifteen arpents front on the left bank of the river Mississippi, by forty arpents in depth, cultivated as a sugar plantation, under the name of the Bellevue plantation, with thirty slaves. Her heirs were nine in number, her husband and eight children of full age, each inheriting one-ninth of her succession. On the 15th of

April, 1843, three of the children and heirs of *Mrs. Cornen*, sold to their father and the five other co-heirs, their interest in the Bellevue plantation and improvements, cattle, implements of husbandry and other appurtenances, also in thirty slaves thereunto attached. The six purchasers, *Jean Marie Cornen*, *Pierre Paul Cornen*, *Emma Cornen*, *Coralie Cornen*, *Mrs. Coolidge*, and *Mrs. Moussier*, the present plaintiff, being thus each vested with the ownership of the entire plantation and slaves for one undivided sixth, formed a copartnership in the business of sugar planting, on the 21st of April, 1843, to continue three years, under the firm of *J. M. Cornen & Co.*; one of the articles of which copartnership was, that *Pierre Paul Cornen* should be the manager for the purpose of making the crops, and *Jean Marie Cornen*, or in case of his sickness or inability, *Pierre Paul Cornen*, should be the financial manager and agent of the concern.

1846, February 12—*Coralie Cornen* and *Mrs. Coolidge*, two of the partners in the firm of *J. M. Cornen & Co.*, and collectively owners of one-third of the plantation and slaves, sold out their interest in the land and 27 slaves, (four of those mentioned in the sale of the 15th April, 1843, not being in this, and one being in this, who was not in the former sale,) and, also, two-eighths of the interest of *Jean Marie Cornen*, their father, therein, which had fallen to them by inheritance, the said *Jean Marie Cornen* having died, to the other three surviving partners, namely, *Pierre Paul Cornen*, *Emma Cornen* and *Mrs. Moussier*.

1846, March 24—*François Theodore Cornen*, one of the children of *Jean Marie Cornen* and his wife, and one of the vendors in the sale of the 15th of April, 1843, above mentioned, made an act recognitive and confirmatory of a sale of the 6th of June, 1844, by said *F. T. Cornen* to his brother *Paul*, and his four sisters *Emma*, *Coralie*, *Mrs. Coolidge* and *Mrs. Moussier*, of all his share (one eighth) in his deceased father's interest in the property of the firm of *J. M. Cornen & Co.*

1846, March 28—*Mrs. Achille Sigur*, another of the children of *Jean Marie Cornen* and his wife, and one of the vendors in the act of 15th of April, 1843, above mentioned, sold her interest (one-eighth) in the share of her deceased father in the said property, to her brother *Paul* and two sisters, *Emma* and *Mrs. Moussier*.

By the effect of the above recited conveyancy, the Bellevue plantation, with its appurtenances and the slaves attached thereto, belonged, after the 28th March, 1846, to the following persons:

1st. *Mrs. Edward Sigur*, in the proportion of $\frac{1}{4}$ to $\frac{1}{4}$, equal to 1-48, as heir of her father, *Jean Marie Cornen*.

2d and 3d. *Mrs. Coolidge* and *Coralie Cornen*, each in the proportion of 1-5 of $\frac{1}{4}$ of $\frac{1}{4}$, equal to 1-240, as vendee of a portion of their brother *Theodore's* share in the succession of their father.

4th, 5th and 6th. *Paul Cornen*, *Emma Cornen* and *Mrs. Moussier*, jointly, for all the remainder, being 233-240, or in the proportion of 233-720 to each.

1847, December 15—*Pierre Paul Cornen*, styling himself owner of one undivided third, although, as we have seen, this was not altogether correct, sold the undivided third of the plantation and appurtenances, also one-third of 29 negroes (four of those named in the sale of the 12th of February, 1846, not being in this sale, and six of those named in this sale not being in the former); also, one-third of 206 shares of Union Bank stock, (not mentioned in any of the previous sales,) to *Mrs. Heloise White*, wife of *Maunsel White*, and authorized and assisted by her husband.

1849, March 3—*Emma Cornen*, making the same mistake that her brother had made, sells to *Mrs. Moussier* the undivided third of the plantation and of twenty-

MOUSSIER
v.
ZUNTZ.

eight slaves—one old negro named *Alexander*, included in the last sale (15th of December, 1847,) not being found in this sale.

1850, *April 22*—*Mrs. White* sells to *Emma Cornen* and to *Mrs. Moussier*, jointly, one undivided third of the plantation and appurtenances, and of twenty-eight slaves; a young man slave named *Paul Turner*, named in both the sales of the 15th December, 1847, and the 3d of March, 1849, being omitted in this sale; while the old man *Alexander*, omitted in the sale of 3d March, 1849, figures again in the present sale. There is no mention, in this sale from *Mrs. White*, of the 206 shares of Union Bank stock of which she had acquired one-third as attached to the plantation when she purchased in December, 1847; neither do those shares of stock figure in the mortgage of which we shall presently speak, nor in the accounts-current between the parties.

The petition for the seizure and sale is equally silent respecting this bank stock, which apparently has been separated from the plantation; but how, or for whose benefit, the record does not inform us.

We cannot help adverting to this *hiatus* in the record, because it might, if filled up, throw some light upon the acknowledgment of the receipt of ten thousand dollars, made by defendant's author, but which defendant now affects to treat as a fiction.

The present market value of 206 shares of Union Bank stock, is believed to be not far from (\$6,000) six thousand dollars.

On the same day with the sale last mentioned, (22d April, 1850,) and before the same notary, *Mrs. Moussier* and *Emma Cornen* acknowledged themselves to be indebted to *Maunsel White* in the sum of \$43,064, for which they make their four joint and several promissory notes, to their own order, and by them endorsed in blank, for \$10,766 each, with eight per cent. interest from date until paid, and payable, respectively, 1, 2, 3 and 4 years after date, and secured by special mortgage upon the plantation and appurtenances, and upon the twenty-eight slaves mentioned in the sale of the same date.

1852, *April 30*—*Maunsel White* assigns and transfers the four mortgage notes above mentioned to *James E. Zuntz*, the defendant, with subrogation to all rights of mortgage and privilege.

The evidence shows the acknowledgment of indebtedness by the plaintiff and her sister, to be based upon accounts rendered by *Maunsel White*, as factor and commission merchant, showing a balance in favor of said *White*, under date of April 2d, 1850, of a like amount with the notes and mortgage.

The accounts of *White* are four in number. The first: "*J. M. Cornen & Co.* in account with *Maunsel White & Co.*" This account commences on the 15th of February, 1847, and is closed on the 24th December, 1847, by the following entry: "To balance transferred to *Maunsel White* \$3,408 94."

The second account is headed as follows: "Bellevue plantation in account-current and interest account to April 1st, 1849, with *Maunsel White*." This account commences: "1847, December 24. To *Maunsel White & Co.* for the full amount of their claims against said plantation \$3,408 94," and is closed by balance to debit of the Bellevue plantation brought down under date of April 1, 1849, of \$25,356 92

Increased by addition of sundry items, said to be omitted, to \$25,604 45

The third account is headed thus: "Bellevue plantation in account-current and interest account to 1st of April, 1850, with *Maunsel White*." This account commences as follows: "1849, April 1st. To balance from page 4 \$25,604 45"

and closes by a balance to the credit of *Maunsel White*, struck under date of
 " April 1, 1850, of.....\$29,620 77"

Moussier
v.
Zunz.

The fourth and final account we copy in full, as it resumes, in a few items, the whole of the charges which go to make up the amount of the mortgage notes.

" Bellevue plantation in account-current and interest account, to April 1st, 1850, with *Maunsel White* :

1850.

April 1. To balance.....	\$29,620 77
March 24. Paid Union Bank.....	5,150 00
April 2. Paid <i>R. Patterson & Co.</i>	6,740 40
Paid for 50 empty barrels, \$1 15.....	57 50
Paid <i>Theodore Cornen</i>	150 00
Paid <i>Madame White</i> her $\frac{1}{3}$	10,000 00
Paid cash insurance.....	112 00
Paid their draft on me.....	184 86
	<hr/>
	\$52,015 53

CR.

By net proceeds of 202 hogsheads of sugar and 100 barrels of molasses.....	\$8,653 00
	<hr/>
	\$43,362 53

My bills receivable for four promissory notes, at 1, 2, 3 and 4 years, from April 1, 1850, \$10,766.....	\$43,064 00
By amount of the above charges for balance.....	298 53
	<hr/>
	\$43,362 53"

During the period embraced by the first account, February to December, 1847, the plantation belonged, as we have seen, with the exception of a small fraction, (7-240,) to *Paul Cornen*, *Emma Cornen* and *Mrs. Moussier*, in equal proportions. During that embraced in the second account, (December, 1847, to March, 1849,) the plantation belonged to *Mrs. Moussier*, *Emma Cornen* and *Mrs. White*, (with the exception of the said fractional part,) one-third to each. And in the period embraced in the third account, the plantation belonged two-thirds to *Mrs. Moussier* and one-third to *Mrs. White*, always with the exception of the trifling fraction above mentioned. It will also have been observed, that *Mrs. White*, in buying out *Paul Cornen's* share, took his place as to liabilities for the debts of the first of these partnerships. Supposing, therefore, all the charges and credits of the three first accounts-current to be perfectly correct, the balances shown by the same would be due, as follows :

\$3,408 94 balance of the first account.

$\frac{1}{3}$ or \$1,136 31 by *Pierre Paul Cornen*, assumed by *Mrs. White*.

$\frac{1}{3}$ or \$1,136 31 by *Mrs. Moussier*.

$\frac{1}{3}$ or \$1,136 31 by *Emma Cornen*.

\$25,604 25 balance of second account.

3,408 94 being deducted therefrom, which is the balance due by the former partnership, although included in this account, and which we have already distributed,

Leaves \$22,195 31 to be distributed as follows :

SUPREME COURT OF LOUISIANA.

MOUSSIER
v.
ZUNER.

½ due by <i>Mrs. White</i> , equal to.....	\$7,398 43.
½ due by <i>Mrs. Moussier</i> , equal to.....	7,398 43.
½ due by <i>Emma Cornen</i> , equal to.....	7,398 43.

\$29,620 77 balance of the third account.

25,604 25 being deducted therefrom, as already distributed among the members of the previous partnership,

Leaves \$4,016 52 to be distributed as follows :

½ due by <i>Mrs. Moussier</i> , equal to.....	\$2,677 68.
½ due by <i>Mrs. White</i> , equal to.....	1,338 84.

Total due by plaintiff to *Maunsel White*, at the close of the third account, 1st of April, 1850.....\$11,212 42.

RECAPITULATION.

Due by the several partners in the Bellevue plantation to their factor, *Maunsel White*, upon the several balances of account-current rendered by *Mr. White*, to 1st April, 1850 :

1st. By <i>Mrs. Moussier</i>	\$1,136 31	
	7,389 43	
	2,677 68—	\$11,212 42
2d. By <i>Mrs. White</i>	1,136 31	
	7,398 43	
	1,338 84—	9,873 58
3d. By <i>Emma Cornen</i>	1,136 31	
	7,389 46—	8,534 77

Total.....\$29,620 77

It does not admit of discussion, that a partnership in a plantation and slaves employed in agriculture, is an ordinary partnership, in which the liabilities of the several partners are not solidary but joint, each being bound for the debts in the proportion of his interest in the concern. And yet we will find the settlement of the affairs of the Bellevue plantation, to be made on the footing of a solidary obligation, on the part of two out of three parties interested, for the whole amount of three accounts running through three distinct partnerships; in one of which partnerships, one of those two parties (*Emma Cornen*) had no interest whatever; while the third party, *Mrs. White*, who was liable, by contract, for one-third of the debts of the first of the three partnerships, and as partner, for one-third of the debts in the second and third partnership, is left entirely out of view, and treated as if she were under no liability whatever. The evidence of that settlement is contained in the fourth account, which we have copied above, and in the four notes of *Emma Cornen* and the plaintiff, secured by mortgage, for the balance of the fourth account. We are next to inquire how this final balance, thus liquidated by mortgage notes, has been arrived at.

Commencing on the debit side with a statement of a balance due by Bellevue plantation, under date of April 1st, 1850, of \$29,620 77, *Mr. White* proceeds, in the fourth account, to charge the plantation with the amount of two debts which he had paid; one to the Union Bank of Louisiana, and the other to *Robert Patterson & Co.*, of Philadelphia, which were mortgages resting upon the property when *Mrs. White* bought out the interest of *Pierre Paul Cornen*, in December, 1847, and one-third of which she had assumed to pay in her contract of purchase

These debts amount to \$11,890 40, of which two-thirds, or \$7926 94 are chargeable to *Mrs. Moussier*, and one-third, or \$3,963,46, to *Mrs. White*.

The next charge in this account which demands attention, is the item of \$10,000 paid *Mrs. White* for her third of the plantation sold *Mrs. Moussier* and *Emma Cornen*. The District Judge has rejected this charge, because the same is not proven, but on the contrary, the authentic act of sale by *Mrs. White* shows that the purchasers paid the price in cash in the presence of the notary. The following are the expressions of that instrument, which was signed by *Mr. White* as well as by his wife: "This sale is made for and in consideration of the price and sum of ten thousand dollars, which by the said purchasers has been in hand well and truly paid in lawful current money, at the execution of these presents, the receipt whereof is hereby acknowledged, and acquittance in full therefor granted by the vendor."

Supposing that it was competent to defendant, as assignee of *Maunsel White*, to show that the money, thus acknowledged in the act of sale to have been paid by the purchasers in lawful current money, at the execution of these presents, was in reality paid by *Maunsel White* himself to his wife, and not by the purchasers (which is a point not necessary to determine), yet, some affirmative proof of such payment should at least have been administered, to overcome the solemnity of the acknowledgment to the contrary, signed by *Maunsel White* as well as by his wife. But defendant has offered no proof, oral or written, in support of the charge. The only witness who was questioned in relation to it (*Miss Emma Cornen*, one of the purchasers from *Mrs. White*,) declared, on the trial, in answer to defendant's queries, that she and her sister had paid the total of the price of *Mrs. White's* third interest in the plantation, cash, with their own proper funds, and that no conversation took place between the parties at the time of the sale, in relation to *Mr. White's* paying this price for the purchasers, and including it in the mortgage. The defendant has introduced a number of letters of this witness, expressive of limited means and pecuniary embarrassments, to discredit this portion of her testimony. To the introduction of these letters in evidence, the plaintiff has excepted. But granting that they were properly admitted, and giving them all the effect which the defendant proposes, it is not seen that his case is much benefited. We are only rid of the testimony of one witness, elicited by himself, adverse to the charge in question. But the notarial act still remains, unrefuted, unimpeached, unexplained. It would be contrary to all principle and to all precedent, to allow a party to destroy his own act, by a mere side wind of suspicion.

Proceeding to the credit side of the account under consideration, we think *Mrs. Moussier* should only be credited with two-thirds, instead of the whole of the nett proceeds of 202 hogshheads of sugar and 100 barrels molasses, say \$5,768 67, the other third to be credited to *Mrs. White*.

The District Judge was correct in holding the defendant to be bound by the equities which existed between the original parties to the notes and mortgage, two of the notes being past due when defendant acquired them; and the assignment and subrogation conferring no greater rights than the original mortgagee had.

Having thus corrected what we conceive to be errors in the accounts upon which the plaintiff's notes were based, we have not been able to concur with the District Judge in relation to the rejection of items as having not inured to the use of the plaintiff. The production of proof for every small sum paid for a planter by his factor, is not easy, after many years have elapsed, and we think, that to require proof of the signature of the payee of every order of the planter

MOOREHEAD
v.
ZETTEL

on his factor, is requiring too much. The authority of plaintiff's husband to draw orders, must be inferred from the evidence. Such appears to have been the uniform course of business of the Bellevue plantation, after *Mr. Paul Cornen* ceased to have an interest, and even before.

The next ground of injunction is, that \$3600 have been paid on account of the mortgage debt, which are not credited in the writ of seizure and sale issued. This appears to be well founded, and the injunction must be perpetuated for so much.

As to the horses, mules, working oxen, cows, sheep and lambs, carts and farming utensils, which are advertised for sale, although not mentioned in the mortgage, we are of opinion that the mortgage covers them, although not expressed. The property mortgaged is a tract of land under culture as a sugar plantation. The animals and movables above enumerated, are evidently attached to this land for its service and improvement. They are, therefore, immovable by destination, and constitute a part of the plantation. C. C. 459.

The petition next alleges that petitioner has suffered twenty thousand dollars damages by plaintiff taking illegal possession of the plantation of petitioner from the 30th January to the 28th February, 1855, under the writ of seizure, and committing various acts of trespass and waste thereon, such as forcing petitioner's servants out of her use and employ, ruining her field by mismanagement, preventing her from cultivating the same and planting therein the canes which she had prepared and matrassed for the purpose, starving her cattle, destroying her poultry-yard, cutting down fruit trees, &c.

Upon this claim for damages, some evidence has been given of waste committed by the Sheriff's keeper, who was put in possession of the property seized by that officer; but no privity of the defendant is proved, and the plaintiff must look to the Sheriff for reparation of the tortious acts of his subaltern in the execution of the writ addressed to him. Sheriffs give bonds for the faithful and proper discharge of their duties; and litigants pursuing legal remedies, are not responsible for the Sheriff's abuse of those powers which the law confers upon him as the executive officer of the courts of law. *Mayes v. Schmidt & Co.*, 11 An. 476.

There is a further claim of twelve hundred dollars for travelling expenses and counsel fees in defending the executory process, which requires no further notice, as plaintiff has introduced no evidence in support of it.

We state the indebtedness of the plaintiff to the original mortgagee, at the time the notes and mortgage were executed, (22d April, 1850,) as follows:

Balance of account April 1st, 1850,.....	\$11,212 42
Add two-thirds of the Union Bank and Patterson debts paid by Maunsel White.....	7,926 94
Also $\frac{1}{3}$ of items \$57 50, \$150, \$112, \$184 86,—total \$504 36, in account under date of 2d April, 1850,.....	336 24
	<hr/>
	\$19,475 60
CR.	
By $\frac{1}{3}$ net proceeds sugar and molasses.....	\$5,768 67
	<hr/>
Balance in favor of mortgagee, bearing interest from April 22d, 1850, at 8 per cent.....	\$13,706 93
	<hr/>
To be credited with the sum, paid on the 4th of April, 1851, of...	\$5,057 08
And with the further sum, paid on the 15th February, 1853, of...	\$3,600 00

It is, therefore, adjudged and decreed, that the judgment of the District Court be amended; that the writ of seizure and sale be reduced in conformity to the statement above written, and that the injunction be perpetuated for the surplus, without prejudice to defendant's recourse against *Emma Cornen* upon his mortgage; that the injunction herein issued be perpetuated for the amount by which the executory process is hereby reduced as above; and that, for the remainder of the writ, after the reductions and credits aforesaid, the injunction be dissolved; and that the defendants pay the costs of the court below; those of appeal to be borne by plaintiff and appellee.

SPORFORD, J., dissenting. We all agree that the duress which forms the burden of the complaint in this case was insufficient to afford any ground for relief to the plaintiff.

There is no presumption of improper marital influence; because the notes were not signed with, nor for her husband, from whom the plaintiff alleges herself to be separated of property.

It is not now pretended that the husband received anything for the notes, or had any interest to induce his wife to sign them if she did not owe them.

The only ground left is that of error, which is most vaguely alluded to in the petition.

In this court, I understand the theory of the plaintiff's case to be, that *by mistake*, she signed, and *Mausnel White* took her notes for about \$20,000 too much, in executing a mortgage for about \$43,000 only. To establish this, we are called upon to ignore one notarial act which she signed, and to give a literal and isolated interpretation in her favor to another, which she signed at the same time, and before the same notary and witnesses. I look upon these simultaneous acts as constituting one entire transaction; construing them thus, the plaintiff's indebtedness is established.

And my review of the record has led me to the conclusion, that the evidence is not sufficiently cogent to overturn the notarial act of mortgage, and to sustain the plaintiff's injunction on the ground of error to the extent of about \$20,000.

JAMES SAUNDERS v. J. W. CARROLL et al.

A defendant pleading prescription may be interrogated, as to any acknowledgments or promises he may have made, before prescription has been acquired.

The Act of 1856, which provides that parol evidence shall not be admitted to prove a promise to pay any written obligation when prescription has already run, but that in all such cases the promise to pay shall be proven by written evidence, is an Act affecting the remedy, and must be held to apply only to the proof of promises made subsequent to its passage.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
Simmonds & Fenner, for plaintiff. *Singleton & Clark*, for defendants and appellants.

MERRICK, C. J. This suit is brought against two members of the firm of *Buchanan, Carroll & Co.* upon a draft accepted by them. The draft was drawn on the 1st of March, 1850, on the acceptors, at eight months, and payable to the order of the plaintiff for \$2006 29. It was not presented to the acceptors for

SAUNDERS
v.
CARROLL.

payment until more than five years after its maturity. The suit was commenced on the 22d day of May, 1857.

The defence is the plea of prescription. To show interruption of prescription, the plaintiff, among other things, propounds interrogatories on facts and articles which have been taken as confessed.

The defendants excepted to the interrogatories, and declined answering them until their exceptions were overruled.

Certain of the interrogatories inquire of the defendants whether at certain times therein mentioned, (the same being before the expiration of five years,) they did not state to the individuals named, that said debt was then due and unpaid?

This portion of the interrogatories is not satisfactorily answered, and the question is presented, whether the court could compel the defendants to answer the interrogatories? This point was decided in the case of *Levistones v. Marigny*, 13 An., in the affirmative, and we see no reason to doubt the correctness of the conclusions in that case.

It is true that the debtor, in order to interrupt prescription, cannot be called upon to swear whether the debt has or has not been paid, because good faith is not required in order to prescribe. Art. 3515 C. C. But the Code does not prohibit the plaintiff from proving, by propounding interrogatories to his adversary, any other fact needed to make out the case.

The Code declares that an acknowledgment of the debt by the debtor interrupts prescription. C. C. 3486, 3516, 3517. What good reason can be assigned why the fact of acknowledgment may not be proven by the highest sort of evidence, viz: the admission of the debtor on interrogatories on facts and articles? The question is not then, has the debt been paid, which is prohibited, but, did you at such a time and to such a person admit that you owed the debt? did you at such a time promise to pay the debt? or, did you at such a time make a payment of so much upon the debt? or the like. Here the interrogatory goes to a fact which hitherto at least might also be proven by testimonial proof, and does in no manner raise the question of the good or bad faith of the debtor. If the question is, did you promise to pay? the affirmative answer establishes a new contract: the *pact constitutum pecunie*. If a partial payment, then a tacit acknowledgment which leaves the residue of the debt free from any question of honesty or of the good or bad faith of the debtor in pleading prescription, and his plea is not to be tainted by the imputation that it is opposed to a demand valid in the estimation of all honorable men. If prescription has been acquired, it is for the debtor alone to determine whether it is right or wrong to avail himself of the shield furnished him by the law. But the creditor has the right to prove any fact which shows that the debtor has in truth never acquired prescription, and this may be done by propounding interrogatories as well as by testimonial or written proof.

We think, therefore, that the plaintiff had the right to propound the interrogatories, and in default of a legal answer, to take the same as confessed.

But it is urged that the Act of 1858, which provides, that hereafter parol evidence shall not be received to prove any promise to pay any written obligation when prescription has already run, but that in all such cases the promise to pay shall be proven by written evidence, is an act affecting the remedy, and, therefore, applicable to the case before us. Acts of 1858 p. 148, sec. 4. This section of the Act, if at all applicable to a case of this kind, we are of the opinion, must be held to apply to the proof of promises made after its passage. To construe it as referring to antecedent promises would be to violate the well settled rules of con-

struction, as well as to impair the obligation of contracts. *Leges et constitutiones futuris certum est dare formam negotiis, non ad facta præterita revocari, nisi nominatim et de præterito tempore et adhuc pendentibus negotiis cautum sit.* Code, lib. I, tit. 14, Const. 7.

SAUNDERS
v.
CARROLL.

No general or special legislative Act can be so construed as to avoid or modify a legal contract previously made. C. C. Art. 1940, No. 1 ; C. C. 8 ; Mackeldy, *parte spéciale*, sec. 467.

Taking the interrogatories as confessed, and in connection with the same, the letter of October 10th, 1856, it leaves the defendants without any further reply to plaintiff's demand.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be affirmed, with costs.

THOMAS BUCKLEY v. F. LACROIX AND THE CITY OF NEW ORLEANS.

The failure of the appellant to file the transcript of appeal on the last judicial day, will not be excused on the ground of the Clerk's office being closed earlier than usual; in the absence of proof of the time of day when the attempt was made to file it, the presumption being that it was after business hours.

APPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
Hunton & Miller, for plaintiff. *Collens & Wooldridge* and *J. J. Michel*, for defendants and appellants.

MERRICK, C. J. The appeal in this case was not filed until after three judicial days after the return day. The city of New Orleans has moved for the dismissal of the appeal.

We think the motion must prevail.

It appears that the transcript was completed on the last judicial day, and the Deputy Clerk employed upon the same undertook to file it in the office of the Clerk of the Supreme Court; that he went in the evening to file the transcript but found the Clerk's office closed earlier than usual; that he searched for the Clerk, but did not find him that evening, and that he filed the transcript early the next day.

We have not heard it pretended that the Clerk's office was not open as usual during business hours, and in the absence of proof of the time of day when the agent of the appellant went to file the transcript, we must presume that it was after business hours, and that the failure to file the transcript was the fault of the appellant.

It is, therefore, ordered, adjudged and decreed, that the appeal in this case be dismissed at the costs of the appellant.

14 30
45 680
45 1070

J. B. MORGAN v. SETH W. NYE.

Since the statute of 1843, a bare majority of the creditors of an insolvent have the power to grant a respite and thus postpone the payment of the debts of the minority.

The vote of a single creditor for a respite, is not a mere offer to make a new contract between the creditor and debtor, but is a *quasi judicial act* by which the rights of other creditors are to be affected. Any agreement of the debtor to buy the vote of a creditor by giving security for the payment of his debt, must be considered as fraudulent, and the creditor whose vote is thus bought, cannot recover the amount of his debt against the surety furnished by his debtor, as the contract must be considered as a perversion of the course of justice, and a fraud upon the court charged with the homologation of the deliberations of the creditors.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
H. T. Hays and Henry M. Spofford, for plaintiff and appellant. John H. Holland, for defendant.

MERRICK, C. J. The plaintiff is a resident of Pennsylvania. He had a claim against *Henry S. Sherman* for \$2,474 12. Being about to proceed in the United States Circuit Court to collect the debt, the plaintiff was induced to desist and vote for a respite upon the verbal agreement of the defendant to stand security for the debt. It is shown that *Sherman* could not have obtained the respite without the plaintiff's vote, and that other creditors, in ignorance of the private agreement, were governed by this vote, and voted accordingly, which resulted in a respite.

In a little over a year afterwards *Sherman* made a surrender, which produced on this claim \$420 11.

This suit was brought to recover of *Nye* the amount assumed by him.

The defence to the action is that the contract is illegal. The Judge of the District Court being of this opinion, gave judgment for defendant, and plaintiff appeals.

On behalf of the plaintiff it is contended in substance, that *Sherman* represented himself to be solvent when the agreement was made, and that the application for and obtaining a respite is no evidence of insolvency, and that the surrender made fourteen months afterwards cannot have a retroactive effect, so as to render invalid an agreement made at a time when the creditor did not suspect his debtor to be insolvent.

We think that it is a matter of no consequence, so far as it concerns this case, whether *Sherman* was or was not insolvent. It is evident that the agreement was entered into for the purpose of obtaining *Morgan's* vote in favor of the respite, and also thereby to influence other creditors. And this result was obtained.

Since the statute of 1843, a bare majority of the creditors have the power to grant the respite, and thus postpone the payment of the debts of the minority. The vote, therefore, of a single creditor, is not a mere offer to make a new contract between the creditor and debtor, but is a *quasi judicial act* by which the rights of other creditors are to be affected. Hence, any agreement of the debtor to buy the vote of a creditor, by giving security for the payment of the debt, must be considered a perversion of the course of justice, and a fraud upon the court charged with the homologation of the deliberations of the creditors. Such a contract cannot be enforced. See *Slidell v. Pritchard*, 5 Rob. 104, and authorities there cited.

Judgment affirmed.

MOSES A. JAMISON v. ISAAC BRIDGE et al.

A slave cannot be a party in any civil action, either as plaintiff or defendant, except when he has to claim or prove his freedom. C. C. 177.

As emancipation is now prohibited in this State, a slave cannot prosecute a suit for his freedom. Session Acts 1857, p. 55.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*
Ogden & Leovy, for plaintiff and appellant. *T. H. Howard*, for defendants.

COLE, J. Petitioner avers that in 1836, he was sold to *Jeremiah Berry*, but for a cause unknown to petitioner the title was not taken in the name of *Berry*, but in that of his daughter, now deceased, who was then the wife of *Isaac Bridge*; that after the purchase he remained in possession of *Jeremiah Berry* as his property, and the said *Berry* acquired a title by prescription; that in 1855 *Berry* died, leaving an olographic will, which has been probated; that *Berry*, in the will, donated to petitioner his freedom; that *Isaac Bridge*, the husband of *Mary Berry*, in whose name petitioner was purchased, for himself and as tutor of his minor children, now claims and asserts a title to petitioner.

The petition concludes with a prayer that defendants be prohibited from asserting any claim to petitioner, and that so far as the defendants are concerned, petitioner be declared to be free.

The judgment was for the defendants, without prejudice to the rights of the succession of *Jeremiah Berry*.

A slave cannot be a party in any civil action, either as plaintiff or defendant, except when he has to claim or prove his freedom. C. C., Art. 177.

As emancipation is now prohibited, plaintiff cannot prosecute this suit for his freedom. Session Acts 1857, p. 55.

It is objected by plaintiff, that this suit is not only one for freedom, but also for the determination of the question, whether the *Succession of Jeremiah Berry*, or that of his daughter, be entitled to petitioner as a slave.

The sole interest of plaintiff in this question is, that he may successfully enforce his suit for freedom, and as this is impossible under the law as it now exists, it would be useless to enter into such an investigation.

The judgment ought to have been one of nonsuit, for the plaintiff may hereafter have a right of action for his freedom, if he be entitled to it, in the event of a change of the law relative to emancipation.

It is, therefore, ordered, adjudged and decreed, that the judgment be so amended, that there be judgment against the plaintiff as in case of nonsuit, instead of a final judgment for the defendants; and that the judgment so amended, be affirmed; and that appellees pay the costs of appeal.

JEANETTE MOCK V. J. M. KENNEDY.

Where an officer in executing a writ of *feri facias* against the husband, seizes property which he has good reasons to know is the separate property of the wife, he is responsible to her in damages for such illegal seizure.

APPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
G. & C. E. Schmidt, for plaintiff. *T. J. Semmes*, for defendant and appellant.

LAND, J. The defendant has appealed from a judgment condemning him to pay two thousand five hundred dollars damages, for the illegal seizure of the plaintiff's property, under a writ of *feri facias*, issued in the suit of *Robertson & Hudson v. Auguste Rose*, the plaintiff's husband, from the United States Circuit Court for the Eastern District of Louisiana.

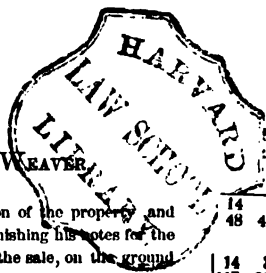
It appears from the evidence, the property seized consisted of a stock of dry goods, in a store-house situate at the corner of Girod and Tchoupitoulas streets in this city, and was in the possession of the plaintiff, who was carrying on business in her own name, as a public merchant, and was separated in property from her husband. It further appears from the evidence, that the defendant had previously seized the stock of goods in possession of the plaintiff, in the same store-house, in the suit of *A. Jounray & Co. v. A. Rose*, her husband; that she enjoined the sale, and upon the trial of the injunction suit, she was decreed to be the owner of the property seized, and the defendant perpetually enjoined from selling the same under the writ of *feri facias* then in his hands.

It further appears that the defendant was enjoined from selling the goods seized in the suit of *Robertson & Hudson v. A. Rose*, and that *this injunction was also perpetuated*, on the ground of plaintiff's separate ownership of the property seized, and that the judgment was affirmed on appeal to this court.

It, therefore, is manifest, that the defendant had good reasons to know that the property seized at the suit of *Robertson & Hudson* was not the property of the defendant in execution, but the separate property of *this plaintiff before, and at the date of the seizure*, and that he was committing an act of trespass and wrong at the instance of the plaintiff in execution.

The damages allowed by the District Judge are heavy, but, under the circumstances of the case, we do not think them excessive.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.



ROBERT McCULLOCH, Administrator, v. J. D. WEAVER

Where the purchaser of property at a succession sale had gone into possession of the property and complied with the terms of the sale, by making a cash payment and furnishing his notes for the balance of the price—*Held*: That the administrator could not sue to rescind the sale, on the ground of defects in the title of the purchaser.

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48	417
14	33
117	305

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
Benjamin, Bradford & Finney, for plaintiff. *T. A. Bartlett*, for defendant and appellant.

MERRICK, C. J. We take this case as stated by the counsel for the appellee, merely premising that the decision of this court referred to, was one against *José Martinez*, and not against the defendant, *Weaver*. It is stated as follows:

"In pursuance of an order of the Second District Court of New Orleans, the property belonging to the successions of *Newland* and *Eliza Holmes*, of which the plaintiff is the curator, was sold. At this sale, the defendant, *Weaver*, purchased a house and lot at the price of \$2075, payable as follows:

- "1. Cash, \$518.
- "2. Three promissory notes for \$51 87½ each, payable at one, two and three years after date, \$155 62.
- "3. Eight promissory notes, each for \$116 71, payable at one and two years after date, \$933 68.
- "4. Four promissory notes, for \$116 73½ each, payable at three years after date, \$466 94."

"The sale was executed, and the defendant took possession of the property, which he has ever since enjoyed.

"It was afterwards decided by this court, that the sale thus made, was invalid.

"Your Honors say: "This is a suit for partition, instituted by one representing himself to be the attorney in fact of an absentee, who is of age, against the co-heirs of said absentee, two of whom are of full age, and two minors. The two minors are cited through their tutor, *Thomas Mushaway*. *Mushaway* appeared, and denied the power of attorney of the petitioner, and pleaded several other exceptions. The two defendants who are of age filed their consent to the partition; and the court, on the *ex-parte* motion of the counsel of the plaintiff, ordered a sale of the property, without a formal judgment of partition, and without the dilatory and declinatory exceptions of the tutor of the minors having been disposed of.

"Your Honors have thus decided, as we understand, that the sale thus made was in pursuance of a judgment rendered *ex-parte*, under circumstances which did not warrant the exercise of any such authority by the Judge of the Second District Court of New Orleans. The order was certainly of no legal effect. The sale had been executed, as we have said, and the defendant was in possession of the property, enjoying its fruits and revenues; but the sale was unquestionably null, being a sale of the property of a succession belonging in part to minors, in the absence of any legal showing, of all circumstances and of all formalities, which the law requires to support such an alienation. Both parties, then, the curator as well as the defendant, were in a false position."

"The defendant had the property, but no title; and the curator had the defen-

McCOLLOUGH
v.
WEAVER.

dant's notes for the purchase money, which were without consideration, and could not be collected. Justice required that the sale should be rescinded, and both parties placed where they were before the sale. Acting upon this view, the curator tendered the defendant all the money which he had paid, with eight per cent. per annum interest from the date of payment, and all the notes which he had given for the credit part of the price, and demanded a reconveyance of the property and an account of the rents. The defendant offered to reconvey, upon receiving the cash paid with interest, and his notes, and upon the further condition, that he should be allowed to retain the rents and revenues."

The distinction between the present case and that of *Martinez* exists in the fact, that *Weaver* complied with the terms of sale, and went into the possession of the property, whilst *Martinez* refused to accept the sale and comply with its terms, because there was a cloud upon the title offered him. The cases are, therefore, different, and are governed by different provisions of law, as is explained in the case of *Gassen v. Palfrey*, 9 An., 560, referred to by the court, as decisive of the case of *Martinez*. But in this case, *Weaver* has gone into possession, and complied with the terms of sale, without discovering or caring to urge the defects which are said to exist in the title. He says now, that he is content with the title which he has acquired, and that he will risk any disturbance, relying solely upon his right to demand security for the restoration of so much of the price as remains unpaid, whenever he shall be called upon to pay the same.

As *Weaver* has no action against the administrator to rescind the sale until evicted, so also he cannot be compelled to rescind against his will, and he may well impose any conditions he pleases upon all parties bound by the sale who demand a rescission. C. C. 2476, 2535, 2538; 7 N. S. 272; 2 L. R. 242; *Bessy v. Pintado*, 3 L. R. 490; 16 L. R. 505; 10 L. R. 120; and *Succession of Deveux*, 13 An. 33.

It may be that the cloud which rested upon the title of the purchasers will be removed by a final decree of partition, and that the minor heirs, when they shall arrive at the age of majority, will neither find it their interest nor inclination to disturb the defendant.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that the said rule taken against the said *Joseph D. Weaver* be discharged, and that the appellee pay the costs of both courts.

S. D. McCUTCHEON v. JOHN ANGELO.

Proof of possession as owner is sufficient to maintain an action of damages for injury done to a slave. The authority given by law for the use of fire-arms by freeholders, in the arrest of slaves under certain circumstances, is not to be extended beyond the express terms of the statute.

A PPEAL from the District Court of the Parish of Plaquemines, *Foulhouze, J. J. M. Davidson*, for plaintiff. *Collens & Wooldridge and J. McConnell*, for defendant and appellant.

MERRICK, C. J. The plaintiff is the owner of a negro slave, whose eyesight was utterly destroyed by shot fired from a gun by the defendant.

It seems that some one having heard a noise in *Angelo's* yard, informed him of the fact; whereupon he took his gun, went upon the gallery, and seeing some one going from his chicken-house, he called three times to the person to stop, which not being done, he fired; he then went out to catch and tie the man, but was prevented by the witness and two others, and by the running away of the person at whom he shot.

The person shot proved to be the slave of plaintiff, who lived a short distance from the defendant, on the opposite bank of the Mississippi River.

The action is brought to recover damages for the injury to the slave, which deprives the owner of his services, and entails upon him the charge of taking care of a negro who has thus become helpless and a constant burden upon the owner.

The defence to the action pleaded in the answer, is a general denial and a claim in reconvention of \$1500 for the libel contained in plaintiff's petition, and the damage occasioned by the action.

Judgment was rendered in favor of plaintiff for \$1500, and the defendant takes a devolutive appeal.

I. The first ground of defence assumed in this court is, that there is no written evidence of title adduced by the plaintiff. We are of the opinion, that the proof of plaintiff's possession as owner was sufficient to enable him to recover. Wrongdoers and trespassers, without color or title, cannot compel parties in possession, as owners, to exhibit their titles.

II. We see no objection to the testimony of *Dr. Eagan* as to the value of the negro. He states that he *believes* the negro to have been worth \$1800. Witnesses commonly testify to value in this manner, and if the negro did not possess the usual qualities of slaves of his age or appearance, defendant could have shown it by a cross-examination or other proof.

III. It is further contended, that the law authorized the course pursued by defendant, 1st, because the negro was committing a felony, and 2dly, because he did not stop when commanded. The facts do not sustain the first of these positions. As it regards the other, it is true that it is provided by law that "if any slave shall be found absent from his usual place of working or residence, without some white person accompanying him, and shall refuse to submit himself to examination, any freeholder shall be permitted to seize and correct him; and if he should resist or attempt to escape, the freeholder is authorized to make use of arms, but to avoid killing the slave; but should the slave assault and strike him, he is authorized to kill him." *Bullard & Curry's Digest*, pp. 53, 54, and *Rev. Stat.*, p. 59, sec. 71. But the defendant has not relied on this statute, as a justification, in his answer, and the proof does not enable us to say that he was a freeholder, or had any right to use fire-arms in order to compel the negro to submit to an examination, if such were his object.

On this branch of the case, we adopt with approbation what was said in the case of *Blanchard v. Dixon*, 4 An., 58. Mr. Justice King, as the organ of the court, says:

"The provisions of the sections under consideration are departures from the general law, and must be strictly construed. In the absence of this express legislation, no citizen could legally assume to interfere with the property of his neighbor in the manner authorized by the statutes. The extraordinary powers it confers in relation to slaves, has been confided to a certain specified class of citizens, to whose prudence and discretion the Legislature supposed they could be safely intrusted. Freeholders alone are authorized by the law invoked, to seize

McCUTCHEON
v.
ANGELO

and correct slaves who are found absent from their homes, without a written permission and unaccompanied by a white person, and to use arms in the event of resistance or of an attempt to escape. The authority cannot be extended beyond the express terms of the statute."

"The defendant could only have availed himself of the protection of the statute on which he relies, by bringing himself within its provisions, and showing himself to be a freeholder. This he has neither alleged nor proved; and under the evidence, we think he is answerable for damages which the plaintiff has sustained."

The case of *Dupérier v. Daurive*, 12 An. 664, relied on by defendant, is not in point. The parties who attempted to arrest the slave in that case, composed the patrol, and were in discharge of a duty imposed by law.

The case of *Bibb v. Hebert*, 3 An. 132, was that of one slave killing another, and of course, the statute under consideration could not apply.

It is ordered, adjudged and decreed by the court, that the judgment of the lower court be affirmed with costs.

REDING, PASTEUR & Co. v. T. RIDGE et al.

An affidavit to obtain an attachment, that the plaintiff really believes and has just grounds to apprehend that the defendant *may depart* from the State, &c., is insufficient. The affidavit must be positive as required by Art. 242 of the Code of Practice.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Michel & Koontz, for plaintiffs and appellants. *J. McConnell*, for defendants.

LAND, J. The plaintiffs are appellants from the judgment dissolving the writ of attachment issued in this case.

The District Judge, in his reasons for judgment, says: "The affidavit in this case, alleges that the affiant verily believes and has just grounds to apprehend that said *Thomas Ridge may depart* from the State of Louisiana permanently, without leaving in it sufficient property to satisfy plaintiffs' demand.

This is somewhat too uncertain to come within the strict meaning of the law; the affiant should state that he believes that the defendant is *on the eve of*, or *about leaving the State permanently*.

The word 'may,' intimates a doubt in the mind of the affiant, and leaves the time of the departure very indefinite, '*non constat*,' that defendant will depart before the plaintiff can obtain a judgment or have his property seized."

We concur with the District Judge, that the affidavit should have been *positive* as required by Article 243 of the Code of Practice.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed with costs, and that the cause be remanded for further proceedings according to law.

CITY OF NEW ORLEANS v. ELIZA COSTELLO.

Assuming that the tax of \$250 assessed against every person who boards or rents rooms to lewd and abandoned women is legal, the city authorities might be authorized to impose a penalty upon all persons who should set up the occupation or open a house of the description, without first taking out a license. This would be a mere police regulation.

The corporation, however, exceeds its powers in imposing imprisonment of not less than one calendar month, by the ordinance of March 10th, 1857.

Section 3d of the ordinance authorizing a prosecution before the Recorder, does not violate Article 108 of the Constitution.

The fourth section of the ordinance under which this suit is instituted, as amended by the first section of the ordinance of 27th of March, 1857, does appear to violate sections 108 and 106 of the Act of 1856, pp. 158, 159.

The ninety-second section of the Act of 1855, p. 144, relative to crimes and offences, does not prevent the city from levying a tax upon boarding houses kept for these people, provided they do not license houses of this class.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*
Laville & Morel, for plaintiff and appellant. *L. M. Day* and *M. M. Reynolds*, for defendant.

MERRICK, C. J. This suit is instituted to recover of the defendant a tax of \$250 assessed under an ordinance of the city of New Orleans of 10th of March, 1857, levying a tax of that amount against every person who boards or rents rooms to lewd and abandoned women.

The defendant excepted, that the ordinance is illegal, unconstitutional and void. Judgment being for the defendant, the city appeals.

We have thought it best in this case, briefly to consider the objections to the ordinance, although a single objection may be decisive of the case.

Assuming that the tax is legal, the city authorities might be authorized to impose a penalty upon all persons who should set up the occupation or open a house of the description without first taking out a license. For such, we think, would be a mere police regulation rendered necessary by the character of the occupants and visitors of the house, and the danger of disturbance of the public peace.

This regulation the city has the power to enforce, by a penalty not exceeding one hundred dollars fine, and in default of payment, by imprisonment not exceeding one month.

But as the ordinance declares that the imprisonment shall not be less than one month, perhaps that and the law together would be construed to mean that the imprisonment shall not be less than thirty days, nor more than one calendar month, but then it might happen that the calendar month in question would be less than thirty days. Hence, whether the month be taken to be either lunar or calendar, the imprisonment exceeds the power of the corporation. See French Penal Code, Art. 40; 1 Co. Litt. 135-6; 2 Black. 141; 4 Kent Com. 94, 95, note; 1 Bouvier Inst. p. 284; United States Dig. vol. 3, No. 30; C. C. 2055; 6 Term. Rep. 224.

The case of *Municipality No. 1 v. Pance*, 6 An. 515, is not in point. For the penalty there imposed, was to enforce the collection of a tax. See *Guillotte v. City of New Orleans*, 12 An. 432; Acts of 1852, p. 48, sec. 22, and 1805, p.

NEW ORLEANS
v.
COSTELLO.

52; Revised Statutes of 1852, p. 112, sec. 29, and p. 114, sec. 35; Revised Statutes, p. 373, sec. 62.

The 3d section of the ordinance authorizing a prosecution before the Recorder, does not violate Article one hundred and three of the Constitution, which requires prosecutions to be by information or indictment, because the same Constitution expressly authorizes the Legislature to vest in the city Recorders such criminal jurisdiction as may be necessary for the punishment of minor offences and crimes, and as the police and good order of this city may require. Art. 124. And this power has been conferred upon the Recorders by express legislation. Act 1856, p. 142, sec. 28; Act 1852, p. 48, sec. 22, and p. 49, sec. 27; Act of 1836, p. 35, sec. 19; Act of 1840, p. 50, sec. 5; and Act of 1820, p. 20, sec. 1; Revised Statutes, 1852, p. 141, sec. 133.

The fourth section of the ordinance under which this suit has been instituted, as amended by the first section of the ordinance of 27th of March, 1857, does appear to violate sections 103 and 105 of the Act of 1856, pp. 158, 159. Because the fourth section of the ordinance is clearly a tax known as a license on a calling, and was (under the law as it then stood) payable in the month of January, and must expire the 31st day of December of each year.

This section is as follows :

"Sec. 4. Be it ordained; &c.; That an *annual* license tax of one hundred dollars be, and the same is hereby levied upon each and every woman or girl notoriously abandoned to lewdness, occupying, inhabiting, or living in any house, building or room within the limits prescribed in the first section of this ordinance, but not in contravention thereof, and an annual tax of two hundred and fifty dollars upon each and every person keeping any house, room or dwelling for the purpose of renting rooms to, or boarding lewd and abandoned women, which said tax shall be payable *in advance* on the first day of April of each year."

Now, as the ordinance makes the annual tax payable in advance, on the first day of April of each year, the license is continued by implication to the first day of April, and the portion of the ordinance under consideration is in contravention of the Act of the Legislature, and so far void. See Acts 1858, p. 1.

The case might have been different, perhaps, if the ordinance had simply levied a tax for the year 1857, leaving the license to expire December 31st of that year, instead of prescribing regulations different from the statute.

The 92d section of the Act of 1855, p. 144, relative to crimes and offences, does not prevent the city from levying a tax upon boarding-houses kept for these people, provided they do not license disorderly houses of this class.

And, because the calling is subject to taxation, it by no means follows, that a house kept for this class of people shall be subject to the same tax as other boarding-houses, merely because the city ordinance calls the house a boarding-house for lewd and abandoned women, instead of using the true or another name for the establishment. We can discover no reason why such establishments should be classed with respectable boarding-houses, and subjected to a tax uniform with them.

We do not perceive in what particulars sections 11 and 14 of the ordinance are in conflict with the Constitution of the United States. See 12 An., p. 434.

Judgment affirmed.

E. S. GREEN v. S. K. GREEN.

The reputed father of a child, who has introduced the mother as his wife and the child as his son, will not be permitted afterwards to bastardize such issue.

APPEAL from the District Court of the Parish of Pointe Coupée, *Ratliff, J. U. B. & E. Phillips*, for plaintiff. *W. Beatty, W. Cooley and C. Roselius*, for defendant and appellant.

COLL, J. This suit is instituted by the plaintiff, as heir of his mother, to recover certain slaves inherited by him from his deceased mother, which are now in possession of the defendant.

The evidence establishes that his mother formerly lived with the defendant, that he introduced her into society as his wife, and they were regarded by the community as man and wife; that he and his supposed mother acknowledged petitioner to be their son, and they treated him as such; that they afterwards separated, and *Mrs. Green* married *Mr. Ives*, from whom she also separated and returned to *Mr. Green* with whom she lived till her death, which took place a few months after her arrival.

It is also shown, that at the time of her death she was the owner of the slaves now sued for, that she died at the house of the defendant, who took all of the slaves into his possession.

That defendant afterwards married *Miss Birdwell*, by whom he has several children.

Defendant answered by a general denial, and claimed to be the owner of the negroes, but he has failed to exhibit any title to the same.

Before going into the trial, defendant filed a motion requiring plaintiff to elect whether he would claim as the legitimate or illegitimate child of his mother.

The motion was properly overruled.

It is sometimes impossible for a child to know with certainty whether he be legitimately begotten or not; besides, the motion came with a bad grace from the one presumed to be the father, who was, perhaps, better able to give information upon the subject than any other person.

We are of opinion, that the introduction to the world, by defendant, of *Mrs. Green*, as his wife, and plaintiff as his child, joined with the recognition of plaintiff by *Mrs. Green* as her child, prevent defendant from now successfully seeking to bastardize plaintiff in order to enjoy the possession of property which never belonged to him, and for which he has no title whatever.

Judgment affirmed, with costs.

14	40
107	808
14	40
109	351
14	40
112	334

STATE v. C. ROLLAND.

Where in a criminal case the Judge *a quo* refused an application for a new trial, based on the ground of newly discovered testimony and the failure of the Sheriff to summon witnesses, stating that he disbelieved the affidavit of the accused—*Held*: That the refusal to grant a new trial could not on appeal be assigned as error.

An indorsement or memorandum of the Clerk upon the indictment is not properly a part of the record.

APPEAL from the First District Court of New Orleans, *Hunt, J.*
Vaughn & Thomas, for appellant. *M. A. Foute*, District Attorney, for the State.

MERRICK, C. J. The accused in this case is sentenced to two years imprisonment in the penitentiary.

He appeals, and his counsel assigns as error the refusal of the Judge *a quo* to grant a new trial and a rendition of judgment without reasons.

The application for a new trial was based on the ground of newly discovered testimony and the failure of the Sheriff to summon witnesses. The District Judge states that he disbelieves the affidavit of the accused. It is, therefore, clear that no question of law can be predicated upon the refusal of the Judge to grant the new trial. See *State v. Johnson*, 11 An. 422, and cases there cited.

The judgment is as follows:

"And the said *Constantine Rolland* being present at the bar, in the custody of the Sheriff, and being ready to receive the sentence of the law on the verdict of the jury of 26th May, 1858, finding him guilty of embezzlement, and having nothing to offer in arrest of judgment—it is ordered, that in consideration of the above verdict and the 81st section of an Act of the Legislature of the State of Louisiana, entitled An Act relative to crimes and offences, approved 18th March, 1855, that the said *Constantine Rolland* for his offence aforesaid, viz: embezzlement, be sentenced to two years imprisonment at hard labor in the penitentiary, and to pay the costs of this prosecution."

The foregoing judgment does not violate the Constitution, for it is manifest it was not rendered without reasons.

The supposed judgment to which we have been referred by the counsel of the accused is but an indorsement or memorandum of the Clerk upon the indictment. It is properly no part of the record.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be affirmed, with costs.

PELAGIE BROWN, f. w. c. v. URSIN RABY.

A slave claiming to be a *statu liber*, whose master is a resident of another State, cannot have her rights judicially investigated in this State. She should resort to the courts of the State in which her master is domiciliated.

Under our present law no slave can be emancipated, and a slave's right to freedom cannot be established here according to the laws of another State.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
H. Gauthier, for plaintiff and appellant. *T. Drouet*, for defendant.

COLE, J. Plaintiff was arrested and lodged in jail as a runaway slave belonging to defendant; whereupon she presented a petition, averring that she was purchased from *Mary Walker*, her former mistress, by *Branch Walden*, who lives in the city of Mobile, with the special condition of emancipating her; that she is a *statu liber* by the laws of Louisiana, and is entitled to be emancipated; that the said *Walden* will emancipate her, as soon as he will come to New Orleans; that she is entitled to the protection of the laws of Louisiana to prevent the defendant from removing her from this State, and prays for a writ of sequestration ordering the Sheriff to sequester her, until *Walden* comes to the city to set her free.

In accordance with her prayer she was sequestered.

A motion was afterwards made to dismiss the suit on several grounds.

The suit was dismissed and plaintiff has appealed.

The evidence establishes that the defendant is a resident of the State of Mississippi; that he came to New Orleans with plaintiff in his possession, and a short time afterwards he was obliged to leave the city without plaintiff, she having run away.

We are of opinion that she ought not, under such circumstances, be permitted to have her rights judicially investigated in this State, but ought to resort to the courts of Mississippi, where her master resides. *Marshall v. Watregant*, 13 **An.**

Besides, she claims to be emancipated by *Walden*, who is not a party to the suit.

The counsel of plaintiff has asked us to have the case remanded in order to enable plaintiff, with the aid of amended pleadings, to try the case on its merits, and establish the validity of her claim to freedom according to the laws of Alabama.

It would be useless to remand the cause, as under our present laws no slave can be emancipated.

Judgment affirmed, with costs.

STATE OF LOUISIANA v. JOSEPH LINDSEY.

The refusal of the Judge of the criminal court to grant a continuance on the affidavit of the accused, which the Judge did not believe to be true, cannot be assigned as error of law on appeal. After the jury list had been called over in the presence of the accused and his counsel, and five jurors had been sworn, and four peremptory challenges had been made by the prisoner, his counsel moved for a continuance, on the ground, that various jurors in the list were not in attendance, nor within the jurisdiction of the court, and were not liable to jury service, and that some of them had been excused previous to the list being served on the prisoner—*Held*: That the accused must be considered as having waived any objection he may have had to the panel, and that it was too late to move for a continuance.

A PPEAL from the First District Court of New Orleans, *Hunt, J.*
E. W. Moise, Attorney General, for the State. *A. P. Field*, for defendant and appellant.

MERRICK, C. J. The accused having been convicted of a capital offence and sentenced to undergo the penalty of death, has taken this appeal.

No assignment of error has been made; no brief has been filed, nor oral argument presented to this court on behalf of the prisoner.

Not knowing, therefore, on what particular grounds the accused expects a reversal of the judgment of the lower court, we shall examine his bills of exception and such grounds contained in the motion for a new trial, as are proper to be considered by this court.

I. The first bill of exception is to the refusal of the Judge to grant a continuance on the affidavit of the counsel on account of the non-attendance of certain witnesses. The District Judge did not credit the affidavit. No question of law is, therefore, presented by this bill. See *State v. Kennedy*, 11 An. 479.

II. It appears by the second bill of exception, that after the jury list had been called over in the presence of the accused and his counsel, and after five jurors had been sworn, and four peremptory challenges had been made by the defendant, and after the thirty-fourth juror on the list had been called to the book, the counsel for the accused moved the court for a continuance, on the ground, that various jurors in the list served on the 24th of April were not in attendance, nor within the jurisdiction of the court on the 24th of April, and not liable to jury service, and some of them had been excused previous to that time, and ought not to have been placed on the list, inasmuch as it was calculated to embarrass and confuse defendant in his selection of a jury; said list being insufficient in law and not a compliance therewith. That the court overruled the motion and the accused excepted.

It further appears, that some of the jurors had been excused for sufficient cause, and that others were absent from the city or not served, and others who were in the city, and whose presence could have been procured by the process of attachment, were not in attendance. The list consisted of seventy-two jurors, twenty-four of whom, including those excused and absent, were not present on the day of trial. But it does not appear that the accused made any objection to proceeding to empanel the jury until five jurors were sworn, nor that he required the absent jurors to be brought in by attachment, before proceeding with the cause. The accused must, therefore, be considered as having waived any objection he may have had to the panel, and it was too late to move for a continuance on

that account. *State v. Benjamin*, 7 An. 47; same v. *Viaux*, 8 An. 514; same v. *Mazant*, 10 An. 743; same v. *Jackson*, 12 An. 681; same v. *Nolan*, 15 An. 276.

STATE
v.
LOUISST.

III. As to the motion for a new trial, the only matters which we can consider are those contained in the bills of exception, which are reiterated in the motion. We have nothing to add to what we have already observed in regard to the bills of exception. If the bills show no error, it was not error to refuse a new trial on account of matters therein set forth.

We discover no error in the record to justify a reversal of the judgment.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be affirmed, with costs.

ELISHA S. AUSTIN v. JAMES VAUGHAN and E. HILL.

A partner cannot obtain judgment against his copartners for a debt due him by the partnership, when it is shown that the partnership accounts are unsettled, and that the judgment asked for will not have the effect of a final liquidation of the partnership affairs.

APPPEAL from the Fourth District Court of New Orleans, *Price, J.*
Singleton & Clack, for plaintiff and appellant. *Simonds & Turner*, for defendants.

LAND, J. The plaintiffs and defendants were the owners of the steamer D. S. Stacy, employed in carrying personal property for hire. The plaintiff instituted this suit against his copartners for the recovery of a specific debt due him from the partnership. The copartner, *Vaughan*, pleaded in compensation specific debts due from plaintiff to the partnership. The compensation opposed by *Vaughan* was allowed by the judgment of the lower court, and the plaintiff condemned to pay the difference between his demand and the amount opposed in compensation.

The evidence shows that the partnership accounts are unsettled, and that a judgment in this case on the demands of plaintiff and defendants, will not have the effect of a final liquidation of the partnership affairs—the legal consequence of which may be, under the judgment of the lower court, to condemn the plaintiff to pay *Vaughan* a partnership debt, when *Vaughan* really may be a debtor of plaintiff on partnership account. The judgment should have been one of nonsuit as to the demands of both partners.

It is, therefore, ordered, adjudged and decreed, that the judgment be avoided and reversed; and proceeding to render such judgment as should have been rendered by the lower court: It is ordered, adjudged and decreed, that there be judgment in favor of defendant as in case of nonsuit on plaintiff's demand; and that there be judgment in favor of plaintiff, as in case of nonsuit, on the demand opposed in compensation. It is further decreed, that the defendant and appellee pay the costs of this appeal; and that plaintiff pay the costs of the lower court.

E. H. ROQUEST v. ANTOINETTE BOUTIN.

Neither a rescission of the sale nor a reduction of the price can be claimed by the purchaser of a slave affected with a redhibitory disease, if he neglects to procure the medical assistance which the situation of the slave requires, until long after the sale.

Where the answer of a witness is not responsive to the question asked, or is a voluntary statement made by him, the court may order it to be stricken out.

APPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
Durant & Horner, for plaintiff and appellant. *G. & C. E. Schmidt*, for defendant.

MERRICK, C. J. This is an action of redhibition brought to annul a sale of a female slave sold by defendant to plaintiff for \$1000, and alleged to be afflicted with an incurable disease of a scrofulous character, and addicted to drink.

The slave was sold in March, and no physician was called until August, although some of the witnesses swear the slave had a swollen foot and leg immediately after the sale.

Three physicians have been called by plaintiff to testify in the case.

The one called to see her and treat the disease in August, calls it "Edème," (an edematous tumour). One of the two called to examine the slave in November, terms the disease "Elephantiasis," and says it is incurable. The other says it was a tertiary syphilis, and if it had been attended to three or four months previously, he presumes the disease might have been cured long ago.

It is shown that the plaintiff had several conversations with a broker (*Bonneval*), previous to August, in regard to the sale of the slave, giving as a reason that his family was about to move away, and fixing her price at \$1200; that in these conversations, he made no mention of her being sickly, and finally told the broker he had changed his mind and would keep the negress.

The judgment of the lower court was in favor of the defendant.

We discover no error in the decree. The testimony is too uncertain to justify a judgment in favor of the plaintiff. If it be even conceded that the disease, as a syphilitic tumor, lessens her value one half, still the plaintiff is not entitled to a rescission of the sale, nor a reduction of the price, because he did not procure for her that medical assistance which, to judge from the testimony of his witnesses, her situation required, until four months after the sale. *Palmer v. Taylor*, 1 Rob. 412; *Dupree v. Prescott*, 5 An. 593; *Williams v. Talbot*, 12 An. 407.

The court did not err in receiving the testimony of *Bonneval*, as it was not offered either to make or destroy title. 10 Rob., 135, *Smith v. Taylor*.

And we are not prepared to say that the court erred in striking out the declaration made by the witness that, "about a month and a half ago, he had met the plaintiff at the corner of St. Ann and Chartres streets, who informed him that he had brought suit against *Boutin* for the slave," although it deprived the plaintiff of a cross-examination as to that conversation, if the court were of the opinion that the answer was not responsive to the question of the defendant's counsel, or that it was voluntarily stated by the witness. And such, we infer was the case, from the concluding portions of the bill.

Judgment affirmed.

14	45
111	896

A. THOMPSON & Co. v. ROBERT HOWES.

When a party is sued for damages, resulting from a breach of contract in failing to deliver, as he had contracted to do, a specific number of molasses barrels—*Held*: That the market price of barrels at the time of the breach of the contract, and not exceptional sales, is the proper criterion for the estimation of damages.

APPEAL from the Fourth District Court of New Orleans, *Price, J.*
A. N. Ogden & Stansbury, for plaintiffs. *Mott & Fraser and Whitaker & Fellows*, for defendant and appellant.

MERRICK, C. J. About the 20th or 22d day of January, 1857, the defendant contracted to deliver to the plaintiffs fifteen hundred molasses barrels at one dollar each.

On the 28th day of the same month, the plaintiffs made a demand for the barrels, and stated their willingness to pay for the same.

The next day they sought to obtain a specific performance of the contract, and for that purpose sued out a writ of sequestration. The Sheriff was able to seize only five hundred barrels, and these the defendant released by giving bond.

The plaintiffs afterwards filed a supplemental petition, and claimed three hundred and fifty dollars damages for the breach of the contract. No objection appears to have been made to this change in the pleadings.

Judgment was rendered in favor of the plaintiffs for \$375, and the defendant appeals.

The defendant contends that the District Judge has assessed the damages too high, inasmuch as the evidence shows that about the time of the alleged breach of the contract plaintiffs bought fifteen hundred barrels at a less sum than that allowed by the Judge, and sales have been shown by the defendant to have been made by different parties for from 90 cents to \$1 10, and no advance in the market has been shown from the 22d to the 28th of January.

We think that the testimony shows that the market value of the barrels at the time of the breach of the contract was not less than that found by the District Judge. It is the market value at the time of the breach of the contract, and not exceptional sales, which is the criterion for the estimation of damages in actions of this kind, at least where no portion of the price has been paid. *Nelson v. Morgan*, 2 M. R. 263; *Douglas v. McCallister*, 3 Cranch, 298, (1 condensed, p. 537;) 3 Wheaton, 200, *Shepherd v. Hampton*; *Vance v. Tourné*, 13 L. R. 225; C. C. 2462; 2 Greenleaf's Evidence, sec. 251. The District Judge did not therefore err in his assessment of the damages.

The plaintiffs, by abandoning their original action and claiming damages for a breach of the contract, have abandoned their sequestration. They are, therefore, bound for the costs occasioned by it.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be so amended as to decree, that the plaintiffs shall pay the costs of the sequestration, and that the said judgment of the lower court, so amended, be affirmed, the plaintiffs paying the costs of the appeal.

STATE v. PATTERSON.

The arrival of a vessel at New Orleans, after refusing to obey the orders to remain in quarantine at the Quarantine Station, in the parish of Plaquemines, is an offence committed in the parish of Orleans, and triable in the First District Court of New Orleans. Session Acts 1855, p. 316, § 6.

The proclamation of the Governor is the only evidence admissible to prove that the port of departure of the vessel was an infected place; but, being matter of evidence, it need not be set forth in the information.

A PPEAL from the First District Court of New Orleans, *Hunt, J.*
E. W. Moise, Attorney General, for the State. *W. D. Hennen* and *W. H. Hunt*, for appellant.

BUCHANAN, J. An information, filed by the Attorney General in the First District Court of New Orleans, charged that the defendant arrived at the Quarantine Ground in the parish of Plaquemines, with the steamship *Star* of the West, under his command, on the 28th July, 1856, from an infected place, to wit, from Havana, in the Island of Cuba; that he was directed by the proper officer at the Quarantine Station to anchor his ship at the Quarantine ground, and there to remain with his ship during the period assigned by law for her quarantine, to wit, ten days; "all of which the said *Patterson*, master as aforesaid, neglected and refused to do,—but, before the expiration of the ten days aforesaid, brought his said ship to the port and city of New Orleans, contrary to the form of the statute."

Defendant having been convicted upon this information, by the verdict of the jury, moved in arrest of judgment on the two following grounds:

1st, That the First District Court of New Orleans was without jurisdiction to try the cause.

2d. That the offence charged in the information, is not charged with legal certainty.

I. The argument of defendant's counsel upon the first ground divides itself into two branches, namely: that the prosecution is based upon alleged violations of the Act to establish quarantine laws for the protection of the State, (Session Acts of 1855, No. 336); that by the 19th section of that Act, all violations of the same, at the Quarantine Station on the Mississippi River, and at the Rigolets, are triable by the *Criminal Court of New Orleans*, not by the First District Court of New Orleans.

But granting that the First District Court of New Orleans was the court intended by the Legislature, it is urged that the conferring upon that court, of jurisdiction over offences committed in the parish of Plaquemines, is contrary to Article 103 of the Constitution, which declares, that the accused shall have a speedy public trial by an impartial jury *of the vicinage*:—meaning, of the parish where the offence was committed.

Both these branches of the argument take for granted that the offence is charged to have been committed in the parish of Plaquemines, at the Quarantine Station on the Mississippi River, within the limits of that parish.

But such does not appear to be the fact. The information charges that the defendant, being ordered by the proper authority at the Quarantine Station to come to anchor, and to remain at said station for the space of ten days, not only

STATE
v.
PATTERSON.

refused to obey said orders, but brought his vessel to New Orleans, before the expiration of the ten days. The offence is therefore charged as having been complete only upon the arrival of the steamship *Star of the West* at New Orleans; and in so charging, the information followed the words of the statute, which says, section 13, page 474: "Every master of a vessel, subject to a quarantine or visitation, arriving in the port of New Orleans, who shall refuse or neglect either, first, to proceed with or anchor his vessel at the place designated for quarantine at the time of his arrival; second, to submit his vessel, cargo and passengers to the examination of the physician, and to furnish all necessary information to enable that officer to determine what quarantine shall be fixed for his vessel; third, to remain with his vessel at the quarantine ground during the period assigned for her quarantine, &c., shall be guilty of a misdemeanor, and be punished, &c."

The refusal to obey the orders to remain in quarantine was, therefore, no offence against the statute, unless the vessel arrived in the port of New Orleans. The arrival of the *Star of the West* at New Orleans was an offence committed in the parish of Orleans, and triable in the First District Court of New Orleans, in which this prosecution was instituted. Acts 1855, p. 316, § 6.

II. It is said the description of the offence in the information was wanting in legal certainty in this: that it avers the steamship *Star of the West* came "from an infected place," instead of averring, as it should have done, that the steamship came "from a place which had been proclaimed by the Governor of the State to be an infected place."

The 13th section of the Quarantine Act, upon which the prosecution is based, commences by enacting that the Governor shall issue his proclamation, upon the advice of the Board of Health, declaring any "place where there shall be reason to believe a pestilential, contagious or infectious disease exists, to be an infected place, &c." The section applies to vessels arriving "from such infected place." In a prosecution upon this section, it is plain that the only evidence admissible to prove that the port of departure of the vessel was an infected place, is the proclamation of the Governor. But this matter of evidence needs not be set forth in the information. The State is not obliged to give notice to the accused, in the act of accusation or indictment, of the evidence by which it is intended to support the accusation. 1st Chitty, 231.

Judgment affirmed, with costs.

J. A. BARELLI v. J. Y. SZYMANSKI.

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45 122

The lessee of mortgaged property holds his lease subject to a dissolution by the judicial sale, which may take place to enforce the mortgage.

If after the sale such lessee continues to enjoy the property, he will be bound for the rent to the purchaser, notwithstanding he may have paid his negotiable notes, in the hands of third persons, which were given in consideration of the rent at the time the lease was executed.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
M. M. Cohen, for plaintiff and appellant. *Semmes & Labat*, for defendant.

LAND, J. On the 11th of January, 1854, *L. A. Pellerin* mortgaged, by notarial

BARELLI
v.
SZYMANSKI.

act, to the plaintiff, *J. A. Barelli*, certain lots of ground with the improvements thereon, situate in the city of New Orleans.

On the 22d of March, 1856, the mortgaged property was offered for sale by the Sheriff, in virtue of a writ of seizure and sale issued at the suit of the mortgagee, and adjudicated to him.

In the meantime, on the 10th of April, 1855, *Pellerin*, the mortgagor, leased the mortgaged property to the defendant *Szymanski*, for a term of three years, and in pursuance of the terms of the lease, the lessee executed his promissory notes payable to his own order and by him endorsed, *for the whole rent to become due*, and delivered them to *Pellerin*. This suit is to recover the sum of \$1250, the amount of rent that became due for the months of September, October and November, 1856.

The defence is, payment to a *bona fide* holder of the promissory note given to the lessor, for the rent demanded. The want of notice of plaintiff's claim to the rent for which the note was given. The neglect of plaintiff to obtain possession of the note from the lessor, and his knowledge of the existence and contents of the contract of lease at the time of his purchase, and his ratification and adoption of the contract after the Sheriff's sale.

The mortgage granted to the plaintiff was a security for his debt, and gave him the power of having the mortgaged property seized and sold in default of payment, for the satisfaction of his claim. C. C. Art. 3245. The mortgagee expressly obligated himself not to alienate, sell or encumber the property to the prejudice of plaintiff's right of mortgage.

The rights of plaintiff, as mortgagee, were fixed and vested at the date of the execution and registry of the act of mortgage, as well against third persons as the mortgagor. The important right vested in him was the right to cause the mortgaged property to be seized and sold, in default of payment for the satisfaction of his debt, free from any alienation or sale subsequently made, or encumbrance created by the mortgagor on the hypothecated property.

This right thus vested could not be modified or impaired, by any act or contract subsequently entered into between the mortgagor and other parties without the consent of the mortgagee.

The right to sell in default of payment carried with it the correlative right to buy the property free from alienation or encumbrance, and the plaintiff consequently became the purchaser of the mortgaged premises, subject only to the claim of third persons as they existed at the date of the registry of his act of mortgage, and free from all others subsequently acquired.

Mortgagees could be easily deprived of the security of their mortgages, through the agency of contracts of lease of the character of the one made by defendant with *Pellerin*, if such contracts were binding upon them. Long leases with the future rents secured by negotiable paper in the hands of third parties would greatly depreciate the value of mortgaged property at judicial sales, made for the payment of the debts of hypothecary creditors.

The lease was dissolved by the judicial sale to the plaintiff, and he, as purchaser, had his election to make it his own contract with the consent of the lessee, or to repudiate it, and demand immediate possession.

It therefore results, that plaintiff, as owner, was entitled to the fruits and revenues of the property from the date of the sale, and that defendant is liable to him for the rent claimed in this suit, unless plaintiff has done some act by which his right has been lost or forfeited.

BARKLI
v.
SUTMANSKI.

The record does not show either a remission or renunciation of the claim for rent on the part of the plaintiff, but, on the contrary, a demand of it from the defendant.

It is true, defendant has paid his note given for the rent to the holder thereof. This obligation he incurred by giving his note for future rent, which might become due, as in this case, to a third party.

That the holder of the note had a right to demand and receive payment of it from defendant is not doubted, but payment of the note was not a payment to the right person of the rent due the plaintiff, as owner of the premises.

Future rents may become due and payable to third persons, and whenever a lessee gives his negotiable notes for the payment of future rents, he incurs the risk, if the property has been previously encumbered, of having to pay the notes to a *bona fide* holder, and also the rents for which they were given, to a third person.

For a payment to be valid it must be made to the creditor, or to some person having power from him to receive it, or authorized by a court or by the law to receive it for him. C. C. Art. 2136.

The defendant, however, insists, that the plaintiff has no greater or other rights than *Pellerin*, the lessee, had, for the reason, that plaintiff adopted and ratified the contract of lease. The evidence does not sanction this position. The plaintiff consented to a continuance of the lease, but demanded payment of the rent to himself, and so informed defendant before the payment of the note to the holder.

It is, therefore, ordered, adjudged and decreed, that the judgment be avoided and reversed, and proceeding to render such judgment as should have been rendered by the lower court, it is ordered, adjudged and decreed, that plaintiff recover of the defendant the sum of twelve hundred and fifty dollars, with five per cent. per annum interest on the same, from the first day of September, 1856, and costs in both courts.

JOS. NOLAND and HONORÉ MORANCY v. J. B. BEMISS AND WIFE.

A judgment by default having been duly confirmed, and the judgment signed after the lapse of three judicial days, the defendant took a rule on the plaintiff to set aside the judgment, on the ground that an answer had been filed after the submission of the cause and before its decision, which rule was made absolute and a new trial granted. *Held*: That the plaintiff not having appealed from the judgment on the rule, it could not be revised on the appeal taken by the plaintiff from a subsequent judgment in favor of defendant.

One who was not a creditor of the husband at the time of the wife's obtaining a judgment against him, of separation of property, cannot successfully attack such judgment, without proof of fraud on the part of the wife.

APPEAL from the District Court of the Parish of Jefferson, *Burthe, J.*
A. Steele, for plaintiffs and appellants. C. Roselius, for defendants.

COLE, J. The origin of this litigation is three promissory notes, amounting to \$2,500, executed by J. B. Bemiss the 30th January, 1846, payable in 1, 2 and 3 years, with eight per cent. interest from date until paid.

NOLAND
v.
BEMISS.

They were executed to *H. P. Morancy*, tutor of a minor, *Victoria Morancy*.

A mortgage was made on the same day by *J. B. Bemiss*, to secure the payment of the notes given.

This mortgage was on his supposed one-fourth interest in the lands known as the Friend Lands, and also on certain negroes.

Joseph Noland intermarried with *Victoria Morancy*, and *H. P. Morancy*, the tutor, transferred these notes to *Noland* as part of the separate property of his wife.

But a small part of the notes having been paid, *Noland* instituted an ordinary action, without claiming the mortgage, and recovered judgment for \$2,350 on the 5th of May, 1852, with interest, &c. No mortgage or privilege having been asked for, none was allowed.

This judgment not being paid, *Joseph Noland*, on the 28th of June, 1854, for use of *H. P. Morancy*, who claims to have paid *Noland* and to have a transfer of the judgment, institutes suit on this judgment, in the parish of Jefferson, against *J. B. Bemiss* and *Mrs. Elizabeth M. Bemiss*, for the purpose of subjecting certain property in the parish of Jefferson, held by *Mrs. Bemiss* as her separate and paraphernal property, to the payment of this judgment debt, alleging fraud and collusion between *Bemiss* and wife in a certain judgment which she obtained for her separate property; and now, for the first time, the mortgage executed on the third of January, 1846, is set up and claimed to be enforced upon certain property in the parish of Jefferson, in which property the proceeds of the Friend Lands, it is alleged, are invested.

The first question that arises is, whether plaintiff can have the benefit of the first judgment which was rendered in this case, and which was in his favor. The judgment on the second trial was in favor of defendants.

It appears that a judgment by default was taken, and the default confirmed, and the judgment was signed on the 3d February, 1855, after the lapse of more than three judicial days from the date of its rendition.

On the 26th of February, 1855, a rule was taken to set aside the judgment, on the ground that an answer had been filed, after the submission of the cause, and before its decision.

Upon trial of the rule, the judgment was set aside, and a new trial was granted.

It is unnecessary to express any opinion upon the judgment upon the rule; for if plaintiff were dissatisfied therewith, he was bound to have appealed from the same.

After the decision upon the rule, the whole case was ended; it was in reality almost the same as if the suit had been dismissed, and no appeal had been taken from the judgment of dismissal.

A new trial having been accorded after the decision upon the rule, the only questions before us are those which arose upon the new trial.

The decision upon the rule produced the same effect as if the case had never been tried, so far as relates to our jurisdiction of the matters at issue on the first trial, and it was the duty of plaintiff, if he wished to be relieved, to have appealed from the judgment upon the rule, which set aside entirely all that had been done upon the first trial.

Upon the merits, plaintiff cannot succeed, because :

1st. He was not a creditor of *J. B. Bemiss* for the notes now sued upon at the time of the separation of property between *J. B. Bemiss* and his wife.

It appears that *Mr. Gibbon* had purchased, in 1839, certain property for *Mr. Bemiss*, from a desire to benefit *Mrs. Bemiss*.

Afterwards, by a compromise between *H. P. Morancy*, the tutor of *Victoria Morancy*, (to the succession of whose father the property bought by *Gibbon* had belonged), acting by the advice of a family meeting, and *John B. Bemiss* and *Henry Gibbon*, the property was surrendered to *Morancy*; the unpaid notes of *Gibbon* were cancelled, and he gave to *Morancy* his notes for \$2,500, which he paid, and *Bemiss* gave his notes now sued on for \$2,500.

This compromise took place in January, 1846.

From this statement it appears, that up to this time, *Gibbon* owed to *Mr. Morancy*, and not *J. B. Bemiss*; but, upon the supposition, that *Bemiss* was responsible to *Gibbon*, and really owed for the price of property, bought by *Gibbon* at his request and for the benefit of his family, still the compromise entirely novated the original debt of *Gibbon* or *J. B. Bemiss*.

The old notes were cancelled, and *Gibbon* and *Bemiss* gave notes, each for \$2,500. The notes of *Bemiss* were given to extricate *Mr. Gibbon* from the purchase of the property and from any liability he might be equitably or legally under.

The notes were, therefore, given on account of a new contract entered into long after the 3d of May, 1845, the day upon which the judgment of separation was rendered.

Besides, even if it should be said there was no novation, and that the debt for which these notes were given existed before the judgment of separation, still the debt was due to *Morancy*, as tutor, and not to him personally.

The judgment upon the notes of *Bemiss* was transferred to *Morancy* individually, many years after the separation of property, so that *Morancy* became the creditor of *J. B. Bemiss* many years after the judgment of separation of property.

As then, *Morancy* was not a creditor of *J. B. Bemiss* at the epoch of the judgment of separation of property; and further, as the judgment does not appear to have been obtained by collusion in order to defraud *Morancy* of recourse upon the property of *J. B. Bemiss*, *Morancy* cannot, therefore, now contest the judgment of separation. *Morris v. Williams*, 6 An. 391.

2d. At the time that *J. B. Bemiss* gave a mortgage on the Friend Lands, the title was actually in *Mrs. Bemiss*.

In the absence of any proof of fraud on her part, this action of her husband cannot affect the property with any mortgage.

Judgment affirmed, with costs.

HUGHES, HYLLESTED & Co. v. KLINGENDER BROTHERS—W. MURE, Intervenor.

A creditor whose debt has been secured by a conveyance of property to a trustee, with authority to sell, and pay the debt, cannot claim such property as owner; and when attached, cannot set aside the attachment, upon giving bond, and take possession of it during the pendency of the litigation. Such a conveyance would only give him the right to enforce the execution of the trust, and make him a creditor with a privilege.

APPEAL from the Fourth District Court of New Orleans, *Price, J.*
Benjamin, Bradford & Finney, for plaintiffs. *William D. Hennen*, for intervenor and appellant.

MERRICK, C. J. The plaintiff and others having attached the ship *Warbler*, of Liverpool, *William Mure*, as the agent of the Bank of Liverpool, through his counsel, has taken a rule upon all parties to show cause why he should not be authorized to take the ship into his possession during the pendency of this litigation, upon giving bond. He bases his application upon the allegation that, during the litigation in these cases, great expense will be incurred by the detention and custody of the ship, and produces an instrument executed by the owners in Liverpool, England, for the security of the bank, by which the ship is conveyed to *Joseph Layton* in trust, with authority to sell and pay the bank, &c.

The intervenor relies upon the cases of *Park v. Porter*, 2 Rob. 344, *The Ohio Insurance Co. v. Edmondson*, 5 L. R. 296, and Art. 21 C. C., in support of the motion.

The instrument produced by the Bank of Liverpool does not purport to convey the ship to the bank, but to a trustee; the bank is therefore not the owner. At common law, the instrument, we suppose, would be considered (as between the parties at least) to convey the legal title in the ship to *Layton*. The only rights the Bank of Liverpool could have, would be a right in chancery to enforce the execution of the trust.

Hence, the most favorable footing on which the claim of the intervenor can be placed, is that of a creditor with a privilege. It has, therefore, no right to the possession of the property, and must enforce whatever rights it may have upon the proceeds, precisely as the attaching creditors are compelled to do.

The law confers upon the *defendant* only the right to set aside the attachment by giving bond. C. P. 259; Acts 1852, p. 165. It is not conferred upon the creditors.

It is true the courts have allowed, under an equitable construction of the Article, an intervenor having possession and claiming to be owner, to bond in order to avoid the great injury which third persons might suffer by the unjust seizure of their property. We see no reason to adopt a construction which shall confer this right upon creditors, particularly as the Legislature has recently revised the Article of the Code of Practice, without extending it to other persons than defendants.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be affirmed.

M. EMANUEL v. C. T. MANN—BEERS & BOGART, Intervenor.

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14	53
48	704

Where plaintiff sues out an attachment, and a third party intervenes claiming the goods attached as vendor, having the right of stoppage *in transitu*, and bonds the property seized—*Held*: That if he fails in his intervention, although his bond may not be made in conformity to law, he and his surety are nevertheless bound to satisfy any judgment that may be obtained against the defendant. In such a case, the return of *nulla bona* upon an execution issued against the defendant, is sufficient to render the surety upon the bond of the intervenor liable.

A PPEAL from the Fourth District Court of New Orleans, *Reynolds, J.*

John M. Chilton, for plaintiff. *Mott & Fraser*, for appellant.

MERRICK, C. J. The appellant's counsel state the case as follows :

"In this case the plaintiff sued out an attachment, when *Beers & Bogart* intervened and claimed the goods as vendors, having the right of stoppage *in transitu*, and bonded the goods seized, on which they were put in possession of the goods. On the trial of the case, the claim of the intervenors was dismissed, and subsequently a rule was taken on the surety on the bond of the intervenors, *J. Wright*, to show cause in ten days, why he should not pay the amount of the judgment, &c. ; to which he replied, that the rule is premature, as there has never been an execution against his principal, and cites, as authority, *Godman v. Allen et al.*, 8 An. 381."

The defence to this action is purely technical. By intervening and bonding the property attached, the intervenors have relieved it from the lien of the attachment, and removed it from the jurisdiction of the court. Now, if they can defend themselves on the bond, they will defeat plaintiffs' claim altogether. In construing the obligation of *Beers & Bogart*, and *Wright*, their surety, we must look at the law and ascertain on what condition the property was to be delivered to them. It was on condition that they would satisfy such judgment to the amount of the value of the property attached, as might be rendered against the *defendant* in the pending suit. Acts 1852, p. 155, sec. 1. The condition of the bond, as written, is that the defendants or intervenors shall satisfy such judgment as shall be rendered against them, or either, in the suit pending to the extent of the valuation of the property released. The principal obligation was, therefore, to satisfy whatever judgment should be rendered against the *defendant*, and it was the duty of the intervenors so to word their obligation, as the condition, on which the property was to be delivered them. They cannot, therefore, be heard to construe their obligation so as to defeat the law. *Slocumb v. Robert*, 16 La. 174 ; 7 An. 570.

Having failed in their intervention, they and their surety are responsible upon the bond. The return of *nulla bona* on the execution against the defendant, *Mann*, is sufficient, and the intervenors could not defeat plaintiff's demand by paying the costs on the intervention or requiring an execution against themselves. The case cited in 8 An. 381, differs from the present in this, that no judgment had been rendered against the third opponent.

Judgment affirmed.

J. H. GAILS v. SCHOONER OSCEOLA, MASTER AND OWNERS.

14 54
51 1200

Novation does not take place unless by the terms of the agreement, or a full discharge of the original debt.

Where the proceeding is *in rem* founded on a privilege, the defendant cannot except to the jurisdiction of the court, on the ground of his domicile being in a different parish from that where the seizure was made.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Singleton & Clack, for plaintiff. *P. Childress*, for defendants and appellants.

LAND, J. This suit was commenced by a provisional seizure for the recovery of the sum of \$456 40, alleged to be due for materials furnished and work and labor done on the schooner *Osceola*, for which the plaintiff claimed a privilege on the vessel.

The defendant excepted to the jurisdiction of the court, on the grounds that his domicile was in the parish of Livingston, and that the plaintiff's privilege, if it ever existed, had been lost by limitation. He also moved to set aside the writ of provisional seizure. His exceptions were overruled, and he answered to the merits by pleading a general denial, *payment, novation*, and a demand in reconvention for \$1200.

The general denial was waived by the pleas of payment and novation. *Dean v. Jackson*, 1 N. S. 172; *Furgurson v. Thomas*, 3 N. S. 75; *Judice v. Brent*, 6 N. S. 226.

These pleas admitted the former existence of the draft, and the defendant thereby assumed the burden of proof on himself to show that the debt had been extinguished in one of the modes pleaded in his answer.

From the evidence, it appears that the plaintiff and defendant, *G. W. Watterson*, the owner of the schooner, had a settlement of accounts for the materials furnished and the work done on the *Osceola*, and that the plaintiff signed a receipt at the foot of his account, in these words :

"Received, April 5th, 1857, from *G. W. Watterson* one hundred dollars in cash and an order on *S. Newburger* for the balance in full."

It is well settled law, that where the creditor "*receives in payment of his debt*" either the note of his debtor or that of a third person, or a draft upon a third person, it is a novation of the debt, which is thereby extinguished with all its accessory rights and privileges. *Barron v. How*, 2 N. S. 144; *Abat v. Nolté*, 6 N. S. 637; *Hunt v. Boyd*, 2 L. 111; *Walton v. Bemiss*, 16 L. 140; *White v. McDowell*, 4 A. 543.

In the case of *Barron v. How* the account was receipted as follows : "Received payment by *David Falcott's* notes at three and four months."

In the case of *Abat v. Nolté* the proof was direct that the draft had been received in payment of the antecedent debt. In the case of *Hunt v. Boyd*, the account was receipted as follows : "Received payment by draft of *John Boyd & Co.* at thirty days sight. In the case of *Walton v. Bemiss* the account was receipted thus : "Received payment by note payable at four months." In the case of *White v. McDowell* the account was receipted : "Received payment by note of *Elizabeth Ross.*"

In all these cases there was an *express acknowledgment in writing, or direct proof that the note or draft had been received in payment.*

GAILS
v.
SCH. OSCEOLA.

In the case before the court there is no such *express admission or direct proof* that the order or draft on *Newburger* was received by the plaintiff in payment of the balance of his account. The draft was received for the balance in full ; and it is as just and reasonable to say that it was received in full of the account *when paid*, as to say it was in full payment of the account.

Novation is not presumed, it must be express, or result clearly from the terms of the agreement, or from a full discharge of the original debt. C. C. 2186.

The defendant has, therefore, failed to prove a novation of his original debt, and has likewise failed to prove its payment.

As to the reconventional claim of defendant, we are of opinion that his settlement of accounts with the plaintiff on the 5th of April, 1857, was a waiver of any demands that he might have had against plaintiff growing out of his contract for materials and repairs to the schooner *Osceola*.

The exception to the jurisdiction of the court was properly overruled ; the proceeding was *in rem* founded on a privilege which attached to the schooner. *Hennen v. Steamer St. Helena*, 5 An. 352.

The privilege was not prescribed at the date of the seizure. The vessel was in possession of the plaintiff, undergoing repairs, on the 22d of March, 1857, and this suit was commenced and the schooner provisionally seized on the 13th of April following. C. C. 3212 ; *Lee v. Creditors*, 2 An. 599 ; *Scott v. Creditors*, 3 An. 40.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.

SAME CASE—ON A RE-HEARING.

LAND, J. The only evidence offered by defendant to prove his reconventional demand, related to damages alleged to have *resulted* from the *delay* of plaintiff in completing the repairs of the schooner. This delay and the damages consequent thereon were known to defendant *before* his final settlement with plaintiff, on the 5th of April, 1857.

If there was a defect in the repairs, discovered *after* the *settlement*, no evidence of the fact was offered on the trial. Nor was there allegation or proof of error in the settlement.

Re-hearing refused.

J. C. & C. VAN WICK, Executors, v. J. RIST.

Where the capacity of a testamentary executor has been recognized, and he has been authorized to act as such by the judgment of a competent tribunal, an objection cannot be entertained collaterally, that he is a foreign executor and has not given the security required by the Act of the Legislature of 1842.

Where a total want of consideration is alleged to avoid an act, and only a *partial* want of consideration is shown by the evidence, without any tender of restitution of what was received, the plaintiff will be nonsuited.

He who seeks equity, must do equity.

APPEAL from the District Court of East Feliciana, *Ratliff, J.*
W. F. Kernan and Bowman & Delee, for plaintiffs. *Muse & Hardee*, for defendant and appellant.

BUCHANAN, J. The proof of the capacity of plaintiffs and of their authority to act within the State of Louisiana, is found in the order of the Clerk of the District Court of East Feliciana, of the 31st of December, 1855, that the will of *Cornelius C. Van Wyck* be filed, registered and executed; and that the plaintiffs be recognized as testamentary executors of the said *Cornelius C. Van Wyck*, and authorized to act in said capacity in the State of Louisiana. It is objected, that the Act of 1842 requires that foreign executors shall give bond and security before being authorized to act as such in Louisiana. But this objection cannot be entertained collaterally. The court will presume that all the formalities required by law were complied with, in aid of this judgment of a tribunal whose competency in the subject-matter is not disputed.

The plaintiffs sue to set aside, for fraud and error, the entry of satisfaction of a judgment rendered in two consolidated cases. The judgment was rendered on the 30th of April, 1844; and the entry of satisfaction upon the judgment docket is as follows:

"These judgments satisfied, as per power of attorney to me; August 4th, 1845. (Signed) Z. S. LYONS, Plaintiffs' Attorney."

The petition alleges that the consideration of this entry was a tract of land of four hundred acres; which tract of land petitioners have since ascertained to have no existence; and that the satisfaction of plaintiffs' judgment was, therefore, destitute of all consideration whatever, and void for error on the part of the plaintiffs, caused by fraud on the part of the defendant.

On the trial, the witnesses offered by the plaintiffs themselves, prove that there was another consideration for the entry of satisfaction of judgment in question, besides the land mentioned in the petition, to wit, a negro boy.

This showing renders it unnecessary that we should pass upon a variety of legal questions presented by the record.

It is clear, that the action, in its present shape, cannot be maintained.

The plaintiffs have declared upon a *total* want of consideration, and they have proved a *partial* want of consideration. It was their duty to have tendered restitution of the negro boy, or of his value. He who seeks equity, must do equity.

The judgment of the District Court is, therefore, reversed, and judgment is rendered for defendant and appellant, as in case of nonsuit, with costs in both courts.

MERRICK, C. J., took no part in this decision.

WHITE & TRUFANT v. CAZENAVE et al.

An appeal will lie from an interlocutory order dissolving an injunction in accordance with the provisions of Article 307 of the Code of Practice, when the facts show that such an order will work irreparable injury to the plaintiff in injunction.

Article 566 of the Code of Practice allows an appeal in all cases where an interlocutory order may work an irreparable injury. *Held*: That an order which necessarily compels a party, in order to protect his rights, to institute another suit for the same cause of action, is one from which an appeal will lie under this Article of the Code of Practice.

When an appeal is taken from an *ex parte* order, under Article 307 of the Code of Practice, dissolving an injunction, the necessary consequence of maintaining the appeal is to reverse the order dissolving the injunction.

APPEAL from the Fourth District Court of New Orleans, *Price, J.*

A Benjamin, Bradford & Finney, for plaintiffs and appellants. *Roselius and Collens*, for defendants.

MERRICK, C. J. "This suit was brought to enforce a specific performance of a contract between the plaintiffs, *White & Trufant*, and *Isaac Osgood*, one of the defendants.

"The plaintiffs allege that on the 28th April, 1848, they purchased from *Samuel Packwood* a plantation and slaves, situated in the parish of Plaquemines, for \$225,000; that afterwards, on the 11th March, 1853, they entered into a private agreement with *Isaac Osgood*, (carried out by an authentic act, passed on the 17th March, 1853,) by which they sold to *Osgood* an undivided moiety of the plantation and slaves for \$65,000 cash, but with the further condition that he should advance the necessary funds to take up their notes in favor of the vendor, maturing in 1854, 1855 and 1856, amounting together to \$77,771 30, and with the express stipulation and agreement that they should cultivate and manage the plantation, and that their one-half part of the crops should be handed over to said *Osgood*, who was to sell the same with his own half for the best price he could obtain, and appropriate the proceeds to the repayment of his advances, till the final liquidation of the amount, with interest at eight per cent. per annum.

"That this sale was made to *Osgood* at his own instance, and in pursuance of his unsolicited overtures: that *Osgood* was a man of great wealth and of high and established credit, and the plaintiffs consented to the sale for the inadequate price above stated, in order to secure the association and aid of a capitalist of ample resources to make the requisite advances, and allow them time by the assiduous devotion of their industry to the management of the plantation, to redeem their undivided half-interest therein.

"That the contract was in all things duly and faithfully complied with, till in the commencement of the year 1855, the said *Isaac Osgood*, apparently supposing that the plaintiffs were entirely in his power and at his mercy, repudiated his agreement, for the purpose of evicting them from their remaining interest in the plantation, which he might thus acquire at a reduced price, or of compelling them to submit to still more onerous terms, which he might dictate."

"That, accordingly, he refused to make any advance to take up the note held by *Samuel Packwood*, maturing on the 1st of March, 1855, but that his co-defendant, *P. A. D. Cazenave*, took up the note, and received a subrogation from *Packwood* to his mortgage on the plantation, and then applied for an order of

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14	57
49	342
49	584

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50	272

14	57
52	105
52	1193
52	1283
52	1284

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118	563

14	57
120	746

WHITE
v.
CAZENAVE.

seizure and sale, under which the plantation and slaves were adjudicated to him, on the 2d of June, 1855, for \$122,500.

"That while these proceedings were in progress, the plaintiffs, finding themselves abandoned and betrayed by *Osgood*, and unable, in their unexpected distress and difficulty, to make any other arrangements, entered into an agreement with the said *Cazenave*, whereby it was stipulated and agreed that he should reconvey the plantation to them for \$191,520, payable in ten annual instalments, with interest at eight per cent. per annum; but with the condition that if they should be unable to make the first payment of \$20,520, due on the 15th of March, 1856, the agreement should be null and void, and the plantation should remain the property of said *Cazenave*.

"That the plaintiffs made the stipulated payment of \$20,520, on the 16th of March, 1856, and received a reconveyance of the plantation and slaves on the terms and conditions of the agreement set forth.

"That as plaintiffs are now informed and believe, the said *Cazenave* acted in the premises at the suggestion and for the account of *Osgood*; that he was interposed for the purpose of enabling *Osgood* to evade and defeat the rights of the plaintiffs under and in virtue of his several engagements with them.

"And finally, the plaintiffs aver their readiness to carry out the agreements with *Osgood*, and pray that a specific performance thereof be decreed and enforced against him.

"On filing their petition, the plaintiffs, upon their proper affidavit and bond, obtained an injunction against both *Cazenave* and *Osgood*, restraining them from parting with, or disposing of, or taking any proceedings at law, for the enforcement of the payment of the mortgage notes received by *Cazenave* for the retransfer above stated, against the plantation and slaves so retransferred, till the further order of the court."

On the 31st of March, 1858, the defendant, *Cazenave*, applied, by petition, to the Judge of the Fourth District Court, who granted the injunction, for a dissolution of the same, so far as he was restrained from taking proceedings at law for the enforcement of the three notes described in plaintiffs' petition, upon giving bond in conformity to Article 307 of the Code of Practice.

The order dissolving the injunction was granted him, on executing his bond in favor of plaintiffs in the sum of \$25,000.

Immediately after giving bond, it seems, *Cazenave* obtained an order of seizure and sale against the plaintiffs on the notes so released. The plaintiffs thereupon applied for and obtained a suspensive appeal from the *ex parte* orders dissolving the injunction.

The defendant moved to dismiss the appeal on the ground that the order cannot work an irreparable injury.

It is urged by defendants, that if an appeal of this kind is favored, the whole object of Art. 307 C. P. would be defeated; that "it would be vain for the District Judge to grant the dissolution of an injunction under that article; to exercise the discretion there vested, for the interposition of an appeal would at once render judicial action nugatory, though the law, on its face, contemplates no appeal; but, on the contrary, the evident intention is to relieve the party from interruption."

The answer to this is, that the Article of the Code of Practice only confers on the District Court the discretion to dissolve the injunction on the party's giving bond, where the act prohibited is not such as may work an irreparable injury.

Now, where the District Judge, through error, embraces, as within this article, a case not contemplated by it, one where the prohibited act may work an irreparable injury, an appeal must lie by the express terms of Art. 566 of the Code of Practice.

In the case of *De La Croix v. Villéré*, 11 An. 39, we set aside a similar order, being of the opinion that the act prohibited might, if executed, work irreparable injury.

The question then must be determined by the facts and circumstances of each case, and in order to test the plaintiffs' right to the present appeal, we are forced to consider whether the court erred in granting the order. If it did err, an appeal lies by the very terms of Articles 307 and 566. If it did not err, the appeal must be dismissed.

In the consideration of the question before us, the allegations of the plaintiffs' petition must be taken as true, and *Cazenave* must be viewed as a person interposed for *Osgood*; *Osgood* should be considered the owner of the notes, and that the order of seizure and sale issued in *Cazenave's* name for his benefit.

Now the plaintiffs would have the right to oppose the same defence to the order of seizure and sale in the parish of Plaquemines that they do to the notes here, and obtain the same judgment there that they are entitled to in this suit, and it may be urged that the prosecution of a legal right can never work an irreparable injury, for the party sued may offer an issue before the court, and adduce his proofs and obtain justice before the one court as well as the other. This may be true as a general proposition, but, in the case before us, we have to consider the petition as true, as just observed, and it then follows that *Cazenave* has instituted, or may institute, an order of seizure and sale upon notes fraudulently obtained, and which do not rightfully belong to him, the consequence of which is to drive the party to an injunction or opposition, or run the risk of a sale of the plantation to some third party, and thus defeat the plaintiff's demand for a specific performance altogether.

No argument is required to show that the latter consequence would be an irreparable injury involving as it does the loss or transfer of a plantation. It has also been held by this court in several cases, that where the consequences of an interlocutory order are such, that they cannot be remedied by a final decree, and the party will be driven to another action to obtain his rights, it is an irreparable injury, from which he may appeal. The obtaining of executory process in the parish of Plaquemines is intended to obtain satisfaction of the notes by the sale of the plantation. If defendant succeeds, his promissory notes have been paid, and their return on the final decree in this case will be the return of so much waste paper. Plaintiffs, to maintain their rights, will therefore be driven to another injunction, in which they will be forced to set up the same issues and demand the same judgment as they do in this case. But what will prevent the defendant from dissolving that injunction in the same manner and upon precisely the same grounds as in this? It is but another step in the proceeding. The Article 566 of the Code of Practice allows an appeal where an order may work an irreparable injury and it appears to us that an order which necessarily compels a party, in order to protect his rights, to institute another suit for the same cause of action is covered by the Article. See case of the *State v. Judge of Fifth District Court*, 12 An. 455, and authorities there cited, viz: 6 L. R. 435; 14 L. R. 245; 12 L. R. 137, 148; 15 L. R. 481; 2 Rob. 342.

We do not consider that the injunction has the effect of preventing defendant

WHITE
v.
CAMERON

from suing upon his notes, for he can set them up in the present suit by way of a reconventional demand against the plaintiff, and demand judgment thereon. See Acts 1839, p. 64.

The cases in 12 R. and 2d and 4th An., cited by the defendant, were considered in the case in 11 An. 39.

It is, therefore, ordered, that the motion to dismiss the appeal in this case be overruled.

SPOFFORD, J., took no part in this decision.

SAME CASE—FINAL DECISION.

LAND, J. This is an appeal from an *ex parte* order of the District Judge under Article 307 of the Code of Practice, dissolving the writ of injunction issued in this case.

A motion was made to dismiss the appeal, and the motion was overruled.

The reversal of the order dissolving the injunction is a necessary consequence of the judgment maintaining the appeal.

It is, therefore, ordered, adjudged and decreed, that the order of the District Judge, dissolving the writ of injunction in this case, be annulled, avoided and reversed, and that said writ of injunction be reinstated and declared in full force, and that the cause be remanded to the lower court for further proceedings according to law, and that the defendants and appellees pay the costs of this appeal.

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STATE, ex rel. DODEMAN, for mandamus, v. THE JUDGE OF THE FOURTH DISTRICT COURT.

A *mandamus* will not be granted by the Supreme Court, to compel a District Judge to rescind an order granting an appeal.

ON application for a *mandamus* to the Judge of the Fourth District Court of New Orleans. A. Bodin, for relator.

BUCHANAN, J. The petition of the relator sets forth, that an appeal has been granted by the District Judge, returnable the 4th Monday of January, 1860, from a judgment rendered on the judicial admissions and confessions of the appellant.

Relator avers the order granting the appeal to be contrary to Article 567 of the Code of Practice, and prays for a *mandamus*, to compel the District Judge to rescind the order of appeal.

In support of this application, the relator has referred us to 4th Robinson, 85, 5th Robinson, 447, and 5th Annual, 233 and 597. The cases cited are cases where, either applications were made for *mandamus* to allow appeals from judgments on confession, or where this court dismissed appeals, regularly before it, on the ground that the judgment appealed from was rendered upon confession. Neither of these is the case before the court.

The District Court having exercised its legal authority in granting the appeal, this court cannot anticipate the return of the appeal, by entertaining at this time, what is in substance a motion to dismiss the appeal. The transcript of the record is not yet filed in this court, and it is possible that it never will be filed.

Rule *nisi* refused.

JOHN W. WOOD et als. v. SAMUEL S. HARRELL.

Where an appeal has been taken by the defendant and warrantor, and the defendant alone files an appeal bond, it is presumed that the warrantor has abandoned his appeal, and in such a case the plaintiff cannot complain, as he has no judgment against the party called in warranty.

Objections to the sufficiency of the security on the appeal bond, should be made in the court below.

No judgment having been rendered in favor of the plaintiff against the warrantor, there can be no objection to the warrantor signing, as surety, the appeal bond given by defendant.

The law does not make it absolutely necessary for the Clerk to affix the seal of the court, to his certificate attached to the transcript of the record.

Where plaintiffs bring a petitory action to recover a slave, alleging that their right of property in the slave was derived by inheritance from their mother, and subsequently attempt to amend their petition by demanding in the alternative, if the court should be of opinion that the slave was the community property of their father and mother, that they be decreed to be the owners of one-half of the slave claimed, and at the same time expressly adhere to their original demand.—*Held*: That the two demands are inconsistent, and that the District Court did not err in rejecting the alternative demand.

Parol evidence is inadmissible to show that a slave was received by the husband, in lieu of money due his wife from her father's estate.

Property bought by the husband in his own name, and paid for with the separate funds of his wife, is not the property of his wife, but the fact of his having paid for it out of the separate funds of his wife, gives to her a mortgage for the amount thus used, which in a proper form of action may be enforced on any property of the husband.

A PPEAL from the District Court of the Parish of East Feliciana, *Ratliff, J. J. B. Smith, P. Pond and John McVea*, for plaintiffs and appellees. *Muse & Hardee*, for defendant and appellant.

BUCHANAN, J. Plaintiffs and appellees move to dismiss this appeal, on the following grounds:

1st. That the warrantors, who are appellants, have given no appeal bond.

2d. That the appeal bond filed by defendant is defective, inasmuch as the surety on that bond is one of the warrantors, who is also an appellant of record.

3d. That the certificate of the Clerk of the District Court to the transcript of appeal has not the seal of the court.

I. Judgment was rendered upon the verdict of a jury, in favor of plaintiffs, against defendant, for certain slaves and their hire; and also in favor of defendant, against his warrantors, for the value of said slaves and their hire. On motion, an appeal was allowed to the defendant and warrantors. The defendant alone has filed an appeal bond. From this it would seem that the warrantors have abandoned their appeal. But that is no concern of the plaintiffs. They have no judgment against the warrantors, nor have they asked any such by their pleadings.

II. Objections to the sufficiency of the security upon the appeal bond should have been made in the court below. As already observed, the judgment against

13	61
45	480
45	483

14	61
49	966

14	61
107	147

14	61
116	384

14	61
118	494

120	281
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14	61
124	594

125	227
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WOOD
v.
HARRILL.

the defendant is entirely distinct (being in favor of a different party) from that against the warrantors. No reason is seen why the warrantor, if she possessed the legal requisites, might not be the security of the defendant upon his appeal bond in this case.

III. The law does not in express terms require the seal of the court to the certificate of the Clerk to the transcript of appeal. C. P. 585, 896, 898. If it did, as the want of a seal is an irregularity clearly not attributable to the fault of the appellant, it would merely justify us in allowing time to rectify it. Acts of 1839, p. 170; Acts 1855, p. 314. But that would not be necessary here. The Clerk certifies the record, under his "signature official and the seal of said court," although no impress of the seal appears in the space reserved for that purpose in the margin of the certificate. See *Conway v. Erwin*, 1 An. 391; *Medley v. Voris*, 2 An. 140.

The motion to dismiss is overruled.

Plaintiffs claim a negress slave named *Harriet*, and her issue, in possession of defendant, as their property by right of inheritance from their mother, *Winifred Hurst*, deceased wife of *Anderson Carle*; their mother, as they allege, having inherited said slave *Harriet* from the estate of her father, *Henry Hurst*.

Defendant and warrantors deny specially that plaintiffs' mother inherited the slave *Harriet* from her father, as the plaintiffs pretend. They aver that the said slave was adjudicated, at a probate sale of *Henry Hurst's* estate, to *Anderson Carle*, by whom she was sold to *Hezekiah Harrell*, from whom defendant derives title. Defendant pleads the prescription of five, ten and fifteen years, and avers an open and undisturbed possession in himself and his authors, by virtue of a title translativo of property.

Several years after issue thus joined, plaintiffs attempted to amend, by demanding, in the alternative "if the court should be of opinion, after hearing all the evidence, that *Harriet* was community property of their father and mother," that a decree might be entered up in their behalf for the one-half of the slaves claimed. At the same time, not relinquishing, but expressly adhering to, their original demand.

The District Court rejected this alternative demand; to which plaintiffs excepted. This ruling was correct. The two demands were inconsistent. Had they been presented in the same petition originally, the defendant might have refused to answer until the plaintiffs had made their election, whether they demanded a whole or only an undivided half ownership of the slave in question.

The court also correctly rejected parol evidence that the negro woman *Harriet* was received by *Winifred Hurst*, in lieu of money due her from her father's estate, for the price and sum of five hundred and ninety-one dollars. Such testimony was not only, in effect, making out a title to a slave by parol, but it contradicts the written and recorded evidence in the cause. The *proces verbal* of the probate sale of the effects of *Henry Hurst's* succession, given in evidence by plaintiffs themselves, shows that the slave *Harriet* was adjudicated to *Anderson Carle*, at such sale, by the parish Judge, for the sum of five hundred and ninety-one dollars, on a credit of one and two years, for his notes with good and approved freehold security, with ten per cent. interest from date of purchase until paid, and special mortgage until final payment.

All the cases quoted by the counsel of plaintiffs, in opposition to the ruling of the court upon this point, viz, *Dominguez v. Lee*, 17 La. 295; *Terrell v. Cutrer*,

WOOD
v.
HARRIEL.

1 Rob. 367; *Rousse v. Wheeler*, 4 Rob. 114; *Stroud v. Humble*, 2 An. 930; and *Metcalf v. Clark*, 8 An. 286—are cases where the purchase was made either in the name of the wife alone, or of the wife and husband jointly. In which cases, proof was admitted, as against creditors of the husband, that the purchase price was paid out of the separate funds of the wife; and it was held, that, although in general purchases during marriage would make the things purchased common property, according to Article 2371 of the Code, yet, if the thing purchased by the wife were paid for out of her separate funds, the property would become paraphernal, provided the wife had not parted with the administration of her paraphernal estate. See the language of Judge Simon in *Rousse v. Wheeler*.

Now, there is nothing analogous to those cases in the present. *Harriet* was not purchased in the name of *Mrs. Carle* individually, or jointly with her husband, but in the name of her husband alone. The proof offered, was proof of a different contract—a sale to a different vendee—which (as the object sold was a slave) could not be proved by parol.

Even supposing that *Carle* made use of his wife's separate funds to pay for the property thus acquired in his own name, that would not, under the authority of the case cited, have made such property hers. It would only have given rise to a mortgage for the amount of the separate funds thus employed, which, in a proper form of action, might have been enforced against *Carle's* property, or property alienated by him in the hands of third persons.

But in reference to this question of the manner in which the slave *Harriet* was paid for by *Carle*, we have in evidence :

1st. The final account of administration of *Henry Hurst's* estate, and the judgment of the homologation of the same, rendered on the 3d of February, 1829, which were given in evidence by plaintiffs, and are entirely inconsistent with the parol evidence offered by them and rejected by the court. For in that account the administrator charges himself with all the notes given by the purchasers at the probate sale above mentioned, (including *Carle*), as so much cash received by him; and the judgment of homologation fixes the distributive shares of the eight heirs of *Henry Hurst*, (including *Mrs. Carle*), without any deduction made for any thing paid on account of her share, or received *pro tanto* in lieu of her share. Yet this account was filed, and this judgment of homologation rendered, more than three years after the probate sale, and more than one year after the last of *Carle's* notes for *Harriet* and for the other slaves and movables, purchased by him at the said sale, had fallen due.

The record thus given in evidence by plaintiffs, is corroborated by another record offered in evidence on the part of the defence, but which was rejected by the District Court, and which comes up annexed to a bill of exceptions. It is an extract from the record of sales and mortgages of the parish of St. Helena, duly certified to be a correct copy by the Recorder of said parish. It recites a conveyance by the parish Judge and by the curator and curatrix of *Henry Hurst's* succession, of slaves and movables adjudicated to *Anderson Carle* at the probate sale of the 26th December, 1825, with mortgage granted by said *Carle* for the security of the payment of two notes, at one and two years, given by him for the price of adjudication.

This act of sale and mortgage, of the same date with the probate sale, is copied at full length, with a certificate appended, signed by *L. H. Moor*, parish Judge of St. Helena, that he had compared it with the original, and having found it correct, had admitted it to record on the 29th of December, 1825.

WOOD
v.
HARRIS.

Across this record is written another certificate, signed by *Burlin Childress*, parish Judge of St. Helena, that the notes described therein were acknowledged before him by the curator of *Henry Hurst's* succession, to have been paid, and that the mortgage was thereupon cancelled, of date the first of February, 1830.

The objection made to this certified extract from the parish records of St. Helena, and which was sustained by the District Court, was, that said document was not an original act, but only a copy of a copy. This objection was improperly sustained.

The certificates of the two parish Judges, one of the 29th December, 1825, that the mortgage had been recorded—and the other of the 1st of February, 1830, that the mortgage had been erased—were certainly originals, of which the parish Recorder was the legal custodian, and of which his certified copy is authentic proof. The first of those certificates recites the conveyance and mortgage very properly, in order to prevent all uncertainty as to the objects of the mortgage. The certified extract thus offered, was clearly not only good evidence, but the best evidence of the inscription of the mortgage granted by *Carle* upon the slave *Harriet*, and of its radiation.

This document was not at all needed by the defendant as evidence of the contract of purchase by *Carle*, out of which the mortgage originated. That contract had already been proved by plaintiffs, when they gave in evidence the *proces verbal* of sale.

Again: There is no reason to suppose that the original of the act of sale and mortgage, which appears to have been offered to the parish Judge for record, was ever in the possession of the defendant or warrantors. The parties to that act were, the representatives of *Henry Hurst* on the one side, and *Anderson Carle* on the other side. The latter of those parties was the father of the plaintiffs; the former are their near relations, and have been examined by them under commissions in this suit, as witnesses.

But we repeat, that we view the copy of the act of mortgage as mere matter of recital and reference in the certificates of inscription and of radiation, which ought not to have had the effect of excluding those certificates as evidence. It will be unnecessary to remand the cause on account of the rejection of this document, inasmuch as we have it before us, and full effect may be given to it, the only objection to its admissibility being overruled. With it, nay even perhaps without it, the claim of plaintiffs to the ownership of the slave *Harriet*, and her issue, is disproved.

The judgment of the District Court in favor of plaintiffs and appellees is, therefore, reversed, and judgment is hereby rendered in favor of defendant and appellant, and against plaintiffs, with costs in both courts.

MERRICK, C. J., recused himself in this case, having been of counsel.

FRELLSEN, STEVENSON & Co. v. THOMAS C. ANDERSON.

When new proceedings of garnishment are commenced, the original proceedings are presumed to be abandoned.

A seizure made on an execution which has expired, is illegal and void.

The Act of 1855, which authorizes a Sheriff, in cases of garnishment, to retain a copy of the writ and proceed on that in the same manner as though the original was in his hands, does not empower the Sheriff to effect more with the copy than he could with the original execution. He could not, with the copy, make new seizures on expired writs.

APPEAL from the Sixth District Court of New Orleans, *Cotton, J.*
G. H. Helme and Semmes & Labatt, for plaintiffs and appellants. *Elmore & King*, for defendant.

COLE, J. *T. C. Anderson*, residing in the parish of St. Landry, being indebted to *Frellsen & Co.*, pledged to them four promissory notes given by *T. A. Cook*, also a resident of that parish, for \$5,000 each, secured by mortgage, payable respectively on the 1st of April, 1856, '7, '8 and '9.

On the 11th of December, 1856, *Frellsen & Co.* commenced proceedings in the Sixth District Court of New Orleans, to collect their debt by the sale of the notes pledged, and on the 17th of January, 1857, the Sheriff, on execution issued in the case, seized and took into his possession the pledged notes.

Before this seizure, they had remained in possession of *Frellsen & Co.*

Previous to the sale of said notes by the Sheriff, *Anderson* sold his interest therein, after the payment of the debt of *Frellsen & Co.*, to *Forestier*, at private sale, for fifteen hundred dollars cash.

On the 21st of March, 1857, two days before the Sheriff's sale, *Forestier* took the present rule upon the Sheriff, *Frellsen & Co.* and *Anderson*, to show cause why the surplus, after paying *Frellsen & Co.*, if there was any, should not be paid over to him.

The notes were sold by the Sheriff on the 23d of March, for \$19,000 cash, leaving \$8,080 in the hands of the Sheriff after paying *Frellsen & Co.*

Before the rule taken on the 21st of March against the Sheriff and others by *Forestier*, as assignee of *Anderson*, was tried, *Punderford* and others, who are appellants, took a rule and filed an intervention, claiming the fund as seizing creditors under executions issued on various judgments recovered against *Anderson* in the parish of St. Landry, all which executions, they aver, were levied on the notes in the hands of *Frellsen & Co.*, by process of garnishment, or by actual seizure by the Sheriff, prior to the alleged assignment to the appellee, *Forestier*.

Forestier answered the intervenors' rule, denying the existence of the judgments against *Anderson*, the issuance of executions thereon, the fact of seizures having been made under those executions, and asserting the illegality and invalidity of all the proceedings on behalf of the intervenors.

Anderson filed a general denial.

The plaintiffs' answered, that while the notes were held by them in pledge, they were seized under various writs of garnishment issued on the judgments of the intervenors; that their claim had been satisfied out of the funds in the Sheriff's hands, and disclaimed any interest in the controversy.

FRELLSEN
v.
ANDERSON.

By agreement of counsel, the rule was consolidated with the intervention, and the case was tried on the rule taken by *Forestier*.

The principal question in this case is whether the seizing creditors of *Anderson* have the right to be paid their judgments out of the balance of the notes after satisfying the claim of *Frellsen & Co.* in preference to *Forestier*, the assignee of the residuary interest of *Anderson*, after the payment of the judgment of *Frellsen & Co.*

The judgment of the lower court was in favor of *Forestier*, and the intervenors have appealed.

Forestier, by the assignment, has a superior claim to the fund, unless the garnishments and seizures on which intervenors rely are valid, and it appears to us that they are illegal and inoperative.

1. Even admitting that the original proceedings of garnishment were legal; they were abandoned by the institution of new proceedings, and these were void because these new proceedings of garnishment were commenced long after the execution had run out.

2. The subsequent seizure of the notes after the abandonment of the garnishment proceeding, was illegal and void, because it was made on an execution that had long before expired. The Act of 1855, Sess. Acts, p. 253, cannot heal this defect. This Act authorizes the Sheriff, in cases of garnishment, to retain a copy of the writ, and proceed on that "in the same manner as though the original was in his hands." It does not empower the Sheriff to effect more with the copy, than he could with the original execution; he cannot, by virtue of the copy, make new seizures on expired writs.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

SAME CASE—ON A RE-HEARING.

COLE, J. Upon a reëxamination of this case, we can perceive no reason for changing the opinion heretofore given.

Towards the close of the opinion we said: "The subsequent seizure of the notes after the abandonment of the garnishment proceeding, was illegal and void, because," &c.

The singular term "seizure" was used, because it was applied to all the cases of seizure considered as one, inasmuch as they were characterised by the same illegal features, and the same remarks applied to the whole of the cases.

It is, therefore, ordered, adjudged and decreed, that our former decree remain undisturbed.

SUCCESSION OF SAMUEL BROOM.

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When the record does not show that the amount in dispute is over \$300, and the *hiatus* is not supplied by an affidavit, the appeal will be dismissed.

The practice of introducing all the *mortuaria* of a succession in mass, when it is only intended to prove a fact or a date, is abusive, inasmuch as it is calculated to create unnecessary costs, and to confuse the issues.

A re-hearing will not be granted when the evidence relied upon to support the application is only to be found in a different transcript from that of the appeal, which the parties had agreed might be referred to, but to which, by its title or number, no reference was made in the argument of the cause.

It is the settled practice of the court not to notice in applications for re-hearing, points which were not made in the argument of the cause.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
D. N. Hennen, for appellant. *Durant & Hornor*, for appellee.

BUCHANAN, J. Certain heirs of this estate took a rule upon the administrator, under the Act of 1855, p. 79, §5, to show cause why he should not furnish new and additional security for his administration, on the ground that the present securities are insufficient.

They have appealed from a judgment discharging the rule.

The appellee now moves to dismiss the appeal, on various grounds, of which one alone requires notice, viz, that the amount in dispute does not exceed three hundred dollars.

The record does not show the amount in dispute; and this *hiatus* has not been supplied by an affidavit on behalf of appellants.

Appeal dismissed, with costs.

SAME CASE—ON A RE-HEARING.

BUCHANAN, J. The appellant, in his petition for re-hearing, refers us to evidence which was not noted in the transcript, nor indicated in a proper manner either in the written agreement of parties, or in the argument upon the motion to dismiss in this court.

The note of the evidence in the transcript is as follows:

"Plaintiffs offer in evidence the mortuary proceedings of the estate of *Samuel Broom*.

"Also, copy of petition in the case of *Fonda, executor, v. Broom & Hennen*."

After appeal granted from the judgment of the District Court, the following agreement was entered into by the counsel of appellant and appellee.

"It is agreed that the Clerk, in making up the transcript of the record for the appellant, may omit the mortuary proceedings in *Samuel Broom's* estate, and the copy of the petition in *Fonda, executor, v. Broom & Hennen*, introduced in evidence; leaving to each party the right to refer, in the Supreme Court, to the transcript of record therein filed, containing said mortuary proceedings and petition."

In the printed argument of appellant's counsel, upon which the cause was submitted, the following passage contains the only indication of the record evidence intended by the above extracts from the transcript of appeal in this cause.

SUCCESSION OF
BROOM.

" I. The matter in dispute exceeds the sum of \$300—appears by the inventories of *Broom's* estate—the claim of \$250,000 brought by *Fonda v. Broom*, (see note of evidence,) and for which claim or debt, bond should be given, C. C. 1120, (bad debts alone being excepted.) "

In this extract, no reference is made to any record of this court by its title or number, in which the evidence is to be found. Without such particular reference there was nothing before the court on which it could act.

The appellant seems to have supposed that it was the duty of the court to hunt up, among its records, the evidence alluded to, or to tax its recollections of appeals heretofore decided.

The practice of introducing all the *mortuaria* of a succession in mass, when it is only intended to prove a fact or a date, which may be shown by a particular document, is abusive, inasmuch as it is calculated to create unnecessary costs, and to confuse the issue.

We had occasion to say very lately in the case of *Price v. Emerson*, that it is not necessary to give in evidence all the *mortuaria*; and that decision was only a confirmation of settled principles of practice.

We have thus shown that the opinion delivered in this cause was right in saying that " the record does not show the amount in dispute between the parties appellant and appellee." After that decision rendered, the appellant in his petition for re-hearing, informs us that the evidence upon which he relied is to be found in record No. 4698 of the docket of this court at pages 1 and 127. This information comes too late. It is the settled practice of this court not to notice, in applications for re-hearing, points which were not made in the argument of the cause.

Re-hearing refused.

LAVINIA DODD et al. v. SUCCESSION OF D. L. R. ORILLION.

Where during the marriage an undivided interest in a plantation fell to the wife, as paraphernal property, the husband never taking possession, but of which the management and administration was given by the wife and her coproprietor to an agent of their own selection—*Held*: That of this part of his wife's paraphernal estate the husband never had the possession and enjoyment, neither was it administered by him and her indiscriminately.

The fact that the husband was consulted by the wife's constituted agent as to the crops, settlement of accounts, &c., subject always to the ratification of the wife, did not change the character of the administration.

APPEAL from the District Court of the Parish of Iberville, *Beale, J.*
Zenon Labauve, for plaintiffs. *H. F. Deblieux*, for defendants and appellants.

SPOFFORD, J. The only question presented by this case is whether certain property admitted to have been the paraphernal property of the plaintiff, *Lavinia Dodd*, was retained under her administration, or was administered either by her husband alone, or her husband and herself indifferently, during the community between them.

In the latter case the revenues of the property would, of course, fall into the community. C. C. 2363, 2371.

DODD
&
ORILLION.

If she retained the administration, the fruits were paraphernal; and so the District Judge decreed them to be.

The property in question consisted of an interest of three-eighths in a certain plantation which fell to her during the marriage as paraphernal property. Her husband never took possession of this property. But, immediately upon its acquisition, the plaintiff entered into a contract of partnership with her coproprietor and sister, *Mrs. B. Deblieux* to carry on the plantation. Both partners appointed *Mr. B. Deblieux* the manager or administrator of the property of which they were coproprietors. *Mrs. Orillion* thereby showed her intention of keeping this property out of the hands and control of her husband. *B. Deblieux* was constituted her agent, not her husband's agent. The property continued thus until the death of *Mr. Orillion*. He never entered into the possession and enjoyment of this part of his wife's paraphernal estate, nor was it administered by him and her indiscriminately.

The fact that he was consulted by *Mrs. Orillion's* constituted agent, as to the crops, settlement of accounts, &c., subject always to her ratification, does not change the character of this administration. It was an administration of the wife, and not of the husband.

Judgment affirmed.

SAME CASE—ON A RE-HEARING.

LAND, J. A re-hearing was granted in this case. The law and evidence have been reexamined. We are satisfied that the judgment first pronounced was correct.

The acts of the husband did not constitute either a separate or joint administration of the paraphernal property of his wife. They were acts that naturally resulted from the relation of husband and wife, and can not in law be considered as substantive acts of administration, by which rights to property are acquired.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be affirmed, with costs, as it was by the judgment heretofore pronounced in this cause.

CHARLES D. STEWART et al. v. POLICE JURY OF POINTE COUPÉE.

There can be no vested interest in any inhabitant in the public highways and bridges, as that also would imply a right to control the action of the Police Jury. Citizens are subject to the legal ordinances of the Police Jury as they are to the laws.

APPPEAL from the District Court of the Parish of Pointe Coupée, *Ratliff, J. J. H. Halsey*, for plaintiffs and appellants. *A. Provosty*, for defendants and appellees.

MERRICK, C. J. Plaintiffs' counsel states their case as follows, viz :

"This case comes up from a decision of the District Court upon a peremptory exception to plaintiffs' demand.

STEWART
v.
POLICE JURY.

"The facts of this case are these: By a resolution of the Police Jury of the parish of Pointe Coupée, passed at a regular session on the 7th day of September, 1857, the parish, or the Police Jury as its agents, proposed to build all bridges upon public roads across natural drains and bayous, that were thirty-five feet long and upwards: a provision was attached to the resolution, which required that commissioners should be appointed by the Jury, who should measure the length of the bridge or bridges to be built, and estimate the cost of building the bridge or bridges so to be built at the parish expense; they were furthermore empowered to contract with any builder for the building or constructing of the bridge or bridges, without any further authority from the Police Jury than was conferred upon them by their appointment as commissioners, and before any special appropriation was made for the costs of building the bridge or bridges so adopted by the parish as public works, and to be built at the parish expense.

"Under the provisions of this law an application was made on the 1st day of June, 1858, by the inhabitants of Bayou Letsworth, through a petition or memorial to the Police Jury of the parish, presented by the member of the district in which police jury ward this bayou is situated. This petition was made and presented in order to obtain for Bayou Letsworth the benefit of the before-cited resolution, and asked that the proper steps should be taken by the Jury, so that the six bridges which are on the public road on the west side of the Letsworth and which cross bayous falling into that bayou, should be built under the provisions of that law.

"According to, and under the special provision of the beforementioned resolution, commissioners were appointed by the Police Jury, on the 1st day of June, at a regular session, to measure the length of the said six bridges, and to estimate the cost of making them, they complied with the law, and made their report through the same member who had presented the original petition, but deeming it the more expedient plan, and having in view the avoidance of all difficulties which might arise between them and the contractor or contractors who might purchase the building, as by the tenor of the resolution first recited, they were empowered to let them out at contract to the lowest bidder, without further authority, they asked of the Jury an appropriation which they deemed sufficient to build the bridges, the appropriation was refused, and subsequently, at the same meeting of the Police Jury, the law making it the duty of the parish to build all bridges that may hereafter require to be built across natural drains, was repealed. The refusal to appropriate, and the passage of this repealing law, gave rise to the present action by the plaintiffs, in order to compel by law the performance of what is considered by them as a contract mutually agreed upon, and the obligations of which were mutually entered into in good faith, from the time of the demand by plaintiffs through their memorial, which they consider as an acceptance on their part of the proposal to build the bridges at the parish expense."

The judgment of the lower court being in favor of the defendants, the plaintiffs appeal.

We think it quite clear that the plaintiffs' counsel has not stated any cause of action. A certain portion of the sovereign power has been delegated to the police juries. Among other things, they have the power to make all such regulations as they shall deem expedient "as to the proportion and direction, the making and repairing of the roads, bridges, causeways, dikes, levees and other highways.

This grant of power is entirely inconsistent with any control on the part of the

inhabitants of certain neighborhoods over the roads and bridges made under the general ordinances of the parish.

There can be no vested interest in any inhabitant in the public highways and bridges, as that also would imply a right to control the action of the Police Jury. A thing incompatible with a delegation of power to be used for the greatest good to the greatest number.

There was no contract, because a contract implies at least two parties who enter into an engagement. Nothing has been stipulated between *Charles D. Stewart* and the other inhabitants of *Letsworth*. They are citizens, subject to the legal ordinances of the Police Jury as they are to the laws, without power to prevent a repeal or modification, except in common with the other citizens, through the ballot box or the proper representations made to the members of the Police Jury themselves. See *Layton v. City of New Orleans*, 12 An, 515.

Judgment affirmed.

STEWART
v.
POLICE JURY.

STATE v. WILLIAM HUNTER.

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14	71
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The District Attorney is not bound, under the 15th section of the Act of 1855 "relative to criminal proceedings," to enter a *nolle prosequi* in a case of assault and battery which has been compromised, the section not being imperative, but merely permissive.

A PPEAL from the District Court of the Parish of *Lafourche*, *Roman, J.*
E. Marvin, District Attorney, for the State. *Thibodeaux & Blake*, for defendant and appellant.

MERRICK, C.J. "At the May term, 1858, of the District Court of *Lafourche*, *William Hunter* was indicted for assault and battery in and upon the person of one *André Mecquet*. A true bill having been found by the Grand Jury, and defendant having been called for arraignment, declined pleading to the indictment for the reason that said assault and battery had been compromised, and produced as evidence of this fact a written compromise entered into between *Mecquet* and defendant, accompanied with the necessary vouchers establishing the payment of all costs.

"Defendant having, nevertheless, been ruled to plead to the indictment, entered his plea of 'not guilty;' was, thereupon, put upon his trial, found guilty by the petty jury, and sentenced by the court; defendant having reserved the point as regards the power of the District Attorney to indict and the court to try him for said offence, in view of said compromise.

"The decision of this case turns upon the construction to be given to the 15th section of an Act 'relative to criminal proceedings,' at p. 152 of the Acts of 1855, which reads as follows:

"That in all cases of assault and battery and misdemeanors, when the parties compromise, and the prosecution is withdrawn, no charges shall be brought against the parish, the parties compromising shall pay all costs in such cases; it shall be lawful for the Attorney General or District Attorney to enter a *nolle prosequi*."

The case, therefore, presents the question, whether this section of the statute is imperative upon the District Attorney, requiring him to enter a *nolle prosequi*

STATE
v.
HUNTER.

where the parties have compromised an assault and battery or other misdemeanor and paid the costs, or whether the Act is only permissive and the District Attorney allowed, but not commanded, to enter a *nolle prosequi*.

We concur with the defendant's counsel, that in construing this section it is proper to consider the reason and spirit of it, and the cause which induced the Legislature to enact it. But in doing so it appears to us, that we cannot overlook the object of the criminal law. It is not enacted for the purpose of compelling the violator of the laws to render justice to those he has injured, for civil actions are sufficient for this purpose. It is enacted for the purpose of redressing the injury done to the State by the disturbance of the public peace and the disquiet which is inspired among good citizens by wrongful acts, and to deter others from like offences by the public example which is made of the offender, as well as sometimes to place it out of his power, for a time at least, to renew his attacks against the public peace.

Now, if it were in the power of the offender to compromise with those he had injured, against the wishes of those intrusted with the execution of the criminal law, these very purposes would be defeated. For just in proportion as the offence should be aggravated in that proportion would be the exertions used to bring about a compromise, and deprive the injured laws of their sanction.

Thus, the offender who is bound for the civil injury as well as the penalty denounced for his misdemeanor, would be enabled to escape punishment by making reparation for the civil injury alone.

Again, all those misdemeanors and assaults committed by the bold and unscrupulous upon the good-natured, the weak or timid would be wholly unpunished, as such offenders would find no difficulty in procuring, by intimidation or cajolery, evidence of a compromise. It would, therefore, seem that the power to compromise misdemeanors ought not to be left exclusively to the injured party. Thus, if we look at the section with reference to objects of the criminal law, we shall find no difficulty in concluding that the State never intended to part with its control over prosecutions for assaults and battery and misdemeanors. But it sometimes happens, that offences are committed under such circumstances as imply no real intention of violating the law, and assaults are sometimes made under a misapprehension of facts and a momentary ebullition of anger, and without much harm to the party injured. In such cases, where the injured party voluntarily comes forward and declares that he is satisfied, and desires the prosecution to be dropped, the public justice gains nothing by a further prosecution, and the law permits the District Attorney to enter the *nolle prosequi*. On the other hand, the production of a written compromise of an assault and battery by the bully, and the terror of a neighborhood, might be an aggravation of the public injury and a just cause for a more rigorous prosecution in order that there might be an adequate vindication of the laws.

We have no doubt that the statute in accordance with its very terms is permissive only, and we have no hesitation in affirming the judgment of the lower court.

Judgment affirmed.

WILLIAM M. STORY v. G. F. JONES et al.

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A judgment by default is properly rendered against the defendant in an attachment suit, where the curator *ad hoc*, after exceptions filed by him have been overruled, fails to file an answer.

The fact that no answer was filed by the curator *ad hoc* will not vitiate the subsequent proceedings, and the final judgment rendered on such default cannot be annulled upon the same allegations that were passed upon by the exceptions filed by the curator *ad hoc*, when more than two years had elapsed from the rendition of the judgment.

When it appears that there was sufficient time for the curator *ad hoc* to have corresponded with the absentee, if he was able to ascertain his post-office, it will be presumed that he did his duty in this respect.

A PPEAL from the District Court of the Parish of Madison, *Farrar, J.*
Harrison & Sawyer, for plaintiff and appellant.

SPOFFORD, J.* The object of this suit is to annul a judgment rendered in the attachment case of *Jones v. Story*, in the District Court of Madison, and thus to set aside a Sheriff's sale of the property attached.

The judgment sought to be overruled was rendered on the 1st of May, 1852, for the sum demanded, to wit, \$168, with five per cent. interest from the 9th of May, 1851, and costs.

No appeal could lie from it, because the sum, if disputed, was so small.

It might be questioned whether this court has jurisdiction of a suit to annul a judgment from which no appeal could lie.

But if the original judgment can be examined by us as being the basis of the Sheriff's sale, which also is sought to be annulled, then we think it clear that there was no absolute nullity in the proceedings which resulted in the judgment.

The defendant was an absentee; he had land in the parish of Madison; he was brought into court by an attachment of the land, which was put under the control of a keeper, and also by a constructive citation, that is, by affixing copies of the citation and writs of attachment to the court-house door, and by the appointment of an attorney of the court as curator *ad hoc*, who accepted the appointment and acted under it, as appears of record. A valid judgment, binding at least *in rem*, that is upon the property attached, was the result of these proceedings.

In this suit, the defendant in the attachment case seeks to set aside the judgment therein rendered, upon two allegations which were passed upon when raised by exceptions filed by the curator *ad hoc*; these exceptions, even if true, having been overruled, are now insufficient to strike the whole proceedings with nullity, i. e., that the person who made the affidavit as agent was really not the agent, and that the plaintiff was not absent at the time his pretended agent acted for him.

The only other objections urged against the former judgment are that the curator *ad hoc* did not correspond with the absent party, and that there was no answer filed.

Upon the subject of a correspondence between the curator and the absentee, there is no evidence; it is presumed that the curator did his duty in this respect,

* This decision was pronounced by Judge Spofford while on the bench, and was suspended on application for re-hearing.

STORY
v.
JONES.

if he was able to ascertain the post-office of the party whom he was appointed to represent. The case was delayed sufficiently long for that purpose; besides, the plaintiff does not suggest that he lost any means of defence, or that he had any to communicate to the attorney *ad hoc*.

The fact that the curator *ad hoc*, after his exceptions were overruled, filed no answer, does not vitiate the proceedings; he probably thought it wise to file none, as the suit was upon a promissory note, and no defence is even now suggested by the maker as possible to have been pleaded against it. If the curator did not wish to admit the signature, he was not bound to invent a fictitious defence.

The Code of Practice required him not to "file an answer," but to "defend the suit;" a suit may sometimes be better defended by not filing an answer than by making a false one.

The absentee, if he was aggrieved by the judgment, had a remedy which is now barred by lapse of time; and the judgment complained of cannot be opened or annulled on any such grounds as were set up in this petition filed more than two years after its rendition.

"The absent debtor, against whom judgment has been so rendered, (i. e. "where attachment is demanded after answer filed, or if the defendant has failed to answer," C. P. 265,) "may, within two years after such judgment, obtain the reversal of the same, if he prove that the distance at which he lived from the place where the attachment was obtained, has prevented his being apprised of the proceedings had against him, and that the plaintiff has availed himself of his absence to obtain payment of a debt, either already paid in totality, or partly discharged, or which did not exist." C. P. 267.

Under the head of "rescission of judgments," the Code of Practice also provides, that "a judgment may be reversed, if it has been rendered on an attachment obtained against a person absent, and who had no knowledge of the action having been brought against him; if such person show that he was not indebted either for the whole, or for part of the same, for which the judgment was obtained and his property sold. But this action shall be prescribed after two years have elapsed from the date of the judgment." C. P. 614.

No radical nullity in the Sheriff's sale which followed the judgment has been alleged or proved.

Judgment affirmed.

MERRICK, C. J., concurring. The decree in this case produces a great hardship upon the plaintiff. It is with reluctance that I yield my assent, and only do so because compelled, as I conceive by the clear provisions of the law.

I think the decree in the proceedings in monition was a final bar to all further claims on the part of the plaintiff.

BUCHANAN, J., dissenting. The defendant Jones, a resident of Tennessee, being the holder of a note of the plaintiff, a resident of California, for the sum of one hundred and sixty-eight dollars, brought suit by attachment in the District Court of Madison parish, Louisiana, and attached the interest of plaintiff, being an undivided half, in twenty-five distinct lots and parcels of land, owned by plaintiff jointly with his brother, Thomas M. Story, and containing, in the aggregate, nineteen hundred and fifty acres; all the said tracts being described in the return of the attachment, by section, township and range. A curator *ad hoc* was appointed by the court to represent the plaintiff, defendant in said attachment. The attorney thus appointed not filing an answer, a judgment by default was

rendered, which was made final on the 1st of May, 1852, for the said sum of one hundred and sixty-eight dollars, interest and costs; "and that the land attached be sold in due course of law." Upon this judgment a writ in the nature of a *renditioni exponas* was issued, commanding the Sheriff to sell, not the undivided half interest of *William M. Story* in the land as attached, but *the whole of the twenty-five lots and parcels of land*, by their description of section, &c.

The land thus seized, was appraised by appraisers appointed by the Sheriff, at five dollars per acre cash, and was adjudicated, in block, at the second crying, to *James J. Amonett* and *Isaac Owen*, for two hundred and fifteen dollars and ninety-three cents, being the exact amount of judgment and costs, at twelve month's credit. This Sheriff's sale was made in October, 1852. In March, 1853, *Amonett* and *Owen* sued out a monition under the Act of 1834, which was homologated on the 21st of April, 1853; and on the 16th of May, 1853, *Amonett* conveyed to *Owen* his interest in the land so purchased by them jointly at Sheriff's sale, in the form of a quit claim, for the sum of eleven hundred and ten dollars, "*without any warranty or recourse whatever against him, the said Amonett; the said Owen being acquainted with the nature and title of the said described lands declares that he accepts this transfer at his own risk and responsibility.*"

It should be observed that *James J. Amonett* and *Isaac Owen* signed *Jones'* petition, as his attorney-at-law, and *Isaac Owen* made the affidavit for the attachment, as the attorney in fact of *Jones*. Neither *Amonett* and *Owen* jointly, nor *Owen* individually, appear to have taken actual possession of the land, which is proved to have been occupied and cultivated by one *James W. Wiley*, from 1850 to 1855, that is to say, the cleared portion of the land, being some two or three hundred acres.

Plaintiff brings this action to have the judgment of *Jones* against him, and the sales by the Sheriff to *Amonett* and *Owen*, and by *Amonett* to *Owen*, declared null; and for general relief in the premises.

The defendant *Jones* pleads prescription; and the defendant *Owen* pleads the judgment upon his monition.

This suit was instituted the 1st of December, 1854, two years and seven months after the rendition of the judgment in favor of *Jones* against *Story*. But Art. 612 of the Code of Practice says, that the action of nullity of a judgment rendered against a party who has not been cited, has no limitation, unless the party was present in the parish, and yet suffered the judgment to be executed, without opposing the same.

And as to the plea of monition, the 8th section of the Monition Act of 1834, (Bullard & Curry, page 586,) says, that the Act shall not be taken to render valid any sale made in virtue of a judgment, when the party cast was not duly cited to make defence.

William M. Story was not cited in the suit of *Jones v. Story*. An attachment of his property was obtained upon the oath of the attorney in fact of the plaintiff in that suit, and one of the defendants in this, *Isaac Owen*, that he resided out of the State of Louisiana, (as he did in fact,) the citation was returned served, by posting a certified copy of the same on the court-house door in the town of Richmond, La. *William M. Story* was, therefore, only in court by his property, and this case is, consequently, within the letter of the exception expressed in the 612th Art. of the Code of Practice, and in the 8th section of the monition law.

There is also, as I conceive, a radical nullity in the so called judgment in the case of *Jones v. Story*, which is of such a nature that it would not require to

STORY
v.
JONES

be urged in a direct action to annul the judgment, but might be successfully urged as matter of objection to it, if offered as evidence of a right or title in the party who obtained that judgment.

As already mentioned, no answer was filed in the suit of *Jones v. Story* by the curator *ad hoc* appointed to represent the absent defendant. A default was entered up, in the following words: "The defendant having failed to appear either in person or by advocate, after the delays prescribed by law, judgment by default is rendered against him." And the final judgment confirming the default, reads as follows: "By reason of the law and the evidence being in favor of the plaintiff and against the defendant, and the further reason of the default not being set aside, it is, therefore, ordered," &c. The record shows that the curator *ad hoc* had filed and argued a motion to dissolve the attachment, on formal grounds; which motion being overruled, he made no further appearance in the cause. He did not resign his appointment; neither did he carry it out by pleading to the action. Was a judgment by default admissible under the circumstances?

This point, upon which the plaintiff's case seems to me to turn, is one of great importance, upon which I have found no precedent; which is now presented to us directly for decision, and which comes recommended to our careful consideration by the extraordinary equities of plaintiff's case.

In approaching it, my attention is first arrested by the peculiarity of the practice which is established by law in Louisiana, in the matter of bringing absentees into court. In every other State, as far as my information extends, the absentee who is sued, is notified by advertisements inserted in the newspapers. In Louisiana alone the court appoints counsel to represent the absentee in the suit under the name of curator *ad hoc*, or *ad litem*. The object of the appointment of a curator *ad hoc* to an absent defendant in an attachment suit is, in the words of Article 260 of the Code of Practice, to represent him and to defend the suit. The court said, in *Brown v. Ferguson*, 4 La. 259, that the appointment of a curator *ad hoc* to an absent defendant, supplies the place of citation. But the object of this legal fiction fails, if the silence of the curator *ad hoc* is to be construed as a defence. The defendant personally cited, may, if he so choose, say nothing; not so the curator *ad hoc*. He is the officer of the court and of the law, and must defend the action. In the cases of *Stockton v. Hasluck*, 10 Mart. 474; *Edmonson v. Alabama Railroad*, 13 La. 283; *Collins v. Pease*, 17 La. 117; *Krautler v. Bank United States*, 12 Rob. 461; and *Clacor v. Lane*, 5 An. 499—it was held that a curator *ad hoc* to an absent defendant, had no right to waive any defence, even of form.

This case seems even stronger than those quoted; for here the case was proved up *ex parte*, upon a constructive waiver of all defence, in the same manner as if citation had been personally served on defendant. I cannot find any warrant in law for this proceeding, which appears to us, on the contrary, totally inconsistent with the reason and theory of our peculiar practice in such cases.

The silence of the curator *ad hoc* could not constitute the tacit joinder of issue spoken of in Article 360 of the Code of Practice; for the reason given by the legislator in that Article, does not and cannot apply to this case. That Article reads as follows:

"When the defendant suffers judgment by default to be taken against him, the issue is joined tacitly; because said defendant is presumed, by his silence, to have confessed the justice of his adversary's demand; therefore, the defendant is allowed to proceed with his process, in order to have the judgment confirmed."

Now, it is a principle sanctioned by many decisions, that every law empowering courts to decide upon the rights of absentees, must be strictly construed, and the formalities prescribed exactly followed. Hennen's Digest, verbo Absentee, No. 1.

In numerous cases collected in the same title of Hennen's Digest, No. 23, it is held, that a curator *ad hoc* cannot consent to any judgment being rendered against the party whom he has been appointed to represent. It seems scarcely necessary to assert, that he cannot do indirectly that which he is not allowed to do directly. Yet such would be the effect of construing his silence into a proper foundation for a judgment by default.

I, therefore, regard the judgment by default in question, as an absolute nullity, conferring no right upon the defendants herein, and not cured by the judgment of monition.

In answer to the objection that the suit of *Jones v. Story* involved an amount less than three hundred dollars, and, therefore, could not have been the subject of an appeal to this court, I would observe, that the principal object of the present action, is to annul a Sheriff's sale of lands proved to be worth more than ten thousand dollars; and that nullities apparent in the judgment under which that Sheriff's sale was made, and properly examinable, for the purpose of passing upon the validity of the sale—at least, as between the parties to this record, who were all parties or privies to the said judgment.

I am of opinion that the judgment appealed from ought to be reversed, and that the Sheriff's sale should be annulled.

Re-hearing refused.

WIDOW AND HEIRS OF ROBERT FORD v. H. P. MORANCY.

The decisions of the Register and Receiver of the Land Office, and other federal tribunals, on questions involving the conflict of titles emanating from the federal government, are not subject to the revision of State Courts.

The courts can look behind a patent, but not in all cases; and the general rule, that nothing perfects the title to public lands, but a patent, is not without exceptions; it has been held, that where an equitable right originated before the date of the patent, whether by the first entry or otherwise, and was asserted, such right might be examined into.

A PPEAL from the District Court of the Parish of Madison, *Farrar, J.*

Parham & Snyder, for plaintiffs and appellants. *Edward Sparrow*, for defendant.

VOORHIES, J. The widow and heirs of *Robert Ford*, deceased, claim, as front proprietors on the Mississippi, a tract of land measuring 329 superficial acres, and forming, as they contend, the back concession to which they were entitled under the provisions of the Act of Congress approved June 15th, 1832. They allege in their petition, that notwithstanding their claim, the defendant has obtained a patent from the United States, thereby preventing them from having their rights adjudicated upon by the Land Department of the Federal Government.

The defendant, *Morancy*, excepted to the jurisdiction of the court, on the ground that the question of title presented in this case, was a matter of which the federal tribunals had exclusive jurisdiction; and that, in consequence of their award in his favor, which he pleads as *res judicata*, the plaintiff's demand should

FORD
v.
MORANCY.

be rejected. The answer further sets up title to the land under the patent issued in his name.

It appears that in the years 1834 and 1835, *Ford* had applied at the Land Office at Ouachita, once in person, and afterwards through an agent, in order to enter this land as back concession; but that ultimately his application was rejected, on the ground that the official plat of survey showed that this land extended so far back as to cover good lands bordering on another water course. This matter being brought before the Receiver and Register of the Land Office, *Ford* offered, in that respect, to contradict the correctness of the official plat of survey returned to the office; but that tribunal ruled out the evidence and gave their award in favor of *Morancy*. *Ford* thereupon took an appeal to the Commissioner of the General Land Office and the Secretary of the Treasury, and during its pendency, *Morancy* instituted suit against him to be quieted in his title. On appeal to this court, *Morancy* was non-suited, on the ground that the question involved had been decided by the Register and Receiver, the competent tribunal in such cases, from whose decision an appeal was taken to the Commissioner; and that, as the parties had not a patent for the land, neither possessed such a title as could, under the circumstances, be declared valid by this court. The decisions of the Register and Receiver of the Land Office, and other federal tribunals, on questions involving the conflict of titles emanating from the Federal Government, are not subject to the revision of State courts. In the case at bar, their final award in favor of the defendant puts an end to the contest between him and the plaintiffs. 2 An. 301. Such being the case, it is unnecessary to notice the bill of exceptions touching the admissibility of parol evidence to contradict the official plat of survey returned to the Land Office.

This court, undoubtedly, can look behind a patent in order to determine the rights of the parties; but not in all cases. We have held that, however true as a general rule, that nothing passes a perfect title to public lands but a patent, this rule was not without exceptions; and that, where an equitable right originated before the date of the patent, whether by the first entry or otherwise, and was asserted, such right might be examined. 10 An. 182, 18 How. 87. But in the case at bar, there is no title, not even an inchoate one, exhibited by the plaintiffs; and there is no privity of interest between them and the defendant. The application made by *Ford* at the land office, and the offer to deposit the amount of the purchase money, did not confer any right to the land. The action of the tribunals, whose peculiar province it is to settle such questions, must be considered significant in this instance; for they held, not only that the defendant's entry was valid, but that the plaintiffs could in no event make good their claim, unless by having the error complained of previously corrected, in order not to prejudice third persons who might in the meantime acquire *bona fide* rights.

It is, therefore, ordered and decreed, that the judgment of the court below be avoided and reversed; and that the plaintiffs' demand be rejected with costs in both courts.

MERRICK, C. J., dissenting. The decision of the officers of the land department does not conclude, and was not intended to conclude these parties; for the patent had issued previously to the contest before them, and the executive was, in the language of Secretary Spencer, *functus officio*. He properly remarks, "If the original sale was invalid and the patent void, the claimants have their remedy at law, or if difficulties exist in the pursuit of such remedy, the power of Congress can be invoked. The Executive cannot invalidate its own previous acts by grant-

ing new patents." It was not known to the parties, when the case of *Morancy v. Ford* was tried in this court, that the patent had actually issued, and the court was not aware that any obstacle existed which would prevent a decision in the land department upon the merits of the controversy.

The facts of the present case bring it clearly within the principles decided by the Supreme Court of the United States in the case of *Surgett v. Lapice*, 8 Howard, 48; and the same equity exists in favor of the plaintiffs, which existed in that case in favor of *Surgett*; for the township maps show that no other water course, as defined by the Supreme Court of the United States, interfered with the back concessions.

The appellant does not complain of the manner in which the survey has been ordered, and I can see no good reason why we should not follow the decision in the case of *Surgett v. Lapice*, which is an authoritative exposition of the law on the subject. I am of the opinion that the judgment of the lower court should be affirmed.

COLE, J. I concur with O. J. MERRICK.

STATE v. HEINRICH HAASE.

In a criminal case the Supreme Court cannot assume jurisdiction over questions of fact decided by the court below on a motion for a new trial.

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A PPEAL from the First District Court of New Orleans, *Hunt, J.*
E. W. Moïse, Attorney General, for the State. G. Schmidt, for defendant and appellant.

COLE, J. The defendant has appealed from the judgment of the court upon a verdict pronouncing him guilty of the murder of his wife.

The sole point made by appellant in this court is, that the District Court erred in overruling the motion for a new trial.

The motion was predicated on the allegation, that the accused was insane at the time he committed the murder.

In support of the motion several affidavits were presented, which contain the opinions of the affiants, that he was insane for a time shortly anterior to, and at the time of, the homicide.

One of the witnesses states that he appeared to be insane on the subject of the infidelity of his wife, and seemed to have always before his mind the man who he believed to have seduced her.

The District Judge, in overruling the motion for a new trial, says, that the plea of insanity was urged by one of the counsel of defendant at the trial, and besides declares it to be his opinion, "that if the declarations in the affidavits accompanying the motion had been submitted to the jury on the trial, they would not have influenced the jury to find a verdict different from that which they rendered on the evidence before them."

The affidavits present a mere question as to the sanity of the prisoner, which is a question of fact and not of law, and we cannot assume jurisdiction over it.

Judgment affirmed, with costs.

BANK OF LOUISIANA v. J. L. SATTERFIELD.

The notary who protested a bill of exchange certified that he went to the office of the acceptors of the bill in order to demand payment of it, and found the office shut, and, on enquiry, could not find the acceptors nor any one who could pay the bill—*Held*: That it will be presumed in the absence of proof to the contrary, that the notary had the draft with him, and that he went to make the demand within the usual office hours.

A PPEAL from the District Court of the Parish of Pointe Coupée, *Ratliff, J. J. L. Générés*, for plaintiff. *A. Provosty*, for defendant and appellant.

COLLÉ, J. This suit is instituted by the holders against the drawer of a bill of exchange.

The defendant pleads the general denial, except that he drew the draft sued on, and avers he drew on funds; that the draft was not legally protested, and he was not legally notified of the protest.

There was judgment for plaintiff, and defendant has appealed.

Appellant relies in this court upon the alleged insufficiency of the certificate of the notary, and avers that it does not appear that the notary or his deputy had the bill in his possession; that the presentment was made at a seasonable time, or that due diligence was used to find the acceptors.

The bill was drawn by defendant, payable to his own order, and endorsed by him to plaintiff, upon *Messrs. Andrews & Sierau*, New Orleans, who had accepted the same.

The certificate of the notary states, that he "went to the office of the acceptors in order to demand payment of said draft, and found it shut, and, on enquiry, could not find the said acceptors, nor any one who could pay said draft."

Whereupon he protested the same, etc.

The notice to the drawer, who was also the only endorser, is sufficient, and is not contested.

We are of opinion that the certificate of the notary is sufficient.

It is rather to be presumed that the notary did his duty than violated it. *Poydras v. Bell*, 14 L. 392; *Union Bank of La. v. Cushman*, 12 R. 237.

A reasonable conclusion from the tenor of the protest is, that the notary had the draft with him, else why should he have gone to demand payment of the same? and that he went within office hours, else why should he have repaired there at all. *Nott's Executor v. Beard*, 16 L. 308; *Deyraud v. Banks*, 16 L. 461.

If the notary had neglected his duty, defendant could have easily established that the draft was not presented within the usual hours of the ordinary course of transacting business at counting-houses in New Orleans. Story on Bills, § 328; Chitty on Bills, ch. 9, pp. 421, 422.

Judgment affirmed, with costs.

JOHN NICHOLSON v. LOUIS DESOBRY.

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Where a cross-interrogatory which is pertinent and material has not been answered, the deposition should be excluded.

The party taking the deposition can always protect himself from surprise by taking the rule, or filing the notice allowed by the 17th section of the Act of 1839, which embraces objections of this character.

If the cross interrogatory which is not answered is not relevant, the deposition should not be excluded.

Where the damages claimed are the consequence of the defective execution of the contract, no formal putting in default is necessary.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
J. Livingston, for plaintiff and appellant. *G. L. Bright*, for defendant.

MERRICK, C. J. The plaintiff has instituted the present action as the transferee of the firm of *Arthurs, Armstrong & Co.* He alleges that the defendant is indebted to him in the sum of \$3800, with eight per cent. interest thereon from March 1st, 1849, for this, viz: that said defendant contracted with the firm of *Arthurs, Armstrong & Co.*, composed of *John Arthurs, John Nicholson, Jas. R. McClintock, William Stewart and John Armstrong*, for a steam engine of the same capacity as *Dr. Clement's*, with the privilege of making any alterations not to affect the utility of the same; the contract bearing date the 19th day of December, 1846; that the contractors performed their part of the agreement; that the price agreed upon was \$5800, two thousand dollars to be paid on the delivery of the engine on the plantation, two thousand dollars on the first day of March, 1848, and one thousand eight hundred dollars on the first of March, 1849, with eight per cent. interest; that the installment of two thousand dollars was paid; that the firm of *Arthurs, Armstrong & Co.* was long since dissolved, and petitioner became the owner of the partnership property, assets, credits, &c., and that said claim of \$3800 and interest has been transferred to petitioner. He prays for judgment against the defendant for the debt and interest.

"The defendant denies generally the allegations of the plaintiff. He denies that the plaintiff is the transferee of *Arthurs, Armstrong & Co.* He admits the contract, but alleges that instead of the mill and engine being delivered at the plantation on or before the 1st of June, 1847, and put up ready for use by the 1st of October, 1847, as was stipulated in the agreement, it was not delivered until the 13th of August, 1847, nor put up until the — of November, 1847; that by reason of the bad materials used in their construction, defective workmanship, weakness of the cylinder, iron frames and shaft, defect in rollers, bad construction and weakness of steam-chest, imperfect cog-wheels, bad construction of the chain carrier, and general insufficiency of said engine and mill, and the unworkmanlike manner with which it was erected, it would not work and answer the purposes intended, but was the cause of great loss and damage to him. He alleges that in the month of December following, the plaintiff came to his plantation, and after examining the mill and engine, admitted their insufficiency, imperfections and bad construction, and agreed to return on the 1st of May, 1848, for the purpose of placing stronger iron frames under the sugar mill, furnish a new roller and wrought iron shaft of 8½ inches in diameter, replace a new steam-chest, rebuild the carrier and furnish a stronger chain, in fact rebuild the engine and mill to

NICHOLSON
v.
DEBOERY.

give full and entire satisfaction to your respondent at the next rolling season ; that this second agreement was not fulfilled, and the defendant apprehending the loss of his crop if the rebuilding and repairing of the engine and mill were delayed any longer, purchased in the month of July materials and employed persons to repair and rebuild the engine and mill, so as to make them answer for the approaching grinding season, and expended the sum of \$2026 74, as will appear by the bill of items, annexed to his answer.

"The defendant further alleges that he advanced, on account of the contract, the sum of \$2000, at one time, and at another \$667 ; paid \$31 88 for freight ; making in all \$2,698 88, which is much more than the value of the very defective mill and engine landed on his plantation. He complains that, by reason of the insufficiency and defects of the mill and engine, the cane was not sufficiently pressed ; that by frequent stoppages, caused by insufficiency and bad construction, much time was lost in the making of sugar, and the cane was damaged by frost, cold and bad weather ; that of the crop of 1847, he lost :

100 hhds. of sugar of the value of.....	\$ 5,500
150 bbls. of molasses.....	1,200

Of the crop of 1848, he lost :

60 hhds. of sugar, of the value of.....	3,500
100 bbls. of molasses.....	800

\$10,800

"The several sums of \$2000, \$667, \$31 88, and \$10,800, he pleads in reconvention.

"The District Court rendered judgment in favor of defendant against the plaintiff's claim, and a judgment of non-suit as to the reconventional demand."

The plaintiff prosecutes the appeal. He calls our attention to the bills of exception taken to the ruling of the District Judge, which he deems erroneous. The first bill was taken to the rejection by the District Judge of the depositions of *James Parker*, *James Slicer* and *Andrew J. Nicholson*.

The objection made, as it appears by the bill, is "that the witnesses had not answered the cross-interrogatories propounded."

It is now urged by defendant's counsel, "that the bill is insufficient and too general ; that it requires the court to search through a voluminous transcript for the answer to every interrogatory, whereas it should contain a statement of every thing necessary, to enable the appellate court to say that the court below erred."

It is true that the bill must contain the proper statements in order to enable this court to judge of the ruling of the lower court. But in stating in the bill the objection made by the opposite party, it is obvious it can only be stated as it was made in the lower court. If the objection made was a general one, it will so appear in the bill, and it is not the fault of the party taking the bill, that the objection was not more specific. The bill of exception appears, therefore, to be well taken in its form, and we must examine the objections pointed out by defendant's counsel.

The objection to *James Parker's* deposition is, that he has not answered the fourth cross-interrogatory. The question propounded by defendant was, who composed the firm of *Arthurs, Armstrong & Co.* If you state that any of them died, state when he died ? When was said firm dissolved ? What firm succeeded *Arthurs, Armstrong & Co.* ? Who were *Nicholson & Armstrong* ? When was

NICHOLSON
v.
DEBOASY.

that firm created? When was it dissolved? Witness answers, "*John Arthurs, John Nicholson and Francis Armstrong*, as I understood, composed the firm of *Arthurs, Nicholson & Co.* I do not know when the firm was dissolved. I do not know what firm succeeded *Arthurs, Armstrong & Co. Nicholson & Armstrong* were *John Nicholson and Francis Armstrong*. I do not know when this firm was created nor when it was dissolved."

It is evident that the first branch of the fourth interrogatory, viz, the question "who composed the firm of *Arthurs, Armstrong & Co.*," has not been answered. The District Judge seems to have considered the question as pertinent and material. If so, the defendant was entitled to an answer. The answer given does not respond to the question, and is not entirely covered by the decision in the case of *Lurty v. Merryman*, 12 An., 181. Something must be left to the discretion of the Judge trying the case; and if he be of the opinion that a pertinent and material question has not been answered, he ought to exclude the deposition. The opposite party has no means of compelling an answer to his cross-interrogatories, except by objecting to the deposition, if his questions come back unanswered. The party taking the deposition can always protect himself against surprise by taking the rule, or filing the notice allowed by the 17th section of the Act of 1839, which embraces objections of this character. We cannot, therefore, say that the District Judge erred in excluding the deposition of *James Parker*.

The deposition of *Andrew Nicholson* under the decision in the case of *Lurty v. Merryman*, ought to have been received. Perhaps the numerous matters enquired of in each cross-interrogatory may have been one reason why the answers were not more explicit. The answer of *James Slicer* to the first cross-interrogatory is somewhat evasive. But as the defendant shows that this interrogatory was propounded for the purpose of showing by the planters for whom *Slicer* had previously labored, that he was not a good workman, it is apparent that the question and answer are irrelevant. The matter to be decided is not whether the workmen employed had previously been inexperienced workmen. It is, whether the work done by them on the steam engine and sugar mill was or was not well done. If their work on some former occasion was bad, they may have acquired more experience since, or the work may have been done under the eye of one more competent to direct the workman. The objection is insufficient to exclude *Slicer's* testimony.

The defendant offered witnesses to prove the reconventional demand. The plaintiff objected to the testimony, on the ground that there was no allegation in the answer that the plaintiff had been put in default, the same being a pre-requisite for the recovery of damages.

Where the damages are the consequence of the defective execution of the contract, no formal putting in default is necessary. *Morton v. Pollard*, 9 L. R. 176; *Millaudon v. Ferguson*, recently decided.

The Judge of the District Court did not, therefore, err in receiving the testimony.

The plaintiff offered on the stand as a witness *Francis Armstrong*, a member of the firm of *Arthurs, Armstrong & Co.*, but not a party to the suit, to prove that the assets of this partnership were transferred and sold by the firm to the plaintiff. The testimony of the witness was objected to and excluded, on the ground of interest. A written instrument from each of the partners, bearing date anterior to the institution of the suit, might have been offered in evidence to prove the fact sought to be proven by this witness. The witness was offered to

NICHOLSON
v.
DESOBRY.

prove a single fact adverse to his interest, viz, that the obligation sued on had been transferred by himself and partners. The proof of the fact would be no defence to any reconventional demand, which the defendant might have against the witness and the other partners. It may be said that it will enable the plaintiff to set up the demand of *Arthurs, Armstrong & Co.* as a defence to the reconventional demand. The answer to this is, that the witness and other partners are only bound for their virile shares, and by proving the transfer, it would seem he enables the plaintiff to use the whole demand in defence of the action against himself, and to the prejudice of his co-partners, who are not parties to this suit.

We do not perceive therefore on what particular ground the testimony as to the fact sought to be proven can be excluded.

The party offering the witness runs the risk of a cross-examination upon the whole case should the opposite party think it safe to avail himself of his privilege. 12 An. 826, *Davidson v. Poydras*.

On the merits, conceding the transfer to be proven, we do not think the plaintiff has made out a case. The testimony of defendant's witnesses shows that the work was badly done. This testimony is also corroborated by the agreement taken by the defendant of the plaintiff, December, 1847. The agreement is as follows, viz :

I will agree to be on *Mr. Desobry's* plantation on or about the first of May next, for the purpose of placing stronger iron frames under his sugar-mill, furnish him with rollers and wrought iron shaft of 8½ inches diameter, replace a new steam-chest, rebuild the cane carrier and furnish a stronger chain ; in fact rebuild the engine and mill to give full and entire satisfaction to *Mr. Louis Desobry* at the next rolling season.

PLAQUEMINES, 19th December, 1847.

[Signed]

JOHN NICHOLSON.

The evidence does not, therefore, show that compliance on the part of the plaintiff which will enable him to recover under his original contract.

The defendant has alleged that he repaired the mill and engine in 1848. Plaintiff's counsel contends that, as there is no proof when the work was done, it must be presumed that the work was done by the plaintiff in 1848, and that he complied with the second agreement and is entitled to recover. This argument is inadmissible. The defendant has shown various repairs done by himself, and although he has not proven the date at which they were done, we can safely infer that they were done in consequence of the non-compliance of the plaintiff with his second agreement.

The plaintiff further contends, that if there has not been a strict performance of the covenants contained in the contract on his part, he is still entitled to recover the value of his engine and machinery, because the defendant has taken and used the same, and ought to pay for the value, if not the contract price, of the same. The testimony on this branch of the case is entirely insufficient to form the basis of a judgment.

The reconventional demand is also too vague and uncertain. It does not appear that the defendant ever paid the plaintiff more than \$2000. It is true he has made some considerable repairs upon the engine, but he has been using it many years. As to the loss of the crop of 1847, there is nothing definitely proven.

The defendant alleges that he repaired the mill and engine in 1848. If so, the plaintiff cannot be charged with any loss he may have experienced that year.

The plea of prescription pleaded by defendant cannot be sustained. The second installment was made payable the first of March, 1848, and the suit was instituted in April, 1857.

The plaintiff's testimony having been excluded, the judgment ought to have been one of nonsuit.

It is, therefore, ordered, that the judgment of the lower court be so amended as to reserve to the plaintiff the right to institute a new action for the causes set forth in his petition, and that the judgment so amended be affirmed, the defendant and appellee paying the costs of the appeal.

NICHOLSON
v.
DESBERRY.

JOHN HUGHES, Tutor, et al. v. ROBERT L. HUGHES, Tutor.

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The testatrix, *E. H.*, made a will and died in Louisiana, the place of her domicile. By her will she gave to one of her children the whole of certain immovable property situated in Jackson county, Mississippi, and one-third of the remainder of her estate. The balance of her estate she directed to be divided among her other four children. *Held*: That the right of the testatrix to make such a disposition of immovable property situated in another State, is to be determined by the *lex rei sitæ*.

That the laws of Louisiana, the domicile of the testatrix, making her children forced heirs for a certain proportion of her estate, being in conflict with the *lex rei sitæ*, the latter must govern.

Held, further, that an *express declaration* in the will, of the intention of the testator to give the one-third of the estate to one of the children as an extra part over and above the legitimate portion, was not indispensable, the intention being apparent on the face of the will.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
Durant & Horner, for plaintiffs and appellants. *George L. Bright*, for defendant.

LAND, J. The validity of the olographic will of *Elizabeth Hughes*, is the subject-matter of contest in this suit.

The will is in these words :

"This is my last will. I, *Elizabeth Hughes*, at my death, do hereby give to my son, *Robert L. Hughes*, the whole of my Ocean Springs' property, lying in Jackson county, Mississippi, fully described in the act of partition between myself and *John Hughes*, made before *J. Graham*, Notary; and I give my son *Robert* every thing attached and belonging to said Ocean Springs' property."

"I give my said son *Robert*, one-third of the remainder of my estate. The balance of my estate shall be divided between my five children, including *Robert*. I make *Robert L. Hughes* my testamentary executor. I revoke all former wills made by me.

"Parish of Orleans, July 9th, 1855.

"Written, dated and signed by me.

ELIZABETH HUGHES."

The testatrix was domiciled, made her will, and died in Louisiana, leaving at her demise five forced heirs.

It is contended that the disposition of the Mississippi property to the defendant, in addition to the one-third of the succession in Louisiana, is in contravention of Article 1480 of the Civil Code, and is, therefore, null.

The Article of the Code is in these words : "Donations *inter vivos* or *mortis causa* cannot exceed two-thirds of the property of the disposer, if he leaves at his death a legitimate child, one-half if he leaves two children, and one-third, if he leaves three or a greater number."

НУОНЕ
v.
НСОНЕ.

Under the name of children are included descendants of whatever degree they be, it being understood that they are only counted for the child they represent.

The decision of this point is dependent on the question whether the validity of the disposition of the Ocean Springs' property, is to be determined by the law of the domicile—the law of Louisiana, or the law of the *situs*—the law of Mississippi. If by the former, it is clear that the disposition is forbidden by Article 1480 of the Civil Code. If by the latter law, it is equally clear that the bequest is permitted and valid. For between the civil law of Louisiana, and the common law of Mississippi, there is a conflict as to the right or capacity of a testator to deprive his children of the whole of his property at the time of his death, by last will and testament. Under the law of Louisiana, the right is restrained and limited, but under the law of Mississippi the capacity is without limitation or restraint.

Laws which permit and regulate the alienation or acquisition of real estate or immovable property, are real statutes, and have no extra territorial operation or effect. Story on Conflict of Laws, § 13.

The capacity or right to dispose of or acquire immovables, is determinable by the law of the *situs*. If a person has capacity to transfer by the law of the *situs*, he may make a valid title, notwithstanding an incapacity may attach to him by the law of his domicile. Story on Conflict of Laws, § 430, 431, 474.

The forms and solemnities of contracts and testaments necessary for passing title to real estate or immovables, are also prescribed and governed by the local law. *Ib.* § 435, 474.

The extent of the interest to be taken or conveyed under a contract or testament, is also a question to be determined by the *lex rei sitæ*. On this subject, Judge Story says, and, there seems a perfect coincidence between the doctrine of the common law and that maintained by foreign jurists: "It is universally agreed, that the law *rei sitæ* is to prevail in relation to all dispositions of immovable property, and the nature and extent of the interest to be alienated. If the local law, therefore, prescribes, that no person shall dispose, by deed or by will, of more than half, or a third, or a quarter of his immovable property; or, that he shall dispose only of a life estate in such property, such laws are of universal obligation, and no other or further alienation, therefore, can be made. It follows that, if the local law prohibits the alienation of certain kinds of immovable property, or takes from the owner the power of charging them with liens, or with mortgages, that law will exclusively govern in every such case. D'Aguesseau fully assents to this doctrine, and says, that no one can be ignorant that when the question is, what portion of immovable property may be devised, it is necessarily invariably to follow the law of the place, where the property is locally situate." See Story on Conflict of Laws, § 445, 474.

Mr. Burge, speaking on this point, is more specific, and says: "The power of making the alienation by testament is no less *qualitas rebus impressa*, than that of making the alienation by contract. When, therefore, the question arises, whether the immovable property may be disposed of by testament, recourse must be had to the *lex loci rei sitæ*. That law must also decide, whether the full and unlimited power of disposition is enjoyed, or whether it is given under restriction. The validity of the testamentary disposition depends in the latter case on its conformity to that restriction; whether the restriction consists in limiting the extent or description of property, over which the power of disposition may be exercised, or the persons in whose favor the disposition is made, or in requiring that the

HUGHES
v.
HUGHES.

testator should have survived a certain number of days after the execution of the act by which the disposition was made. *The total or partial defect of the will, on the ground that it did not institute heirs, or that it omitted to name the heirs, the disinheriton of the heirs, the grounds on which the disinheriton may be justified, are essentially connected with the power of disposing of immovable property by testament, and are, therefore dependent on the law of its situs.* 4 Burge Comm. on Col. and For. Law, pt. 2, chap. 12, pp. 217, 218.

If, therefore, the question be, whether the testatrix had capacity to dispose by testament of her Mississippi immovable property, or whether her testament is clothed with the forms and solemnities required to pass the title, or give the testament validity; or whether the testatrix could dispose of the whole or a part of her immovable property in Mississippi by testament; or whether the testatrix could disinherit one or more of her children or heirs, as to said immovable property, is exclusively a question to be determined by the law of Mississippi, the law of the *situs*.

The bequest of this real estate to the defendant to the exclusion or disinherison of his brothers and sisters, cannot be considered contrary to Article 1480 of the Civil Code, or in violation of any other law of Louisiana, for the reason, that the power of disposition by testament exercised in favor of the defendant was not conferred on the testatrix by the law of Louisiana, but by the law of Mississippi, in conformity to the permission and policy of which the disposition was made.

The dispositions of the will being permitted by the law of the *domicil*, so far as the property of the testatrix was situate in Louisiana, and subject to its operation, and being permitted by the law of the *situs*, so far as the immovable property of the testatrix was situate in the State of Mississippi, and subject to the operation of law thereof, the will must, therefore, be adjudged to be valid, notwithstanding the conflict between these laws as to the power of disposition by testament.

If it be true as contended by counsel for plaintiffs, that a deceased person can leave but *one succession*, it does not, therefore, follow, that there can be but *one law* from which the power of disposition by testament can be derived, and *that law must be the lex domicilii*; for the power of disposition as to a part of a succession may be given by the law of the *domicil*, and the power of disposition as to another part given or withheld by the law of the *situs*. And, when the laws are in conflict as to immovable property, each has its operation and effect within its territorial limits. Story on Conflicts of Laws, § 475.

It is further objected to the will, that it does not contain an *express* declaration, that the one-third part of the succession in Louisiana, given to the defendant, was thus given as *an advantage* or *extra part*, over and above the legitimate portion.

This express declaration is not sacramental, or indispensable to the validity of a donation *mortis causa*. The intention of the testatrix to give to the defendant the one-third part of her succession, as an advantage or extra part, is apparent on the face of her will. 3 Marcadé, pp. 219, 220, 221; 2 An. 201.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.

Re-hearing refused.

STATE v. MARCELIN BOUDREAU.

The 11th section of the Act of the Legislature of 1855, which provides that whenever the District Attorney shall not attend, the Judge shall have power to appoint an attorney to prosecute on behalf of the State, (*pro tempore*,) is not a violation of Article 83 of the Constitution of 1852, which requires that the District Attorneys shall be elected by the people.

Objections to an indictment for formal defects, apparent on the face of it, must be taken by demurrer, or motion to quash the indictment before the jury are sworn, and cannot be made afterwards.

APPEAL from the District Court of the Parish of Terrebonne, *Roman, J.*
E. Maurin, District Attorney, for the State. *Aycock & Wood*, for defendant and appellant.

COLE, J. The defendant, having been found guilty of an assault and battery and sentenced, has appealed.

1. He alleges that the prosecution was conducted not by the District Attorney, but by a special attorney appointed by the court to supply the absence of the legally elected and qualified functionary, and that this is a violation of Article 83 of the Constitution of 1852, which requires that the District Attorneys should be elected by the qualified voters of each district. A bill of exceptions was taken to the ruling of the Judge in the appointment of a special attorney.

The eleventh section of the Act of 1855, relative to District Attorneys, provides that, whenever the District Attorney shall not attend, the Judge shall have power to appoint an attorney to prosecute on behalf of the State, (*pro tempore*.) Sess. Acts 1855, p. 369.

The seventy-fourth Article of the Constitution provides that the duties of the District Attorneys shall be determined by law.

The Constitution of 1852 does not prohibit the Legislature to confide to other persons besides District Attorneys, in case of their absence, or inability to act, the duties of the latter as provided by law. *State v. Bass*, 12 A. 862.

The District Judge did not, therefore, err in overruling the objection to the appointment of *F. S. Goode, Esq.*, as District Attorney *pro tem*.

2. An arrest of judgment was moved, on the ground that the indictment does not set forth any violation of the statute or statutes of the State of Louisiana.

The indictment concludes as follows :

“ Contrary to the form of the State of Louisiana, in such case made and provided, and against the peace and dignity of the same.”

The court did not err in overruling this motion. The 18th section of the Act of 1855, to regulate the mode of procedure in criminal prosecutions, provides “ that every objection to any indictment for any formal defect, apparent on the face thereof, shall be taken by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards.” Sess. Acts 1855, p. 175.

Judgment affirmed, with costs.

CONVERSE, KENNETT & Co. v. E. HILL & Co.—W. H. LETCHFORD &
Co. et als., Intervenor.

The privilege granted to the vendor by the Article 3194 C. P. is not conditional, or dependent upon the solvency or insolvency of the buyer; it is positive, without condition or limitation, as long as the property sold remains in the possession of the purchaser.

It is not necessary that the defendant in execution should be made a party to a third opposition claiming the proceeds of a sale made under a *fi. fa.*

APPEAL from the Fourth District Court of New Orleans, *Price, J.*
Hunton & Miller, for plaintiffs and appellants. *P. E. Bonford, Semmes & Labatt*, and *Emerson & Huntington*, for intervenors. *G. P. McPheeters*, for defendants.

LAND, J. The plaintiffs, judgment creditors of defendant, caused certain merchandise to be seized and sold by the Sheriff, under a writ of *fi. fa.* issued on their judgment.

Letchford & Co., Haggerty & Co. and *Gould & Co.* filed third oppositions and claimed the proceeds of sale in the hands of the Sheriff, on the grounds, that they were the unpaid vendors of the merchandise sold, and had a privilege on the proceeds superior to that of plaintiffs.

The facts are not disputed, that the third opponents are the vendors of the goods, and that the price is unpaid. The plaintiffs oppose their claims in argument, on three grounds: 1st, because they have no privilege; 2dly, because the goods were sold *on a credit* and 3dly, because the defendant *is solvent*.

Article 3194 of the Code provides that "he who has sold to another any movable property, which is not paid for, has a preference on the price of the property over the other creditors of the purchaser, whether the sale was made on a credit or without, if the property still remains in the possession of the purchaser."

So that, although the vendor may have taken a note, bond, or other acknowledgement from the buyer, he still enjoys the privilege."

The privilege granted by this Article of the Civil Code is not conditional, depending on the uncertain fact of the solvency or insolvency of the buyer, but is positive, without condition or limitation, if the property sold still remains in the possession of the purchaser.

These grounds, therefore, are not tenable.

On the trial below, the plaintiffs objected to the introduction of evidence on behalf of *Gould & Co.*, on the ground that *E. Hill & Co.*, defendants in execution, had not been made parties to their third opposition. The objection was overruled, and the evidence received. The court did not err. *E. Hill & Co.* were not necessary parties. Article 401 of the Code of Practice prescribes that the third opposition shall be served on the seizing creditor, and the Sheriff, but does not require that the defendant in execution shall be cited, or made a party to the proceeding. 1 An. 144. There is no error in the judgment of the lower court.

Judgment affirmed, with costs in both courts.

RANDOLPH KESSEE V. MAYFIELD & CAGE.

Where one who has employed another for a limited time at a salary, discharges the employee before the expiration of the time, for a good cause, he is responsible to the employee for his services up to the time of the discharge.

A PPEAL from the District Court of the Parish of Terrebonne, *Roman, J.*
Connolly & Rightor, for plaintiff. *Goode & Aycock*, for defendants and appellants.

BUCHANAN, J. The plaintiff sues for wages, as overseer of a sugar plantation belonging to defendants, upon a contract. He avers that he was engaged on the 10th April, 1856, at a salary of eight hundred dollars; his engagement to terminate at the end of the year; that he was discharged, on the 22d June, 1856, without cause or provocation. He claims wages for the whole year.

The defendants plead that they had good cause for discharging plaintiff, namely :

- 1st. Incapacity.
- 2d. Cruelty to the slaves.
- 3d. Disregard of the instructions of defendants.

Defendants tendered to plaintiff and deposited in court the amount of plaintiff's wages, under his contract, up to the time of his discharge; although they deny that he was legally entitled to any wages whatever.

Upon the trial of this issue, the defendants offered no proof of the two first grounds, or causes of discharge, alleged in their answer.

In relation to the third of those grounds, it was proved that the instructions of defendants to plaintiff, as their overseer, were, that he was not to chastise the slaves himself; but, in case they merited chastisement, that the same was to be inflicted by the driver, with the assistance, if necessary, of other slaves, under the direction of the overseer; that all personal collision between the overseer and the slaves under his charge was strictly prohibited.

It was likewise proved, that the plaintiff told witnesses that he would not obey those instructions, and that he actually flogged slaves with his own hand.

Disobedience of defendants' instructions, thus deliberate and intentional, was inconsistent with the duty of the plaintiff towards his employers, and was a sufficient cause for his discharge.

The question of law remains, whether the plaintiff, thus discharged for a good and sufficient reason, was entitled to wages, and, if any, to what extent.

The Judge of the District Court charged the jury, that if one who has employed another for a limited time, at a salary, discharge his employee before the expiration of the time, for a good cause, he owes the employee nothing for the services rendered up to the time of discharge.

An exception was reserved to this charge, and the District Judge added to the bill of exceptions, before his signature, that he had charged as stated, as his construction of Articles 2719, 2720 and 2721; but that he had read those Articles to the jury, and had further charged them, that they were at liberty, as judges of the law and the fact, to adopt a different construction of the Articles in question.

We feel constrained, after a careful examination, to put a different construction upon the statute quoted, from that expressed by our learned brother in the District Court.

KENNER
v.
MAYFIELD.

The Article 2720 says : " If, without any serious ground of complaint, a man should send away a laborer, whose services he has hired for a certain time, before that time has expired, he shall be bound to pay to such laborer, the whole of the salaries which he would have been entitled to receive, had the full term of his services expired."

The Article, it will be observed, is silent in relation to the pecuniary result that will follow from a discharge of an employee by his employer, for a serious or sufficient cause. The Article declares a penalty against the employer who discharges his employee *without a cause*.

But it seems contrary to reason, that the penalty should equally apply (which is the doctrine of plaintiff,) to the employer who *has a cause* for discharging his employee. Indeed, the affirmation that the employer, in the first case, is responsible for the whole wages under the contract, is evidently pregnant with a negation that he is so responsible in the second case. But neither can we infer from the language of the Article, (which is the doctrine of the District Judge,) that the discharge, for a sufficient cause, forfeits the wages earned by the employee, under his contract, previous to the discharge.

The next Article (2721) declares such a forfeiture in one case, namely, when the employee leaves the service of his employer, before the expiration of the term of service, without a just cause. But that is not the case before the court ; and we do not feel authorized to extend the penalty to a case not expressed. See *Nolan v. Danks*, 1 Rob. 332.

We, therefore, award to plaintiff, his wages under his contract to the time of his discharge. The tender and deposits are admitted by plaintiff's counsel to be legal and sufficient.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed ; that plaintiff recover of defendants the amount deposited, to wit, two hundred and nine dollars and fifty cents, with costs to the time of making the deposit ; the subsequent costs of the District Court, and the costs of appeal, to be paid by the appellee.

FELIX MICHEL v. A. J. DELAPORTE.

The existence of the clause *de non alienando* in an act of mortgage, does not change the rule that a sale of succession property regularly made under a judgment of the Probate Court discharges the mortgages on it given by the deceased.

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APPEAL from the District Court of the Parish of Terrebonne, *Roman, J.*
Connolly & Rightor, for plaintiff and appellant. *F. S. Goode*, for defendant.

COLE, J. The only contestation in this suit and the only subject of appeal arises from the following part of the judgment of the District Court : " it is further ordered, that the privilege of plaintiff as a mortgage creditor be, and the same is hereby recognized on the proceeds of the sale made to *Lester and Tennent*, and

MICHEL
v.
DELAFORTE.

the administrator is ordered to pay this judgment by preference, out of said proceeds in due course of law."

Appellant asks to have the judgment so amended as to recognize and enforce his mortgage on the land itself and to order the same to be seized and sold to satisfy the judgment. He claims this amendment on the ground that there was the clause *de non alienando* in the sale from him to Ross, whose estate is administered by the defendant.

It appears that after the death of Ross, the property bought by him of plaintiff and which he promised not to alienate or incumber to the prejudice of plaintiff's mortgage, was sold at public auction by the Sheriff at a succession sale of Ross' property, and the sale was recorded in the book of conveyances.

It is well settled that a sale of succession property regularly made under a judgment of the probate court discharges the mortgages on it given by the deceased. The purchaser takes the property free from incumbrances, and the creditor must enforce his privilege or mortgage on the proceeds in the hands of the curator or executor. *Leverich v. Prieur*, 8 R. p. 97; *Zacherie v. Prieur*, 9 L. 200.

The existence of the clause *de non alienando* in the act of sale does not change this rule. The purchaser promises that he will not alienate the property to the prejudice of the mortgage retained by the vendor. When, then, the property is sold at a succession sale by order of a competent court, it is not the vendee or mortgagor who alienates it, but the decree, sale and recording of the sale. Stat. 15th March, 1830, p. 64, § 1.

The parties are supposed to contract subject to the laws of the land.

The laws provide that, after the death of a person, his personal and real estate may be sold for the purpose of settling up his succession.

If property bought by the decedent and subject to the pact *de non alienando* could not be sold, the liquidation of the estate might be deferred at the will of the mortgagee.

There is no exception in the law which prohibits property bought subject to this pact from being sold after the death of the vendee, like property not subject to the same.

It is true that the vendee or mortgagor promises not to alienate, but this promise only has its full effect during his life, for upon his death his absolute control over his property ceases, and it becomes subject to the laws for the settlement of estates, to the claims of creditors and to the residuary interests of heirs and legatees.

Prior to the sale of the property, plaintiff could have proceeded under Article 990 of the Code of Practice. He did not attempt to stop the sale by the administrator if he had any legal reason for so doing, and we can perceive no cause for interfering with the same.

Judgment affirmed, with costs.

L. BORDELON, for the use, &c., v. J. M. WEYMOUTH et als.

The receipt by the creditor of a check on the bank for the balance due him, it being understood that the drawer of the check had then no money in bank, but would deposit money within two or three days to meet it, is not a giving of time to the debtor which will discharge his surety.

A debt is not novated by a check on a bank given in payment of it.

APPEAL from the Fourth District Court of New Orleans, *Price, J.*
G. & E. E. Schmidt, for plaintiff. *Race & Foster* and *J. Leovy*, for defendants and appellants.

BUCHANAN, J. This is a suit against sureties for balance of sales made by an auctioneer, and not paid over by him to the party who employed him to make the sales.

The evidence is rather confused as to the amount due. The sales were made for account of a succession, and the administrator of the succession is the principal witness. He states the amount now due by *Weymouth* to the succession to be five hundred and eleven dollars and fifty cents, which includes one hundred and eleven dollars and fifty cents "not claimed in the petition." Yet this sum of five hundred and eleven dollars and fifty cents is the exact amount claimed in the petition. The administrator must have meant to say that the item of \$111 50 was not included in settlement and checks, of which he speaks immediately afterwards.

Again, the remaining testimony of the administrator shows that (exclusive of the \$111 50 already mentioned) there was only \$300 unpaid by the auctioneer, this being the amount of his check, which was refused payment at bank.

Total of auctioneer's indebtedness, according to our view of this testimony.....	\$411 50
Upon which the auctioneer has paid.....	100 00
Leaving balance now due.....	\$311 50

The defence of the sureties is, that they have been released by the creditor giving time to their principal; and, secondly, that the debt was novated by taking a check in payment.

Neither of these pleas is sustained by the evidence.

The receipt by the creditor of a check on a bank for the balance due him, it being understood that the drawer of the check had then no money in bank, but would deposit money within two or three days to meet it, was not a giving of time to the debtor.

Neither is a debt novated by the creditor taking from his debtor a check on a bank for the amount due. Such a check is nothing more than an order upon an agent, and cannot be viewed as giving a new debtor in the place of the original debtor, nor as substituting a new debt in the place of the original debt.

The universal practice of men in business is to keep their funds at a bank and to make payment through checks on the bank. This custom is convenient, because it saves the necessity of carrying large sums of money about the person, and facilitates the keeping of accounts. If the check is not honored, the parties are in the same situation as if no check had been given.

It is, therefore, adjudged and decreed, that the judgment of the District Court

BORDELON
v.
WYOMOUTH.

be amended, and that the plaintiff and appellee recover of the defendants and appellants, *in solido*, three hundred and eleven dollars and fifty cents, with legal interest from judicial demand, and costs of the District Court; those of appeal to be paid by the appellee.

SUCCESSION OF E. CROCKER.

The appointment of a dative testamentary executor should not be made when there are no debts of the estate to be paid, nor legacies to be discharged.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
R. Hunt and H. Dugué, for appellants. *R. N. Ogden, Bonford and Leovy*, for appellee.

BUCHANAN, J. The testamentary executor, *H. H. Crocker*, having been removed from office, a petition was presented by *Albin Rochereau*, in February, 1857, to be appointed dative executor.

This application was opposed by several of the instituted heirs on the ground, that there was no necessity for the appointment, there being no debts due by the estate, no legacies except those to the opponents; and, on the further ground, that the testamentary heirs were in possession of the estate.

The District Court, by judgment rendered in April, 1857, overruled the opposition, and appointed *Rochereau* dative testamentary executor. The opponents appealed.

We have been referred, in argument, by the counsel of appellant, to our decision in the case of *Reed v. Crocker*, rendered in June, 1857, and reported in 12th An. 436, which settled the portions of the heirs of this estate, and referred them to the District Court to make a partition of the same.

The case of *Reed v. Crocker* was an action instituted by certain of the heirs-at-law of *Elisha Crocker* against his testamentary heirs, to annul the last will, so far as it disposed of more than one-fourth of the estate; and for a partition. This action was pending when the application of the appellee for the dative executorship was filed. The demand in that action recognizes *Elisha Crocker's* testamentary heirs as being in possession of his estate; and the decree of this court has maintained that possession to the extent of one-fourth, and has sent the heirs-at-law into possession of the other three-fourths.

No proof has been made that there are any debts due by the estate; nor that there are any other legacies than those to the opponents. It is difficult to perceive what would be the functions of the dative executor, were we to confirm his appointment. Without seizin of the estate, without debts to pay, or legacies to discharge, the appointment would result in nothing but useless costs.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and that the application of the appellee for dative executorship of this estate, be dismissed at his costs in both courts.

CARMÉLITE RUYS, Wife, &c., v. H. V. BABIN, Sheriff, et als.

Property was purchased at a Sheriff's sale, under execution against the husband by *M. M.* transferred it to *H.*, who sold it to the plaintiff, the consideration stipulated being the transfer to her vendor of her rights in the succession of her deceased father. The husband always remained in possession of the property. *Held*: That the property so purchased by the wife became her paraphernal property, and that the character of her title was not affected by the fact that her vendor, subsequently to the sale, made a relinquishment of the consideration stipulated in the act of sale.

A PPEAL from the District Court of the Parish of East Baton Rouge, *Beale, J.* *A. S. Hennen*, for plaintiff. *J. Joor* and *H. M. Favrot*, for defendants and appellants.

VOORHIES, J. The plaintiff, *Carmélite Ruys*, sets up title to certain property described in her petition, which has been levied upon as her husband's, *L. A. Latil*, to satisfy two judgments obtained against him for the use of *A. Duplantier*. The defendant avers that she is not the *bona fide* owner; that if she has any apparent title thereto, it was obtained without any consideration, and was simulated, and intended fraudulently to cover her husband's property from the claims of his creditors; and that *Thomas F. Hernandez*, from whom she pretends to derive title, was a party to said fraud and simulation, and never was the *bona fide* owner of said property. She further avers, that the title was always in *L. A. Latil* the husband, and that he has always remained in possession.

It appears that on the fifth of September, 1846, *Joseph Ménard* purchased at Sheriff's sale, all the right, title and interest of *Latil* to the lot and improvements in controversy; and on the 14th of the same month and year, transferred the same by authentic act to *Hernandez*. On the 5th of September, 1853, *Hernandez* conveyed said lot and improvements to the plaintiff, for the sum of \$600; in payment of which she transferred to him her rights in the succession of her deceased father. In the meantime, the plaintiff and her husband remained in possession of the premises without paying rent, and *Hernandez* paid the taxes. It further appears, that when the latter collected the amount coming to the plaintiff from the succession of her deceased father, he gave it back to her; and he testifies that he considered this as a donation.

There can be no doubt as to the complete divestiture of the husband's title by the Sheriff's sale in 1846; so that the effect of the transfer from *Hernandez* to the wife must regulate the respective rights of the parties.

The evidence in the record does not show any fraud on the part of *Hernandez*. He purchased from *Ménard* for a valuable consideration; nor is it pretended that his purchase was simulated and fraudulent. The naked fact that *Latil* was in possession of the property sold under execution, does not of itself vitiate the conveyances from the Sheriff to *Ménard*, and from the latter to *Hernandez*, as the evidence shows the reality of these transactions. Now, in regard to the question as to the consideration of the sale from *Hernandez* to the plaintiff, it appears to us clear, that the sale being made in the name of the wife, and the consideration stipulated being the transfer of her paraphernal rights, it follows, that the property so purchased is paraphernal. It is the consideration as stipulated in the formation of the contract, that gives character to the deed; and if *Hernan-*

RCYS
v.
BARKY.

dez chose afterwards to give up the stipulated consideration, and the plaintiff acceded to it, her original rights could not certainly be impaired thereby. Even if there was no consideration for the sale from *Hernandez* to the plaintiff, still it is not conceived in what respect the defendant could possibly complain; for the act, if not one of sale, must be treated as a donation, enuring to the benefit of the party in whose favor the same was made.

Judgment affirmed.

KLEINWORT & COHEN v. KLINGENDER BROTHERS.

Mere insolvency is not sufficient to render a debt due, which, by its terms, is payable at a future day.

An actual surrender, either voluntary or forced, is required to annihilate the term fixed by the contract for the payment of a debt.

An affidavit for an attachment sued out upon a debt not due is defective, if it does not state that the debtor is about to remove his property out of the State before the debt becomes due.

APPEAL from the Fourth District Court of New Orleans, *Price, J.*
E. Briggs, for plaintiffs and appellants. *H. T. Hayes*, for defendants.

MERRICK, C. J. This is an appeal from a judgment on a rule dissolving an attachment.

The plaintiffs, a commercial firm residing in London, England, represent that *Klingender Brothers*, a commercial firm of Liverpool, are indebted to them in the sum of £500 sterling, or its equivalent in dollars; for this, that plaintiffs are the owners of a bill of exchange of that amount, drawn November 7th, 1857, by *G. W. Oliver & Co.*, sixty days after sight, which was duly accepted by defendants, but that they have failed and proved utterly insolvent, by reason whereof the said bill is now due and payable.

The sixty days after sight not having expired when the attachment was sued out, it is contended that the debt was not due and that the affidavit is not in the form required by the Act of 1823, p. 170.

It appears that the objection is well taken. Mere insolvency is not sufficient to render a debt due, which, by its terms, is payable at a future day. An actual surrender, voluntary or forced, is required to annihilate the term fixed by the contract for the payment of a debt. C. C. 2049; *Millaudon v. Foucher*, 8 L. R. 582; *Funes v. Bank U. S.* 10 Rob. 533.

The debt not being due, the affidavit is defective in not stating that the debtor was about to remove his property out of the State before the debt became due. Acts 1826, p. 170, sec. 7. The case cannot be distinguished from the case of *Millaudon v. Foucher*, 8 L. R. 582, above cited.

Judgment affirmed.

NIZA DUTILLET et al. v. O. L. BLANCHARD—E. BERGERON et. als., War-
rantors.

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It cannot be objected to the confirmation of a land claim by Act of Congress, that the commissioner exceeded his powers by inquiring into and reporting upon a claim not embraced in the instructions of Congress, when it appears that Congress, notwithstanding, accepted the report and confirmed the claim.

The American State papers published by order of Congress are admissible as evidence. The copies which they contain of legislative and executive documents, are as good evidence as the originals are from which they are copied.

When the proceeding was *in rem* under the Act of the Legislature of 1829, relative to proceedings against lands for works done upon the roads and levees of the same—*Held*: That the Act only requires notice to be given "to any person whom it may concern," and that when there has been a sufficient description of the land in the advertisements, and the proprietor, by the use of due diligence might have protected himself, the sale will not be annulled on the ground that the property was described as belonging to others than the real owner.

The prescription of five years, under the Act of the Legislature of 1834, would cure such an irregularity in the description of the property.

A PPEAL from the District Court of the Parish of Assumption, *Roman, J.*
A. Gentile and E. Maurin, for plaintiffs. *Mills & LeBlanc and Beatty & Bush*, for defendants and warrantors, appellants.

COLE, J. The plaintiffs, as heirs and representatives of *Thomas de Villanueva* and *Constance Dreaux*, his wife, claim a certain tract of land in the possession of defendant, which was confirmed to said *Villanueva*.

There was judgment for plaintiffs and defendant has appealed.

The points of contestation are the title of plaintiff, the identity of his title with the land in possession of defendant, and the effect of a purchase of the land made at Sheriff's sale.

1. The title of plaintiffs is established; their claim is based upon an Act of Congress, passed the 28th of February, 1823, confirming said land to *Thomas de Villanueva*, under No. 134, as stated in the American State Papers, vol. 3d, p. 516, and under No. 135, as appears from the certificate of *L. Palma*, the Register.

The Act of Congress of 11th of May, 1820, directs the Register to make a report to the Secretary of the Treasury upon certain claims of land. 1 Land Laws, p. 330.

The Act of Congress, dated 28th of February, 1823, confirms the claims described by the Register in his report of the 6th of January, 1821.

The Register, in that report, (American State Papers, vol. 3, p. 523,) says:

"The preceding claims comprehended in class third are not founded on either Spanish grants, concessions or orders of survey exhibited to me, and are not, therefore, embraced in the literal meaning of the Act of 11th of May, 1820, but as I believe they are within the spirit of that Act, I have thought it proper to report them; I infer this from analogy to former laws on the subject. By previous Acts of Congress, claims in Louisiana have been recognized as valid, which were founded on settlement rights, provided the habitation and cultivation were shown to be on the 20th of December, 1803, or anterior to that period; all the cases reported in this class are proved to have been in peaceable possession either by the claimants or those under whom they claim, before, and some of them long

DUTILLY
v.
BLANCHARD.

previously to the 20th of December, 1803, and, therefore, would have been valid under former laws, to which I have alluded," &c.

He then proceeds to recommend them as claims worthy of confirmation.

It is objected, that the second and fourth sections of the Act of Congress of the 11th of May, 1820, provided only for the confirmation of claims "founded upon any Spanish grant, concession, or order of survey," whereas this claim of *Villaneuva*, No. 135, is not founded either on a Spanish grant, concession or order of survey, but only, as appears from the certificate of claim, on actual inhabitancy and cultivation by claimant's author, under permission of proper Spanish officers, previous to the 20th of December, 1803. Public Land Laws, Berchard's edition, vol. 1, pp. 330, 360.

This might have been a proper objection to have urged in Congress against the confirmation of the claims, in class third, but it is inoperative in the tribunals of the country.

If the Register reported upon classes of claims which were not comprehended in the instructions of Congress, it was in the power of Congress to have rejected the part of the report which embraced claims not contemplated by their Act of 11th of May, 1820; but Congress accepted the report and confirmed the claims.

The defendants cannot offer any valid objection to the confirmation, for they had no title in the lands confirmed, and they cannot control the disposition made of the public domain by the national legislature.

The confirmation of the claim of *Villaneuva* is established, independently of the certificates of the Register, which were objected to on several grounds. Plaintiff offered in evidence the American State Papers, vol. 3, from p. 506 to p. 523, inclusively, for the purpose of showing the different classes of claims therein contained, and the report of *Samuel H. Harper*, Register, on the 3d class, and to show that the claim of *Thomas de Villaneuva* is numbered in said State Papers 134, and that said claim was confirmed by Act of Congress of 1823, upon the report of said *Harper*.

The District Judge rejected the evidence, except as to the notice of the claim, for the purpose of proving *rem ipsam*.

The court erred. The American State Papers are published by order of Congress, and are good evidence in land suits; such is the doctrine of the Supreme Court of the United States.

In *Bryan et al. v. Forsyth*, 19 Howard, p. 339, they say that the American State Papers, published by order of Congress, may be read in evidence in the investigations of claims to lands, "they contain copies of legislative and executive documents and are as valid evidence as the originals are from which they are copied." See *Watkins v. Holman*, 16 Peters, p. 56.

These "State Papers" show that the claim of *Villaneuva* was confirmed by Act of Congress of 28th February, 1823, upon the report of *S. H. Harper*, Register.

There is a discrepancy between the certificate of the Register and the American State Papers, in the statement of the number of the claim; in the former, it is No. 135, in the latter, No. 134: this variance cannot benefit defendants.

Plaintiffs in their pleadings allege this discrepancy; they describe the land fully, and annex the plat of survey made by the United States Government. If this variance were not a mere clerical error, and there were two claims confirmed to *Villaneuva*, defendants could easily have shown, inasmuch as they were put on their guard as to the variance, that there existed another claim besides that

sued for, either under No. 135 or 134, in favor of *Villaneuva*, located elsewhere, on the Attakapas Canal.

2. The identity of the land claimed with that in possession of defendant is satisfactorily established, even if it should be considered not to have been admitted by the answer.

3. But, notwithstanding the title to the land in possession of defendant be established to have formerly been in the ancestor of plaintiff, the latter cannot recover it, because they have been divested of title in the same by its adjudication to *Edward Blanchard*, from whom the title passed by several mesne conveyances to the defendant.

The adjudication was made in a suit to recover payment of work done upon the roads and levees of the land in contestation, under the provisions of the Act of February 7th, 1829.

Plaintiffs urge that this adjudication could not affect their rights, because "the heirs of *Villaneuva* were not notified that their land was about to be sold, but they were put off their guard by the advertisement, which stated that it was the land of *McDonogh*, *Bringier* and *Hall*, and by the proceedings being carried on against these parties."

There are two forms of action under the Act of 1829, the one is personal, or against the owner personally; the other is *in rem*, or against the property. Act 1829, §§ 27, 28, 29; B. & C. Dig. p. 755.

When the action is *in rem*, or against the land, the plaintiff presents his petition to the Judge, and prays that the property be seized and sold to pay the amount of his claim.

To the petition is annexed the claim of plaintiff, duly certified by the inspector.

On presentation of the petition the Judge orders the Sheriff to seize the property and to give notice in cases of non-residents in one of the newspapers published at New Orleans, and in cases of residents, in the newspapers published in the parish, if there be one; if not, notice is given in the ordinary way, by posting the notice at the church door, court-house, and other public places of resort. The notice calls upon any person whom it may concern, to show cause to the court within one month from the date of the order directed to the Sheriff, why the property thus seized should not be sold according to the prayer of the petition; and if at the expiration of the said month nobody does appear or make a defence in writing, the court proceeds to try the cause, *ex parte*, and pronounce if there be sufficient grounds in favor of the plaintiff, but if anybody appears and makes defence, the court proceeds to the hearing of the cause in the usual form. Act Feb. 7th, 1829, § 30.

The order given in the suit of *Edward Bergeron* against the lands of *J. McDonald et als.* and dated on the 20th May, 1843, under which suit the land in controversy was sold, is as follows:

"Let an order of seizure issue as prayed for, and let the Sheriff seize the lands within described, and give notice during eight days in the English and French languages, in one of the newspapers printed in New Orleans, to *John McDonald* or *McDonogh*, *Louis Bringier* and *Hall*, and to all whom it may concern, to show cause in one month from the date of the order directed to the Sheriff, why the said lands should not be sold according to law to satisfy the sum of one thousand seven hundred and seventy-five dollars with legal interest thereon from judicial demand, and the costs of suit.

[Signed]

H. F. DEBLIEUX, Judge Fourth District."

DUTILLER
v.
BLANCHARD.

DUTILLET
v.
BLANCHARD.

On the 21st October, 1843, about five months subsequent to the previous order, the following judgment was rendered in the said suit of *Bergeron* :

"Three judicial days having elapsed since judgment by default was taken ; it being proved to the satisfaction of the court that the advertisements required by law have been made, and there being no opposition thereto, it is hereby ordered, adjudged and decreed, that the Sheriff of this parish proceed to sell the land within described to satisfy, &c.

[Signed]

THOS. C. NICHOLLS,
Judge Second District."

The notice ordered by *Judge Deblieux* was published in the *Louisiana Courier*, of New Orleans, but there is no copy in the record of the form of notice given, but it must be presumed that the notice was given as ordered, because the decree of *Judge Nicholls* was based upon the execution of the order of *Judge Deblieux* and the judgment declares that the advertisements required by law have been made, and as one of the requisitions of the law was, that notice should be given to *all whom it may concern*, the notice must have been so made. The Sheriff declares in his return that he gave due notice.

In pursuance of the judgment of *Judge Nicholls*, the Clerk issued an order dated the 17th November, 1843, to the Sheriff of Assumption, commanding him to seize the land "as the property of *John McDonald* or *McDonogh*, *Louis Bringier* and *Hall*."

The Sheriff executed the writ on the 22d November, 1843. Afterwards, the Sheriff advertised the property for sale by advertisements in the French and English languages, announcing the sale to take place on Saturday, the 6th of January, 1844 ; and, as there was no newspaper in the parish, the advertisements were posted up in three different places of public resort in Assumption, to wit : on the parochial church door, at the parish court-house and at the door of the billiard room kept by *Pierre Blanchard*, at Napoleonville. The advertisement stated that the land was seized as the property of *John McDonald* or *McDonogh*, *Louis Bringier* and *Hall*.

At the sale on the 6th January, 1844, the land was adjudicated to *Edward Blanchard* for one thousand dollars cash, being over one-half of the appraised value, as required by the 30th section of the Act of 1829.

The action *in rem* is explained in the Code of Practice ; Art. 285 provides that provisional seizure may be ordered when the proceedings are *in rem*, that is to say, against the thing itself, which stands pledged for the debt, when the property is abandoned, or in cases where the owner of the thing is unknown or absent. Art. 292 declares that the Sheriff shall seize and take possession of the thing, directing at the same time that public notice be given to all persons interested, to appear within fifteen days to answer to the petition ; and Art. 294 provides, if no one answers the petition, that after certain proceedings, the property may be sold in execution. C. P. 290 to 295.

The Act of 1829 was passed subsequently to these provisions of the Code of Practice, relative to the action *in rem*, and is substantially the same. Act of 1829, § 20, 27 to 31.

The 30th section of the Act of 1829 only requires that notice shall be given to any person whom it may concern.

The law supposes that the description of the land will suffice to put the proprietor on his guard, and that he will know it is his property which is to be sold.

DUTILLET
V.
BLANCHARD

If this be so, the giving of a wrong name cannot deceive him. If it could, then the legislator must have erred in supposing that a description of the property would be sufficient to protect the interests of the proprietor.

The description of the land in the suit of *Blanchard* against it for the payment of his work was sufficient. It was as follows, in the notice of seizure: "a certain quantity of land situated in this parish, on the canal leading to Lake Veret, containing thirty-five arpents more or less fronting on the left bank of said canal, bounded above by lands of *Beasley* and *Barrow*, and below by lands of *Pierre Trahan*, seized as the property of *John McDonald* or *McDonogh*, *Louis Bringer* and *Hall*."

Independent, however, of the notice given by the Sheriff, the proprietor of the land in contestation could have known by other ways, that his land would be sold.

By section 20 of the Act of 1829, the Inspector of Roads and Levees was obliged to make an inspection of the levees, bridges and highways, to ascertain what repairs were needed, to notify the planter, and afterwards to sell the work to the lowest bidder at public auction.

It appears in evidence, that *Collins*, the Inspector, gave public notice in French and English advertisements posted at the parochial church door and the court-house door, that he would on a certain day sell the work to be done on the land in dispute, and afterwards sold it at public auction at the court-house of the parish.

It must be concluded, that if the proprietors had used the diligence contemplated by law, and had used the precaution of having an agent upon the land, or in the parish to attend to the making of the road and levee thereon, they would have had ample notice, because an examination of the road and levee, with notice to the agent, accompanied by actual labor upon the road and levee, which may be considered almost as a direct personal notice; also, the publication of the sale of the work upon the land sufficiently described; also, the suit to get payment for the work, with advertisement of the seizure, would have put the agent upon his guard, and have been a sufficient notification to him of what was transpiring as to the land, and must be considered as doing away with the effect of the wrong name.

It is the duty of a proprietor to keep up his roads and levees, and be present upon the land or have an agent to attend to the same upon his land or in the parish at the time they need reparation.

If the proprietors or their agent had been upon the land, the working of the road and levee thereupon would have notified them of the future sale, for they must be supposed to have known the law, and that a sale in default of payment would follow the execution of the work.

The working of the road and levee would have sufficed at least to put them upon inquiry as to what would be the effect of this labor by those not employed by them.

Proprietors who have thus neglected their obligations are not to be favored over subsequent purchasers in good faith.

We are therefore of opinion, as the action of *Bergeron* was *in rem*, it was unnecessary for the Sheriff to state that he had seized the land, as that of any particular person. The seizure of the land, a sufficient description of the same, and notice to all the world were sufficient, and the addition of the words in the advertisement, "as the property of *John McDonald*," &c., if an irregularity, was cured by the prescription in the statute of 1834, which has been plead. *Sess. Acts*, 1834, p. 123, §4.

DUTILLET
v.
BLANCHARD.

It should be observed, this case differs from that of *Michel v. Parish of Terrebonne*, in 9th Annual, and many others, in this point, that in this the plaintiffs seek to set aside a solemn judgment which has been rendered, whereas in the latter, injunctions were sued out to prevent the sale, or else the party did not institute the action in *rem* against the land, but at once sued the parish.

It is not necessary to decide in this suit, whether the objections now urged would have sufficed to have arrested the sale. *Morse v. McCall*, 13 An. 215; *Laforest v. Barrow*, 12 An. 149.

It is, therefore, ordered, adjudged and decreed, that the judgment be avoided and reversed, and that there be judgment in favor of defendants against the claims of plaintiffs, and that plaintiffs pay the costs of both courts.

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F. S. GOODE, Administrator, v. T. BUFORD.

The surety on the administrator's bond will be held liable for money set down on the inventory as part of the estate, although it is shown that the administrator received it in a fiduciary capacity before his appointment.

A PPEAL from the District Court of the Parish of Terrebonne, *Roman, J.*
Goode & Aycock, for plaintiff. *Connolly & Rightor*, for defendant and appellant.

MERRICK, C. J. *Joseph A. LeBlanc*, former Recorder of the parish of Terrebonne, applied, on the 23d of June, 1855, for letters of administration upon the estate of one *Anson Lauterman*, deceased, and that an inventory might be taken. On the 26th day of the same month, *LeBlanc*, acting in his capacity of Recorder, took an inventory of the effects of the succession, wherein he set down, among other things, the money on hand, amounting to \$515 85. This money he took into his possession at the time of taking the inventory.

LeBlanc was appointed curator of *Lauterman's* succession, and on the tenth day of July, gave bond as such, with the defendant as his surety. *LeBlanc* died before settling his account as curator, and *J. A. Gagné* was appointed administrator of *LeBlanc's* succession, while the plaintiff, *Goode*, was appointed administrator of *Lauterman's* estate.

Goode instituted an action against both *J. A. Gagné*, administrator, and *Buford*, surety of *LeBlanc*, on the bond; but the action was dismissed as premature as to *Buford*, the surety. The suit against the administrator resulted in a judgment against *LeBlanc's* succession for \$741 31, and an execution having been issued, was returned *nulla bona*. Thereupon, the suit was renewed against the surety and judgment rendered against him for the same amount as had been rendered against *Gagné*, the administrator. The surety appealed.

The record contains a bill of exception to the refusal of the District Judge to grant a new trial. We do not understand the counsel to insist upon the bill of exception before this court. Certainly an error of law into which a party had fallen in shaping his defence, would not, as a general rule, be a valid ground for a new trial.

The controversy in this court is confined to the cash received by the Recorder when he took the inventory, and before he gave bond as curator. The defendant contends that *LeBlanc* was insolvent, and that having received the funds before

he was appointed curator, the sureties for him, in the capacity which he bore when he received the money, and in virtue of which he received it, are alone responsible; and that the language of the bond itself imports an obligation of suretyship for future management only, and cannot be held to have a retroactive effect.

GOODRICH
v.
BUTFORD.

The condition of the bond was, that the curator should well and truly perform all the duties incumbent on him as such curator, and pay over whatever moneys should be coming to the lawful heirs of said estate, after the payment of all the just debts of said estate, whenever lawfully required (so) to do. This bond, which substantially embraces the requirements of the Code (see Arts. 1034, 1119), was based upon the inventory which contained the item of cash on hand as forming part of the assets. Nothing prevented the surety from examining the bond and ascertaining for himself for what things the principal was binding himself. In the absence of proof, it cannot be supposed that in the interval between the taking of the inventory and the giving of bond, the Recorder, *LeBlanc*, had committed the crime of embezzlement of a fund, for the administration of which he was applying to the court for power, but it must be presumed that he still continued to hold the same, and that when he was qualified as curator, it was in his hands *in specie*. *Coussy v. Vivant*, 12 An. 46.

The case of *Parmele & Baker v. Brashier*, 16 La. 74, is cited to prove that the surety is not liable for moneys which the principal had received before the date of the bond. The reasoning of the court in that case was in reference to one of three annual bonds which the curator was obliged to give prior to the Act of 1837, on each renewal of his office. It does not appear to be applicable to a case like the present.

We conclude, therefore, that the cash in the hands of the administrator at the time of his appointment and inventoried, must be considered as subject to administration and covered by the bond given for the fidelity of the administration of the curator.

Judgment affirmed.

CHARLES SIMPSON v. FRANCIS LOMBAS et al.

When the name of the State in which plaintiff is domiciled is alone set forth in the petition—*Held*: that it is a sufficient compliance with Art. 172 of the Code of Practice.
The authority of an attorney-at-law is presumed, and an affidavit to obtain an order of seizure and sale, made by him in the absence of his principal, is sufficient.

A PPEAL from the District Court of the Parish of Lafourche, *Roman, J. Beatty & Bush*, for plaintiff. *Thibodaux & Blake*, for defendants and appellants.

LAND, J. This is an appeal from an order of seizure and sale taken by the third possessors of the mortgaged property.

In their petition of appeal the defendants allege three grounds of error. Two, however, are only assigned and urged in this court as apparent on the face of the record, to wit:

First. That the domicile of *Simpson*, or his agent, is not fully set forth in his petition.

SIMPSON
v.
LOMBARD.

Second. That there is no authentic evidence of the power of *G. F. Thompson* to act as agent of his pretended principal, *C. Simpson*.

I. The domicile of the plaintiff, *Charles Simpson*, is stated in the petition to be in the State of Missouri, and this allegation of residence is a compliance with Article 172 of the Code of Practice. *Perry v. Belieue*, 5 N. S. 79.

This suit was not instituted by an attorney-in-fact for the plaintiff, but by attorneys-at-law, whose residence it was unnecessary to allege in the petition.

The first assignment of error is, therefore, groundless.

II. The second assignment of error is equally untenable. As before stated, the agent or attorney-in-fact did not institute this suit on behalf of the plaintiff.

The suit was commenced, and has been prosecuted by, *Messrs. Beatty & Bush*, attorneys at law of the plaintiff, and authentic evidence of their authority is not required. Their authority to act is a presumption of law. *Rowlett v. Shepherd*, 7 N. S. 514.

Louis Bush, Esq., one of plaintiff's attorneys-at-law, made the affidavit required by Article 3365 of the Civil Code, to which was superadded the oath of *J. F. Thompson*, the agent of plaintiff. The affidavit of the attorney-at-law was sufficient, and the superaddition of the oath of the agent was, of course, unnecessary. Phillips' Revised Statutes, p. 92, sec. 11.

It is, therefore, ordered, adjudged and decreed, that the order of seizure and sale of the lower court be affirmed, with costs.

HANNAH I. WALLIS v. A. BOURG, Sheriff, et als.

The existence of a privilege or mortgage upon property seized under a *fi. fa.*, will not authorize an injunction to arrest its sale; the remedy is by third opposition.

APPEAL from the District Court of the Parish of Terrebonne, *Roman, J. Connolly & Rightor*, for plaintiff and appellant. *Beatty & Bush*, for defendants.

LAND, J. This is an injunction suit to restrain the sale of certain property seized under a writ of *feri facias* issued in the suit of *R. Patterson & Co. v. H. H. Wallis*, on the grounds, that the plaintiff is the owner of a part of the property seized, and that she has a mortgage and privilege on the other part.

R. Patterson & Co. moved to dissolve the injunction on the face of the papers, and the District Judge sustained the motion as to that portion of the property seized, on which the plaintiff claimed a mortgage and privilege, and overruled it provisionally as to the property claimed by the plaintiff in her own right.

The existence of a privilege or mortgage on property, will not authorize an injunction to arrest its sale. The remedy is by third opposition. Code of Practice, 396, 401; 6 N. S., 615; 7 N. S., 281.

The judgment of the lower court is correct.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs, and that this cause be remanded to the lower court for further proceedings according to law.

FRANCIS LOMBAS v. E. G. ROBICHAUX, Sheriff, et al.

14	106
110	88

14	106
121	752

The delay within which a suspensive appeal may be taken from an order of seizure and sale is fixed by Art. 525 of the Code of Practice, and, as amended, is in the country fifteen days, excluding Sundays.

The delay commences to run from the date of the service of the notice of the order of seizure and sale, which is notice of judgment to the possessor of the hypothecated property.

A PPEAL from the District Court of the Parish of Lafourche, *Roman, J.*
Thibodaux & Blake, for plaintiff. *Beatty & Bush*, for defendants and appellants.

LAND, J. *Charles Simpson*, one of the defendants, obtained an order for the seizure and sale of certain mortgaged property in the possession of the plaintiff in this suit. The latter applied for, and obtained a suspensive appeal therefrom, which has been recently decided by this court.

The Sheriff disregarded the appeal, and was proceeding at the instance of *Simpson*, to execute the order of seizure and sale, when he was restrained by a writ of injunction sued out in this case.

The defendant, *Simpson*, attempts to justify the proceeding of the Sheriff, on the ground, that the appeal was not taken within the legal delay, and was, therefore, only devolutive. He contends, that the plaintiff's right to a suspensive appeal was limited by Article 735 of the Code of Practice, to three days, to be computed from the day on which the notice of the order of seizure and sale, was served upon him.

The meaning of this Article has been misapprehended. The three days therein mentioned, are days of grace, given to the possessor of mortgaged property; to pay the debt demanded before a seizure by the Sheriff. *Rowlett v. Shepherd*, 7 N. S. 514.

The delay within which a suspensive appeal may be taken, is fixed by Article 575 of the Code of Practice, and, as now amended, is in the country fifteen days, excluding Sundays. Phillips' Revised Statutes, p. 99.

In hypothecary actions the delay for a suspensive appeal, commences to run from the date of service of the notice of the order of seizure and sale, which is notice of judgment to the possessor of the hypothecated property. *Billet v. Henry*, 2 An. 145. C. P. 575, 624.

The plaintiff's appeal was taken within the delay provided by Article 575 of the Code of Practice, as amended, and had the effect of suspending the execution of the order of seizure and sale.

The injunction was, therefore, rightfully maintained by the District Judge, during the pendency of the appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.

STEPHEN VAN WICKLE v. SARAH GARRETT AND HUSBAND.

The action of a judgment creditor of the husband to annul a judgment of the wife against the husband, on the ground of fraud, is prescribed by the lapse of one year from the date of the wife's judgment, she having a real demand.

The reinscription of a judgment interrupts prescription against the hypothecary action on the judgment.

A PPEAL from the District Court of the Parish of Pointe Coupee, *Haralson, J. U. B. & E. Phillips*, and *P. A. Roy*, for plaintiff. *W. H. Cooley* and *A. Provosty*, for defendants and appellants.

LAND, J. This is a revocatory action to annul a judgment of separation of property, obtained by defendant against her husband, and also an hypothecary action to enforce a judicial mortgage on a tract of land and certain slaves in possession of defendant.

The plaintiff obtained a judgment on the 19th of May, 1837, against *R. R. Coyle*, the husband of defendant, for two thousand dollars with interest, and afterwards, in 1839, obtained another judgment against him for one thousand dollars.

These judgments were duly recorded, and have been reinscribed in the proper office.

In 1841, defendant sued her husband for a separation of property, for the recognition of her title to certain slaves, and for the recovery of a debt of \$4,116.

In 1842, a judgment was rendered in favor of defendant for a separation of property, for the slaves claimed, and for the sum of \$3,450.

In 1848, *Coyle*, the husband, transferred to his wife, the defendant, a tract of land in part payment of her judgment, at the price or estimation of \$1599 50.

In 1855, this suit was commenced to annul the judgment of separation of property, on the grounds of collusion and fraud between defendant and her husband, and to subject all the property in her possession as community property to the payment of his judgments, and to enforce his judicial mortgage on the land and slaves held by her.

The defendant pleaded to these demands a general denial, and the prescription of one, ten, fifteen and twenty years.

The plaintiff was the judgment creditor of the husband at the date of the rendition of defendant's judgment, and his right to sue to annul her judgment on the ground of fraud, she having a real demand, was prescribed by the lapse of one year from its date. *Fennessy v. Gonsoulin*, 11 La. 424; C. C. Art. 1989. The prescription of one year, was, therefore, a bar to plaintiff's revocatory action.

The prescription of ten years pleaded in bar of the hypothecary action, was interrupted by the reinscription of plaintiff's judgments, and was, therefore, properly overruled. C. C. 3333.

There is no error in the judgment of the lower court.

Judgment affirmed, with costs in both courts.

MARTHA ANN LOYD, Wife, &c., v. J. J. MORTEE et al.—WM. BAGLEY et al., Warrantors.

In a petitory action, if the title set up by defendant has a common origin with that of the plaintiff, the defendant cannot allege the nullity of plaintiff's title.

APPEAL from the District Court of the Parish of St. Tammany, *Wilson, J. Penn & Martin*, for plaintiff. *A. Hennen*, for defendant. *Jessee R. Jones*, for warrantors, appellants.

COLE, J. This is an action to rescind the sale of the slave *Mary* and her children, born since the sale, on the ground of the minority of plaintiff, *Martha Ann Loyd*, at the date of the sale; and also for the value of their services since the majority of plaintiff.

It appears that on the 30th May, 1829, *John L. Goodbee*, in a marriage contract duly executed in favor of *Nancy Loyd*, the mother of plaintiff, and in consideration of the marriage, gave to the plaintiff the negress slave *Mary*; that on the 31st December, 1847, *William Bagley* by public act purchased the slave *Mary* from the plaintiff, then a minor, and on the 20th December, 1850, *Bagley* sold her and her child to *John J. Mortee*, tutor to his minor children *Anna Maria* and *Lucinda E. Mortee*.

The judgment was in favor of plaintiff, annulling the sales and granting hire.

The act of donation was passed before the Parish Judge, *ex officio* a Notary Public, and two witnesses. C. C. 1523. It would seem that the mother had the corporeal possession for her child, the donee; if so, the donation has full effect, though not accepted in express terms. C. C. 1528. At any rate she would seem to have had corporeal possession at the date of her sale of the slave.

It is not necessary, however, to decide these points, inasmuch as *Bagley* and *Mortee* had full knowledge that the title of the slave was supposed to be in plaintiff. In the act of sale to *Bagley*, plaintiff was assisted by her natural mother, *Mrs. Nancy Goodbee*, and *John L. Goodbee*, the original donor of the slave to plaintiff, and it is stated therein that the slave sold is the same which plaintiff "received from the said *John L. Goodbee* and *Nancy Loyd*, her natural mother by virtue of the marriage contract of the said *John L. Goodbee* and *Mrs. Nancy Goodbee*, executed before *Jesse R. Jones*, late Parish Judge of the parish, on the thirtieth day of May, 1829, extant and of record in the Recorder's office in notarial record book B."

In the act of sale from *Bagley* to *Mortee*, tutor, it is declared, that the slave "*Mary* is the same slave that was acquired of the plaintiff by act passed before the undersigned Notary."

We are, therefore, of opinion, that defendants are estopped from questioning the title of plaintiff.

It is the common origin of the title of defendants, and they cannot successfully allege its nullity. *Squier v. Stockton*, 5 An. 120; 1 R. 369; 8 L. 239; 4 An. 249; Greenleaf on Evidence, §§ 22, 23, 24, 25, 26, 207, 210; C. C. 1528, 1533.

Judgment affirmed, with costs.

PITTMAN & BARROW v. E. G. ROBICHEAU, Sheriff, &c.

14 108
58 1386

The interest of a partner in a particular thing or piece of property belonging to the partnership, cannot be seized for his individual debt, but the whole share or interest of the indebted partner in the partnership may be seized and sold subject to the payment of the partnership debt. This rule applies to a particular partnership, and is the same rule laid down as applicable to commercial partnerships in the case of *Smith v. McMicken*, 3 An. 322.

An injunction will only be perpetuated as issued for some legal cause stated in the petition.

A PPEAL from the District Court of the Parish of Lafourche, *Roman, J.*
C. Belcher, for plaintiffs. *Beatty & Bush*, for defendants and appellants.

BUCHANAN, J. The police jury of Lafourche having obtained a judgment against one *Brown*, seized under execution property of their debtor, which was adjudicated to him at a second crying, on twelve months' credit. *Brown* gave his bond for the price of adjudication, with *John B. Pittman*, as his security. The bond not being paid at maturity, a writ of *feri facias* was issued upon the same against *Pittman*, under which the undivided half of certain lands, farming utensils, animals and negroes, being the entire interest of *Pittman* in an agricultural partnership subsisting between himself and *Robert R. Barrow*, under the firm of *Pittman & Barrow*, was seized and advertised for sale.

John B. Pittman and *Robert R. Barrow*, both join in a petition for an injunction, which has been granted, to stay the proceedings of the police jury under their said seizure. The grounds alleged for the injunction, are the following :

1st. Because sufficient property had already been seized under a *fi. fa.* issued previously, and never released.

2d. Because the issuing of a second *fi. fa.* and the seizure of property under the same, are contrary to the express agreement of the parties.

3d. Because, under a *fi. fa.* against *J. B. Pittman* solely, the assets of the said partnership could not be seized, and all the property seized belongs to the said partnership, &c.

Upon the first and second grounds for injunction, the evidence disproves the allegations of the petition.

Upon the third ground, the counsel of plaintiffs relies upon the authority of the cases of *Smith v. McMicken*, 3 An. 322 ; *Bank of Tennessee v. McKeage*, 11 Rob. 130 ; *Carvin v. Bates*, 10 An. 756 ; and *Alexander v. Burns*, 6 An. 704.

All these cases were seizures of particular assets of a partnership for a debt due by one of the partners. Whereas the present seizure, as the evidence shows, (although there is an allegation in the petition to the contrary,) comprehends the entire interest of *John B. Pittman*, the debtor, in the partnership of *Pittman & Barrow*. Such a seizure is sanctioned by Article 2794 of the Civil Code. And in the earliest of the cases cited, that of *The Bank of Tennessee v. McKeage*, the court said : " The interest of a partner in a particular thing, or piece of property belonging to the firm, cannot be seized or attached for his individual debt. An individual creditor cannot, under an execution or attachment, have the half or third of a piece of goods, or other article belonging to the partnership, seized. He must have the whole share or interest of the indebted partner seized, and thus dissolve the partnership, and take the share after the payment of the partnership debts." To the same effect, are the cases of *Cucullu v. Manzenal*, 4 N. S. ; *Craft v. McKneely*, 1 La. ; *Baca v. Ramos*, 10 La. ; *Oliver v. Guin*, 17 La. ; *Nelson*

v. Connor, and Lee & Bullard, 3 An. ; Harris v. Bank of Mobile, 5 An. ; Carvin v. Bates, 10 An. ; and Davis v. Carroll, 11 An.

PITTMAN
v.
ROMICHNEAU.

The single case of *Smith v. McMicken*, 3 An., contains expressions which have been supposed, although erroneously, to conflict with the doctrine thus uniformly held, as well by the bench which decided that case, as by the predecessors and successors of that bench.

The error consists in mistaking the antecedent of the pronoun *it* in two places in the following sentence of the opinion read by Mr. Justice Slidell, as the organ of the court : "From these principles we think it fairly results, that the individual creditor of a partner cannot seize a particular asset, the property of the partnership, nor even the so called interest of the partner in *it*, under the pretext that his debtor has an individual interest in *it*." The two *its* italicised by us in this quotation, evidently refer to *asset*, as their antecedent, and not to *partnership*. The contrary construction would make the last branch of the proposition *obiter dictum*, uncalled for by the case before the court, which, as we have already observed, was a seizure of a particular asset, or of the interest of an individual partner in that asset, and by no means a seizure of that partner's share or interest in the partnership itself. And the presumption is entirely against Judge Slidell's having intended an *obiter dictum*, as at variance with the known caution and acute apprehension of the points in controversy, which distinguished that learned judge. Besides, how can we reconcile the construction given to the case of *Smith v. McMicken* by plaintiff's counsel, with the emphatic enunciation of a contrary doctrine on repeated occasions, in the cases cited above, by all of the Judges who took part in the decision of *Smith v. McMicken*—not to speak of the express law of Article 2794 of the Civil Code.

We conclude that the District Judge erred in maintaining this ground of injunction.

The property seized should be advertised by the Sheriff, and sold as the share of *John B. Pittman*, in the partnership of *Pittman & Barrow* ; for the reason, that the purchaser ought to be informed that he is buying, *not a joint interest in the property, but the partnership interest of an individual partner*, and that the property, in his hands, will be subject to the settlement of partnership debts, in a liquidation to be made of the partnership, according to the 2794th Article of the Code.

In this case, the Sheriff has not advertised the property or interest seized, as partnership ; but the plaintiffs have not made this objection a ground for injunction, and are not entitled to have the writ perpetuated for this cause. An injunction will only be perpetuated, as issued, for some legal cause stated in the petition.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed ; that there be judgment dissolving the injunction herein issued, without damages ; that the Sheriff, in re-advertising the property seized, make mention that the same is the share of *John B. Pittman* in the partnership of *Pittman & Barrow*, to be sold subject to the payment of partnership debts ; and that the plaintiffs and appellees pay the costs in both courts.

MERRICK, C. J., dissenting. Article 2794 C. C. is in these words : "The partnership property is liable to the creditors of the partnership in preference to those of the individual partner ; but the share of any partner may in due course of law be seized and sold to satisfy his individual creditors *subject to the debts of the partnership* ; but the seizure, if legal, operates as a dissolution of the partnership."

PITTMAN
v.
ROMBERGHAU.

This Article appears to me to apply as well to particular as commercial partnerships. In the particular partnership, of course the *partnership creditor* acts directly against the virile shares of each partner; in the commercial partnership, against the partners *in solido*.

Applying the Article cited to the case before us, we find that the seizure made by the individual creditor of *Pittman* has not been made "subject to the debts of the partnership," as required. There may be debts due the firm, as well as debts due by the firm. If it be conceded that there are no debts due the partnership and that the seizure made in this case of one-half of the plantation, slaves, &c., was a seizure of all the *effects* belonging to the partner in the particular partnership, it does not yet show a compliance with the law, and is not the same thing as the seizure of one-half of those effects subject to the partnership debts.

In my opinion, there are two modes in which the seizure in this case might have been made: the one, to seize one undivided half of the partnership effects (according to the terms of the Article) *subject to the debts of the partnership*, and the other to seize the interest of the partner in the partnership, and then the purchaser of that interest could apply to the proper court for a liquidation of the partnership debts, and a partition of the surplus. Of these two modes of proceeding, the latter is more in conformity to the spirit of the authors. See *Trop., Société*, No. 865.

The partnership is looked upon as a fictitious or moral being entirely distinct from each individual partner. *Smith v. McMicken*, 3 An. 321, and authorities there cited; 5 An. 539, 6 An. 704, 11 An. 706.

In the language of the case of *Smith v. McMicken*, the partners "are not the owners of the (partnership) property itself, but of the residue which may be left from the entire partnership property after the obligations of the partnership are discharged."

If this be law, (and it seems too firmly established to be disputed,) then the execution is simply directed against the moral being, the partnership, to obtain from the same the effects, rights and credits in its hands belonging to the individual partner. And the proceeding in execution ought to be conducted as against any other third person having like effects belonging to the judgment debtor.

Now, if we allow the judgment creditor to seize and sell the undivided interest of one of the partners in a particular thing, we ignore the moral being of the partnership, and admit at once that the partner, objectively and passively considered, is the owner, as distinct from the partnership. We do precisely the same thing when we allow a seizure of all the visible and tangible effects of the partnership. In the case before us, in order to maintain the seizure, we must admit, with reference to the creditors of the partnership, that *Pittman* is the owner of one undivided half of the plantation and slaves, and that the partnership, considered as a moral person, does not own anything. For if one-half could be seized for the benefit of the individual creditors of *Pittman*, and the other half for the benefit of the individual creditors (if any) of *Barrow*, the creditors of the partnership would be without redress, and the purchaser would take the property free of all incumbrance. For if a legal sale can be made of the undivided interest of an individual partner in any or all the partnership effects, the preference given the partnership creditor is gone, because it does not appear to be one of those privileges which can be preserved by registry, and which follow the property into the hands of third persons acquiring the same.

It is proper to observe, that I have never understood the case of *Smith v. McMicken* otherwise than as interpreted by my colleagues. I consider the rule adopted in that case a safe one, and that it is applicable to particular as well as commercial partnerships. I deduce from it these propositions :

PITTMAN
v.
BOUCHÉAU.

1st. That with reference to the creditors of the partnership, and the individual creditors of each partner, the partnership is a fictitious and moral being, the owner of the partnership effects.

2d. That the individual creditor of any one of the partners cannot, as a consequence, seize the undivided interest of one of the partners in "a particular asset" of the partnership, nor of the undivided interest of the partner in any specific number of effects of the partnership, although it may constitute the entire active means of the concern, because they do not belong to the individual partner, and

3d. That the only way to make a seizure to pay the debt of an individual partner is to seize his undivided interest in the partnership effects subject to the payment of the partnership debts, or, which is the same thing, to seize the undivided interest of the partner in the partnership, which would give the purchaser the residuum after the payment of the debts and liquidation of the partnership affairs.

Now the conclusions of my colleagues seem to coincide with one of the modes of seizure which I admit to be valid, and I should not have much hesitation in concurring, but the decree seems to me to fall short of the argument.

The Sheriff says nothing in reference to the partnership in his seizure. He simply seizes the one undivided half of certain tracts of land ; the undivided half of the mules, carts and plantation implements, and the undivided half of the negroes, described by their names and ages.

The seizure forms a part of the record, and is the basis of the title of the purchaser at the Sheriff's sale. The sale, when made, refers back to the seizure. The notice of sale and advertisements are never permitted to control the seizure nor do they properly form part of the Sheriff's return.

An informal or illegal seizure cannot be enlarged or rendered valid by the advertisement.

Now, in the case before us, the seizure and notice of seizure do not indicate that the property was seized subject to the payment of the partnership debts, nor even that it was partnership property. Neither are the active debts of the partnership seized, if there are any ; there being no proof in the record on the subject of the active or passive debts.

The debtor who is bound in warranty is interested, that his property shall be seized in accordance with his rights in it, and he ought not to be subjected to subsequent actions in warranty, growing out of a sale of incumbered interests.

I think the judgment of the lower court ought to be affirmed. The plaintiffs allege that "under a *fi. fa.* against *J. B. Pittman*, solely, the assets of said partnership could not be seized," &c. The petition contains a prayer for general relief, and the evidence in my opinion makes out the plaintiffs' case.

COLLÉ, J., concurred in this opinion.

MICHAEL GAUDET, Under-Tutor, v. WIDOW URSIN GAUDET.

The mother wishing to contract a second marriage may, by the advice of a family meeting, be retained in the tutorship of her minor children on giving security, and her application may be acted on before the marriage is celebrated. Her rights in this respect are not impaired by the refusal of a previous family meeting to retain her in the tutorship without security.

A PPEAL from the District Court of the Parish of Ascension, *Duffel, J.*
J. H. Hsley, for plaintiff and appellant. *A. Gentile and Mills & LeBlanc*, for defendant.

LAND, J. The defendant, wishing to contract a second marriage, applied for an order for a family meeting, to decide whether she should remain natural tutrix of her minor children.

The family meeting was ordered, and after deliberation, decided she should not remain tutrix in the event of her marriage with *Claude Mathieu*.

Afterwards, and before the celebration of marriage, with *Mathieu*, the defendant obtained a second order for the convocation of another family meeting, to decide whether she should remain tutrix, in the event of her marriage with *Mathieu*, upon her giving good and sufficient security for the fidelity of her administration.

The second family meeting advised the retention of defendant in the tutorship, provided she should give the proposed legal security. To this advice the under-tutor refused his assent; but the proceedings of the family meeting, were homologated by the District Judge, and from this judgment the under-tutor prosecutes the present appeal.

It is the opinion of the court, that the defendant had the right to the order for a second family meeting, to deliberate upon the *new matter* which she proposed to submit, that is to say, whether she should remain tutrix upon her giving good and sufficient security for her administration, and that it was not necessary to postpone her application until after marriage.

The right of a family meeting to retain the mother in the tutorship of her children, upon condition of her giving bond and security, prior to the celebration of her second marriage, is recognized in the case of *Smith, under-tutor, v. Dickerson, tutrix*, reported in 2 An. 401, and we think the rule well founded in reason, and recommended by considerations of public policy.

We have no doubt of the validity of the bond of the tutrix given under such authority, whether executed before, or after her second marriage, and that she incurs by such appointment or retention, all the duties and obligations of a dative tutorship.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be affirmed, and that the costs of appeal and lower court be paid out of the estate of said minors.

LOUIS ST. MARTIN v. THE CITY OF NEW ORLEANS.

Where two legislative Acts are approved on the same day, the rule of construction applicable to different sections of the same law will apply ; the minute and particular provisions of one Act prescribing the salary of the Register of Voters in the city of New Orleans, are not repealed by a general grant of power in the other Act to the Common Council in relation to all city salaries.

14	113
51	857
14	113
51	857

APPEAL from the Fourth District Court of New Orleans, *Price, J.*
Benjamin, Bradford & Finney, for plaintiff. *J. J. Michel*, for defendant and appellant.

MERRICK, C. J. We adopt as our own the opinion prepared by Mr. Justice Spofford, which considers all the questions raised by counsel in the oral and written arguments in this case, and the opinion must be understood as deciding nothing else.

SPOFFORD, J. On the 20th of March, 1856, a legislative Act was approved "providing for the registry of the names and residence of all the qualified electors of the city of New Orleans, according to Article 11th of the Constitution of the State." Session Acts, 1856, p. 131.

On the same day, was approved an Act to amend the city charter of New Orleans. Session Acts, 1856, p. 136.

The former Act, (section 18,) declared "that the Register shall, while in office, receive the sum of five thousand dollars *per annum*, payable quarterly ; provided, however, that the said salary may be reduced by Act of the Legislature, at any time or times after the first year of office ; and provided that such reduction shall only begin from and after the current year in which such Act is passed ; which salary shall be paid by the city of New Orleans ; and the said city of New Orleans shall provide a suitable office for the Register in the city-hall of said city."

The latter Act (sec. 126) provided, "that the Common Council shall fix the compensation of the services of every officer of the city or of the State, whose said services are, by law, to be paid by the city of New Orleans."

On the 27th of March, 1857, the Mayor of the city of New Orleans approved a resolution of the Common Council, declaring, "that from and after the 1st day of April, 1857, the salary of the Register of Voters of the city of New Orleans, shall be at the rate of eighteen hundred dollars *per annum*, payable monthly, on the ordinary pay roll of city officers.

The question is, whether the Common Council had the right to pass this resolution ; in other words, whether the legislative provisions as to the salary of the Register of Voters, were repealed by the authorization given to the Common Council in the 126th section of the amended city charter to fix the compensation of the services of officers therein referred to.

The District Judge held, that there was no repeal ; and the city has brought up the case for a revision of this judgment.

"The repeal is either express or implied : it is express when it is literally declared by a subsequent law ; it is implied when the new law contains provisions contrary to, or irreconcilable with, those of the former law." C. C. 23.

In *Johnson v. Pilster*, 4 Rob. 77, it was well said that "prior laws are not repealed by subsequent ones, unless by positive enactment, or a clear repugnancy in their respective provisions. If such be the rule in relation to laws enacted at

ST. MARTIN
v.
NEW ORLEANS

different periods, it applies with greater force to the several parts of a Code adopted about the same time."

As already stated, the two legislative Acts before us were approved upon the same day. The 126th section of the Charter Act can, therefore, have no greater effect in derogation of the 18th section of the Registry Act, than if it were a subsequent section of the same law. The rule laid down in Bacon's Abridgment (vol. 6, 231, verbo statute) is that "if a particular thing be given or limited in the preceding part of a statute, this shall not be altered or taken away by subsequent *general* words of the same statute." This rule was cited with approbation, and applied by Martin, J., as the organ of the court, in *Rogers v. Beiller*, 3 M. 672.

The minute and particular provisions of the Legislature prescribing the salary of the Register, and the only mode in which it may be changed even by the Legislature itself, cannot, we think, be held to be repealed by a subsequent *general* grant of power to the Common Council in relation to all city salaries, in an Act approved at the same time.

Judgment affirmed.

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123	39

CERF WOLF v. FRED. MUNZENHEIMER & Co.

Where the amount sued for was over three hundred dollars, but before judgment was rendered in the lower court, the plaintiff entered a *remittitur*, which reduced it to less than three hundred dollars—*Held*: That an appeal in such a case will be dismissed, it not being appealable in amount.

APPEAL from the District Court of the Parish of Pointe Coupée, *Ratliff, J. Thos. H. and W. J. Cooley*, for plaintiff. *A. Provosty and Phillips*, for defendants and appellants.

COLE, J. A motion is made to dismiss this appeal, on the ground that the amount involved in contestation is not sufficient to give jurisdiction to this court.

The amount sued for was three hundred and fifty dollars, with five per cent. interest from judicial demand.

Upon the trial during the taking of the testimony of plaintiff, which established that according to the contract between the parties to the suit, plaintiff was not entitled to more than three hundred dollars, he entered a *remittitur* of fifty dollars.

As the *remittitur* was entered before judgment, it is clear that the amount in contestation did not exceed three hundred dollars. *Gardère v. Garrey et als.*, 2 An. 136; *Mason v. Oglesby*, 2 An. 793.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed at the costs of appellants.

P. FORTUNICH et als. v. THE CITY OF NEW ORLEANS—M. STAGANCOVICHE et als. v. The same—T. LETCOVICHE et als. v. The same.

In an action against the city corporation to recover damages for injury done by a mob, when the defence pleaded was a general denial—*Held* : That under the pleadings the city might prove in mitigation of damages that the plaintiffs had exposed their property in the public market, in violation of an ordinance of the city requiring the markets to be closed at the hour when the injury was done, but that such evidence, could not be received as a complete bar to the action.

APPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Johnson & Davis, for plaintiffs. *J. J. Michel*, for defendants and appellants.

MERRICK, C. J. These three suits have been brought to recover damages done by a mob, during the night of the 2d of June, 1856, to certain fruit stands of the plaintiffs in the fruit market. The actions are based upon the Act of the Legislature, approved 9th of March, 1855, (Acts 1855, p. 45,) which is in these words, viz :

“ Be it enacted, &c., That the different municipal corporations in this State, shall be liable for the damages done to property by mobs or riotous assemblages in the irrespective limits.”

The defendant pleaded the general denial. There was a verdict of the jury and judgment of the court thereon, in each case respectively, in favor of the plaintiffs.

The first question presented by the record for our consideration, is a bill of exception taken to the opinion of the lower court allowing the defendant to introduce the city ordinance, approved 20th Nov. 1852, the sixth section of which provides that the market shall be opened at the dawn of day and close at twelve o'clock M.

Had this ordinance been relied upon by the defendants, as a complete bar to plaintiff's action, it could not have been offered in evidence under the general issue. But it does not appear, by the bill of exception, to have been offered for that purpose, and the only question now is, was it admissible for any purpose ?

It appears to us that it was admissible under Article 2303 of the Civil Code in mitigation of damages.

The Article cited is as follows : “ Art. 2303—the damage caused is not always estimated at the exact value of the thing destroyed or injured ; it may be reduced according to circumstances, if the owner of the thing has exposed it imprudently.

The defendant contends, that inasmuch as the plaintiffs were in fault in keeping open their stalls, in violation of the ordinance, they cannot recover under the well known legal principle, that where the damage has happened through the fault of both parties neither can recover.

Without admitting that the principle can have any application to a case like the present, it is a sufficient answer to say that this defence has not been pleaded and, as already observed, the ordinance could not have been introduced under the pleadings as a justification.

In regard to the damages there is much uncertainty. But they have been assessed by a jury of the city, who are much better qualified to judge of the facts of

FORTUNICK
v.
NEW ORLEANS.

the case than most of the members of this court, and their verdicts have been approved by the District Judge.

The judgment of the lower court in each of the above named cases is, therefore, affirmed.

SARAH A. RAIFORD AND HUSBAND v. J. B. WOOD AND WIFE.

Where a suit is brought on a promissory note, the property of the wife, in her name conjointly with that of her husband, the husband must be viewed as appearing therein only to assist and authorize his wife, and the judgment rendered in such suit is the property of the wife.

A Sheriff's sale, not recorded in the Recorder's office of the parish where the property is situated, is utterly null and void, except between the parties thereto.

Where the judgment enjoined bears the highest conventional interest, the court on dissolving the injunction cannot add anything to that interest, but in a proper case will inflict the full penalty of twenty per cent. damages.

A PPEAL from the District Court of the Parish of Point Coupée, *Ratliff J. U. B. & E. Phillips*, for plaintiffs and appellants. *J. H. Farrar*, for defendants.

BUCHANAN, J. This is an injunction sued out by plaintiff, *Mrs. Scott*, to arrest the execution of a judgment against her husband, which carried special mortgage and vendor's privilege upon the land and slaves seized under the execution. It appears that between the date of the judgment and of the seizure in execution, *Mrs. Scott* had become the purchaser at Sheriff's sale, of the same land and slaves seized at the suit of another creditor of her husband.

There are two grounds stated in plaintiff's petition for injunction. The first is, that one of the defendants in this suit, *W. B. Wood*, had waived the pact *de non alienando*, in his mortgage, by consenting to the Sheriff's sale of the land and slaves to *Mrs. Scott*, and consequently could not seize the mortgaged property in her hands without the notices and delays required as against third possessors of mortgaged property.

The second ground of injunction is, that eleven hundred dollars had been paid by petitioner's husband on account of defendant's judgment which had not been credited on the execution.

With regard to the first ground, the testimony offered does not establish any waiver of the pact *de non alienando* on the part of *W. B. Wood*, even supposing that he had the right to make such a waiver—which he had not.

The judgment upon which the seizure was made was a judgment in favor of *William B. Wood* and his wife, *Catherine M. Harbour*, upon a note given by *John S. Scott* in part payment of this same land and these slaves, purchased by him from *Pleasant Harbour*, the father of *Mrs. Wood*, and which note came to her in partition of her father's estate. The mortgage, with the pact *de non alienando*, was stipulated in *Pleasant Harbour's* sale to *Scott*, as a security for the punctual payment of this note.

The evidence thus shows the note and its accessory, the mortgage, to have been the paraphernal property of *Mrs. Wood*, and that her husband, although nominally plaintiff in the suit and judgment on the note, conjointly with his wife, must be viewed as only appearing therein to assist and authorize his wife.

Another sufficient objection to this ground of injunction, urged in argument, is, that the Sheriff's sale was not recorded in the Recorder's office of the parish of Pointe Coupée at the date of the seizure, or at the date of the injunction. It was, therefore, without effect, "utterly null and void," as against the defendants in injunction. Revised Statutes, page 453, verbo Registry. Acts of 1855, page 335.

Upon the second ground of injunction, namely : a partial payment of the debt, no evidence whatever was offered upon the trial.

The judgment of the District Court, dissolving the injunction, must be affirmed ; but requires amendment as to its money clause, as suggested by appellees in an answer to the appeal.

Sections 7th and 8th of the title "Injunction," in Phillip's Revised Statutes, p. 247 declare, that on the trial of injunctions of execution of judgments, the surety on the bond shall be considered a party plaintiff in the injunction suit ; and in case the injunction be dissolved, that the court shall condemn the plaintiff and surety, jointly and severally, to pay the defendant in such suit, interest at the rate of eight per cent. per annum, on the amount of the judgment enjoined, and not more than twenty per cent. as damages, unless greater damages are proved. Acts of 1855, p. 325.

The judgment enjoined in this case, bares the highest rate of conventional interest, by its terms ; and under repeated decisions, we are not permitted to add anything to that interest. That judgment, in principal and interest, amounted, at the date of the injunction, to nine thousand dollars and upwards.

We consider this a proper case for the infliction of the full penalty of twenty per cent. damages under the statute ; and there has been no proof of damage beyond that amount.

It is, therefore, adjudged and decreed, that the judgment of the District Court be amended ; that the injunction herein be dissolved ; and that the principal and sureties in the injunction bond, *Sarah Ann Raiford, Auguste Provosty, and James Vignes*, in lieu of the damages and interest given by the lower court, be condemned, jointly and severally, to pay to the defendants, *William B. Wood and Catharine M. Harbour*, eighteen hundred dollars, as damages, with costs in both courts.

JOHN C. INGE V. POLICE JURY OF TENSAS.

The report of the jury of freeholders appointed by the Police Jury, under the Act of the Legislature "relative to the building of levees in the parish of Tensas," to estimate the amount of damage that may be done to a proprietor where a new levee is to be built, and also the benefit that may arise from the construction of the levee, is conclusive against the Police Jury, unless it is contested upon the ground of error or fraud. But to render it conclusive the formalities of the law must be strictly complied with.

The prescription of one year against actions arising from offences and quasi-offences is not applicable to an action for damages for the partial destruction of property occupied by the construction of a levee under legal authority.

APPEAL from the District Court of the Parish of Tensas, *Farrar, J.*
P. Alexander, for plaintiff. *T. P. Farrar*, for defendant and appellant.

COLL, J. This action is based upon the eighth section of the Act of the 16th

INGE
v.
POLICE JURY.

of March, 1848, "relative to the building of levees in the parish of Tensas, and to create a special fund for levee purposes." Sess. Acts 1848, p. 160, § 8.

The section reads thus: Be it further enacted, &c., "that whenever it shall be necessary to make a new levee in the parish of Tensas, and the person or persons on whose lands the same may be laid off shall feel themselves aggrieved or injured thereby, said Police Jury shall appoint a jury of five disinterested freeholders of a different levee ward, who shall examine on oath and report to said Police Jury the amount of damage that may be done the complainant, and the benefit also that may arise from the construction of the levee, and if it appear that the amount of damage is greater than the benefit accruing, the difference shall be paid out of the levee fund within a reasonable time after the report of said jury."

It being necessary to construct a new levee on the plantation of plaintiff, the Police Jury of Tensas appointed a committee, or jury, to examine and report the damage sustained by plaintiff in the location and construction of the same.

The jury, before acting, took an oath to faithfully examine and report to the Police Jury the amount of damage, and also "the benefits" that might arise from the construction of the levee in front of the plantation of plaintiff.

Their report was as follows:

"The undersigned, appointed as a committee by the Police Jury of the parish of Tensas, to assess the damages and the benefits to the plantations of *McCall* and *Inge*, report: that *Duncan McCall* shall be entitled to the payment from the said Police Jury, to the amount of \$25 per acre, from the base of the old levee to the base of the new levee, in front of the plantation of said *McCall*; and that *John C. Inge* is entitled to the same payment per acre, from the base of the old levee to the base of the new levee, recently built, extending from the line of *McCall* and *Inge* to a point a short distance below said *Inge's* house, to where it connects with the old levee."

The number of acres for which damages were due under this report was determined by a survey of the land by the parish engineer. The report was rejected by the Police Jury, and the jury were discharged.

Plaintiff afterwards instituted this suit.

It was tried before a jury, who agreed upon a verdict for one thousand and fifty dollars, being the amount due at \$25 per acre for the number of acres found by the survey.

The Police Jury appealed from the judgment upon the verdict.

The judgment is erroneous. The report was properly rejected by the Police Jury, because the proceedings did not accord with the requirements of the statute of the 16th March, 1848.

The eighth section instructs the Police Jury to appoint a jury of freeholders to examine and report, not only the damage, but also the benefit that may arise from the construction of the levee. The Police Jury, however, appointed a jury to examine and report only the damage. They were, therefore, not authorized to value the benefit.

It is true that the jury took an oath to examine and report the damage and also the benefit, and in their report, they designate themselves as the committee appointed to assess the damages and the benefits, but they do not, in their report, state separately the amount of damage and that of the benefit, but, only, that plaintiff is entitled to twenty-five dollars per acre.

Their report ought to have complied with the law, so that it would have been patent upon it, that the benefits as well as damages had been maturely considered,

and also that no arithmetical mistake had been made in the calculations which produced the difference for which the Police Jury were responsible.

INER
V.
POLICE JURY.

Besides, the jury might erroneously estimate the damages, but not the benefits; but when they are not separately specified, it deprives the Police Jury of the ability of properly contesting the report, and of showing the particular error made by them, either in the estimate of the damages, or of the benefits, or of both.

The report of the jury is, under the statute of 16th March, 1848, conclusive against the Police Jury of the amount of damage and of benefits arising from the construction of the levee, unless it is contested upon the ground of error or fraud.

In order, however, to render it conclusive, it is requisite that the formalities of the law should be followed.

We would further remark, that the statute only requires a jury of five freeholders, whereas the Police Jury appointed seven.

As the law provides for five, this number only ought to have been appointed, for the addition of two might produce a different result from that which would have been arrived at by five. Besides, if an addition of two were permitted there would be no limitation to the extension of the number.

It is true, that in this case, five of the seven appointed only signed the report, but still this was not a compliance with the resolution of the Police Jury, which named seven.

Upon the trial, the Police Jury offered to prove by one of the jury who assessed the damages, that the jury did not take into consideration, in their examination and report, the benefits derived by plaintiff from the levee, and that the same was not considered or estimated by them.

This offer was objected to by plaintiff, upon the ground that the report having been made under oath, could not be contradicted.

The admission of the evidence would not have contradicted the report, for there was no allusion therein to the benefit to plaintiff from the construction of the levee and the object was to show that the benefit had not been considered.

It is objected by defendant, that the levee was not laid out upon the land of plaintiff, but upon the land of *Watson*.

It appears that after the levee had been laid out, the plaintiff purchased the land. The land was bought after the levee had been laid out and constructed.

It would seem, then, that the damage must have been taken into consideration by plaintiff, and that he must have given a less price for the land on that account. The action would seem to be, if at all, with the vendor of plaintiff, unless the right had been transferred by the sale. But this objection has been waived by the Police Jury, and the right of action has been recognized to be in plaintiffs by their proceedings in the case at bar.

Appellant has plead prescription and relies upon Article 3501 of the Civil Code, which declares that actions resulting from offences or quasi-offences are prescribed by one year.

This Article does not apply to the present case. The damages contended for do not result from an offence or a quasi-offence, but results from a law authorizing for the public good, the partial destruction of property by the construction of a levee, that is the destruction of that space which is between the old and new levees, for it would be exposed to inundation, and the same law provides for compensation for the damages suffered, or for the excess of damages over the benefits.

INGR
v.
POLICE JURY.

It is, therefore, ordered, adjudged and decreed, that the judgment be avoided and reversed, and that there be judgment for defendant against the claim of plaintiff, reserving the rights of plaintiff hereafter, if any he has, when the Police Jury shall proceed legally to determine upon them; and that plaintiff pay costs in both courts.

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B. T. K. BENNETT v. CITY OF NEW ORLEANS.

A municipal corporation is not liable for damage done to private property, unless the act which caused the damage was done without the authority of law, or being authorized by law, was improperly or wantonly executed.

Where a municipal corporation was sued for an act of omission or nonfeasance, in not repairing a draining machine erected for public utility, by which neglect plaintiff's premises were overflowed, and his property damaged—*Held*: That as the act complained of involved the disbursement of the corporate revenues, it was a matter of discretion with the corporate authorities, and that if plaintiff was damaged, it was *damnum absque injuria*, and he was consequently without sufficient cause of action.

Held, also: That a corporation in such a case may avail itself of this exemption from suit, under the plea of the general issue.

APPPEAL from the Fourth District Court of New Orleans, *Price, J.*
Mott & Fraser, for plaintiff. *J. J. Michel*, for defendant and appellant.

LAW, J. The defendant is sued for an act of omission, or non-feasance, in not causing a certain draining-machine, erected for public utility, to be repaired and kept in operation; in consequence of which neglect plaintiff alleges that his premises, on which he had an iron foundry and machine-shop, were overflowed, his business suspended, and his property damaged to the amount of eight thousand dollars.

The answer is a general denial, which puts at issue the law as well as the facts of the plaintiff's case.

Admitting the non-feasance of defendant, and damage to plaintiff resulting therefrom, the question presents itself: do these facts give plaintiff a right of action against defendant, a municipal corporation vested with a portion of the powers of government, for the recovery of the damage sustained?

It seems to be a well settled principle in respect to the jurisdiction of courts, that the sovereign cannot be sued without his consent, and that the principle is applicable to all governments, whatever may be their form. Jurisdiction implies superiority, and the supreme power in a state can have no superior.

This exemption from liability on the part of government, has been extended to municipal corporations, vested with, and exercising portions of the sovereign power, for the reason that such corporations are considered the representatives of the government, and that their exemption from suit is necessary to make the prerogative available to the government itself. *O'Conner v. City of Pittsburg*, 18 Penn. R., 187; *Stewart v. City of New Orleans*, 9 An., 462.

The exemption, however, has been strictly construed, in regard to municipal corporations, and they have been held liable, for damage to property, whenever the act authorized by them, was not warranted by the powers vested in them by their charter, was contrary to law, or was improperly, wantonly and maliciously done. *McGarey v. City of Lafayette*, 4 An., 440. *Walling v. Mayor and*

Trustees of Shreveport, 5 An. 660; *Wilde v. City of New Orleans*, 12 An., 15. It is held, that where the act done was clearly within the scope of their powers, and was properly executed, they are not liable for damage to private property. *Reynolds v. Mayor and Trustees of Shreveport*, 13 An., 426.

BENNETT
v.
NEW ORLEANS.

Hence it results, that a municipal corporation is not liable for damage to private property, *unless the act complained of was without the authority of, or against law, or was improperly or wantonly executed*. Such being the rule in regard to acts of commission, it applies with much greater force to acts of omission or nonfeasance, within the discretion of the corporate authorities, and involving, as in this case, an expenditure of the corporate funds. We are therefore of opinion, that the plaintiff is without a cause of action against the defendant.

The exercise of powers involving disbursements of the corporate revenues is a matter of discretion with corporate authorities, unless otherwise expressly commanded by legislative will.

If the plaintiff has been damaged, it is *damnum absque injuria*.

That municipal corporations may be sued in all matters of contract, and in cases of tort, as well as in those expressly authorised by statute, is not questioned. The exemption from suit, or non-liability for damage to private property extends to those cases in which the damage results from, or is consequent on the exercise or non-exercise of power vested in the corporation, and the power itself is legally and properly exercised, or its non-exercise is a matter of discretion. The corporation may avail itself of this exemption from suit, on the plea of the general issue, as was done in this case. *Stewart v. City of New Orleans*, 9 An. 463; *Reynolds v. Shreveport*, 13 An. 427.

It is, therefore, ordered, adjudged and decreed, that the judgment be avoided and reversed, and that there be judgment for defendant, with costs in both courts.

SUCCESSION OF JOSEPH A. BEARD.—SARAH E. ANDREWS v. EXECUTOR OF
BEARD.

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The instrument set up as a last will was in these words: "Due *Mrs. Sarah E. Andrews* the sum of two thousand five hundred dollars, payable to her order, out of the proceeds of my estate, after my death. New Orleans, June 15th, 1855. J. A. BEARD."

Held: That such an instrument being negotiable in its form, cannot be viewed as a legacy, for want of a legatee.

Where it was established that the plaintiff was the concubine of a married man, who executed an obligation in her favor, payable at his death—*Held*: That a *prima facie* case was created, which threw upon the plaintiff the burden of proving a legal consideration.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*

Hart & Martin, for plaintiff. *Simonds & Fenner*, for the Executor, defendant and appellant.

BUCHANAN, J. The testamentary executor is appellant from two judgments; one probating a due bill of the testator as a last will; and the other, condemning the estate to pay the amount of said due bill.

The two appeals are submitted for decision together.

SUCCESSION OF
BEARD.

The instrument which has been admitted to probate as a last will, reads as follows :

"Due *Mrs. Sarah E. Andrews*, the sum of two thousand five hundred dollars, payable to her order, out of the proceeds of my estate, after my death.

"New Orleans, June 15th, 1855.

J. A. BEARD."

The District Judge held this to be a testament, on the authority of the case of *Pena v. Cities of New Orleans and Baltimore*, 13 An. 86. But the difference between the two instruments is obvious. Not to mention other points of distinction, it is sufficient to say, that in the case quoted, there was a devisee named, to wit, *Francis Pena* ; while in the present so called will, there is no devisee.

The amount which *Joseph A. Beard* acknowledged to owe to *Sarah E. Andrews*, he declares to be payable out of his effects, after his death—but to whom? To the order of *Sarah E. Andrews*. The endorsement of *Mrs. Andrews*, would have made this instrument, negotiable in its form, and dated some two years previous to *Beard's* death, the property of the bearer. Consequently, viewing the instrument as an act of last will, each holder became, in turn, the legatee of *Joseph A. Beard*. It is, as if *Beard* had written "my estate, after my death, will be bound for the payment of my due bill in favor of *Sarah E. Andrews*, to any person who may be the endorser and holder of said due bill."

We hold this to be no legacy, for the want of a legatee. It appears to be simply an evidence of indebtedness. As such, it may be considered of superior rank to a legacy ; inasmuch as debts are to be paid before legacies. The document was improperly admitted to probate as a last will ; and the appeal taken from the order of probate, must be sustained.

The other appeal is a suit brought by *Mrs. Andrews* against the testamentary executor of *Joseph A. Beard*, in which she claims judgment against him for the amount of the due bill, with interest, to be paid in due course of administration. The executor, who is also one of the heirs of *Joseph A. Beard*, among other defences, pleads specially want of consideration of the due bill, alleging that the plaintiff was the concubine of said *Beard*.

Evidence received without objection, and not contradicted, has left little or no doubt upon our mind, that an illicit intercourse subsisted between the deceased signer of the due bill, (who was a married man,) and the plaintiff.

Evidence of this character, creates a *prima facie* case against plaintiff, which throws upon her the burden of proving a legal consideration for the instrument sued upon. She has offered no proof whatever upon this point.

As, however, the District Judge has not attached the same significance as ourselves to the portions of the evidence to which we have alluded, we will give plaintiff another opportunity of proving a valid consideration.

It is, therefore, adjudged and decreed, that the judgment or order of probate and execution of the due bill of *Joseph A. Beard*, deceased, held by *Sarah E. Andrews*, as a last will of said *Beard*, be reversed ; and the petition of said *Andrews* for probate, dismissed at her costs in both courts.

It is further decreed, that the judgment of the District Court in favor of *Sarah E. Andrews* against *C. C. Beard*, testamentary executor of *Joseph A. Beard*, being No. 5787 of the docket of this court, be reversed ; and that the said cause be remanded for a new trial according to law ; and that the costs of appeal in said case No. 5787, be paid by the plaintiff and appellee.

JOHN H. KNOX v. L. F. PULLIAM.

A party who has made an entry of public land under a pre-emption law, and obtained the Receiver's receipt for the purchase money, has obtained an equitable right which cannot be defeated by a patent obtained through fraud and misrepresentation.

Where the Commissioner of the Land Office was induced by misrepresentation to cancel an entry so made and to order the land to be entered as school land, under a warrant presented by another party—

Held: That the patent issued under the last entry inured to the benefit of the party making the first entry as the equitable owner of the land.

A PPEAL from the District Court of the Parish of Pointe Coupée, *Ratliff, J.*
A. Provosty, for plaintiff and appellant:

This is a petitory action for a tract of land of which the defendant is in possession. It is claimed by virtue of a patent issued by the State of Louisiana, under a certificate of the Register of the Land Office at New Orleans.

The plaintiff is the vendee of *Nathan K. Knox*, who had located the said tract of land, under a warrant issued by the State of Louisiana, and with the approval and confirmation of the land department.

The defendant avers, that he holds the land by a just title from the United States, as per Receiver's receipt of the 28th of November, 1855; and sets up fraud and error against the title of the plaintiff.

Such is the issue before this court; the question of damages and improvements being reserved for future action.

The evidence substantiates the following facts: *Nathan K. Knox* applied, on the 11th August, 1855, to the Register of the Land Office at New Orleans, to locate school warrant, No. 1233, for 320 acres, on the south half of section 35, in township 5 of range 9, east. The register refused to entertain said application as made, and only allowed it for the portions not comprehended in the entries of *Gayle & Leduf*.

It appears that *Benjamin Collins* claimed lot No. 2 of said section, on an alleged settlement made in 1843; that on the 7th February, 1846, he went before *E. Cooley*, Parish Judge, and declared that it was his intention to abandon, and that he did abandon lot No. 2, of sec. 35, township 5, range 9, east, and all intention to claim the same. It further appears, that on the same day, before the same officer, *E. Cooley*, Parish Judge, *Mathew Gayle* declared his intention to claim said lot, on the ground that he had settled and improved it; that on this declaration and application, the Register of the Land Office allowed the said *Gayle* to enter not only lot No. 2, but the entire south-west quarter of section 35.

On the other hand, it also appears, that one *Honoré Leduf, f. m. c.*, was allowed to enter the south-east quarter of section 35, under the preëmption Act of the 4th September, 1841, after the time allowed by the 5th section of the Act of 3d of March, 1843. These two entries, *Gayle's* and *Leduf's*, so illegal and unjustifiable, so surprised the Commissioner of the Land Office as to cause him to write to the Register the letter of inquiry of the 12th February, 1855; in his answer, the Register admits the illegality of *Leduf's* entry, and argues as to that of *Gayle*, that the law allowed him the quantity of land he obtained; to this Commissioner *Wilson* replies:

"Your decision adverse to the claim of *Honoré Leduf* is approved, and his entry has accordingly been cancelled. In the case of *Mathew A. Gayle*, he should be restricted to lot No. 2 of south-west quarter, section 35, township 5, range 9, east, for which he filed a declaratory statement; a new certificate must, therefore, be issued to him for this said lot, &c., or if the party desire it, the whole entry will be vacated, and the purchase money returned. If issued, send on the new certificate in a special communication, referring to the date of this."

To this decision, *Gayle* has always refused to submit, and no new certificate has ever been issued.

It was under these circumstances, *Leduf's* entry being cancelled, *Gayle's* entry restricted to lot No. 2, and he refusing to submit and claim this lot, that plaintiff's vendor tendered his warrant on the 11th August, 1855, for 320 acres of

KNOX
v.
PULLIAM.

land, that is, the south-half of section 35, in township 5, range 9 east. This application was rejected by the Register, for the portions comprehended in the entries of *Gayle* and *Leduf*, and these entries, it will be seen, included all the lands applied for. Why the Register, in view of his own decision in regard to *Leduf's* entry, and of that of the Commissioner in relation to that of *Gayle*, should have refused the application of *Knox*, or restricted it to the 94 acres, which in fact were covered by *Gayle's* entry, is more than we can understand and explain. *Knox* had then but one course to pursue, that is, to appeal to the land department for redress; he did so; but before his demand could receive the decision of that proverbially slow office, he learned that efforts were made to deprive him even of the lot of 94 acres, which, under the decision of the Commissioner, could not be claimed by *Gayle*, and were untouched by *Leduf's* entry; before anything could be heard from Washington, the Register had granted the tract to *Pulliam*, the defendant in this case. All these facts were again laid before the land office, and they were so grossly illegal, as to prompt the Commissioner, *Hendricks*, to interpose, and to write to the Register his letter of March, 1856, in which he states:

"You erred in not permitting said location, (the one applied for by *Knox*), so far as the tract in said south half of section 35 was vacant, and that in consequence, the subsequent entry of *Lewis F. Pulliam*, per certificate of the north half and south-west quarter of south-west quarter of section 35, allowed by you, and predicated upon an alleged settlement, is without authority of law, and it has therefore been cancelled."

Knox's application was then received by the Register, and it being approved by the Secretary of the Interior, which approval bears date the 29th of April, 1856, the patent in evidence was then issued in his favor by the State of Louisiana.

So that our right to this tract of land, of 94 acres, which is the only one at present under contestation, is sustained, first, by a prior application; second, two decisions of the land department; third, the approval of the Secretary of the Interior; fourth, the patent. To an unprejudiced mind, it really requires some stress on the brain to understand how the defendant can defeat it.

We have read with great attention the authorities quoted by the defendant in the lower court, and have failed to discover in them anything that conflicts in the slightest degree with our claim; in fact, properly applied, we believe they strengthen it. In the *Kittridge* case, 4 R. 83, the patent had clearly been issued in error, and obtained by a suppression of facts within the knowledge of the party who applied for it. In *Dufresne v. Haydel*, 7 A. R. 663, the right of the plaintiff to an equitable division of the land was secured to him by the Act of Congress of 1811; and it was clear that the *inequitable* action of the surveyor could not deprive him of it. In 2 Howard, *Stoddard v. Chambers*, the Supreme Court of the United States merely decided that, if two patents be issued for the same land by the United States, and the first in date be obtained fraudulently and against law, it does not carry the legal title.

We will ask, in what consists the error of the Commissioner of the Land Office, and of the Secretary of the Interior, and the fraud of plaintiff? What facts did the latter suppress? Were not these officers aware of *Pulliam's* entry, and of the circumstances under which it was received by the Register? Where is the defendant's patent?

If the issuing of a patent is a ministerial act, which must be performed according to law to be binding, what else is the act of the Register, and of what force will it be if done against law and equity? *Mr. Palms* knew that *Leduf* had no legal title to any part of the land claimed by plaintiff, himself admits it in his letter; and he knew the cancellation by his controlling officer of *Gayle's* entry, to whom the right of having a new certificate issued for lot 2, if he choose to avail himself of it, was reserved, and the refusal of *Gayle* to submit; and knowing all these facts, he refused to receive the application of plaintiff: and why? He, so prolix on other points, is exceedingly reserved on this; and the same officer, while the appeal of plaintiff is before the land department, allows *Mr. Pulliam* to enter a portion of the land. Is not all the fraud and all the error in the case on the side of defendant and the Register?

The inferior court, in this decision, states, "that it has been the policy and practice of the General Government to permit the first applicant to enter land when he conforms to the laws and regulations of the land department." This is

KNOX
v.
PULLIAM.

certainly correct. 2 Land Laws, page 479; and as *Knox* is the first applicant, his claim should prevail.

"*Mr. Knox*, on the 11th August, 1855," pursues the Judge, "applied to the Register to locate a school warrant on the south half of section 35, containing 320 acres; so far, he was undoubtedly the first applicant; the Register refused to permit him to enter said land, informing him that he would entertain his application for the portion not comprehended in the entries of *Gayle* and *Leduf*." Now, these entries included the whole land applied for by plaintiff; he could, therefore, refuse to accept with good grace; he was entitled to the whole, except lot No. 2, and even, perhaps, to lot No. 2, for *Gayle* refused, and still refuses, to avail himself of the tender made to him of the lot by the government; and under the very decisions quoted by defendant's counsel, plaintiff's right, as the first applicant for vacant land, would have defeated defendant's patent, had the government, instead of giving it to *Knox*, erroneously granted it to the former.

The Judge of the lower court further says: "Here, (after *Mr. Knox's* refusal to accept the land not included in *Leduf's* and *Gayle's* entries,) so far as the evidence informs us, and as the Register was informed, *Mr. Knox* seems to have abandoned his intention to locate his school warrant on section 35, and we hear no more of him until the 12th March, 1856."

On what fact does the court predicate the assumption that *Knox* had abandoned his intention to locate, the record does not inform us. What could he do but to prefer his claim to the department at Washington? And if, as usual, on account of the press of business in that office, the matter lingered there without decision, is he to suffer?

"It is a well established principle," said Judge McLean, in the case of *Lyle v. State of Arkansas*, 9 How., "that when an individual, in the prosecution of a right, does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him. In this case the preemption right of *Cloyes* having been proved, and an offer to pay the land claimed by him, nothing more could be done, and nothing more could be required of him under the Act.

So, here, *Knox* having presented his warrant on the land, which was vacant, and the Register having refused to entertain his demand, nothing more could be done by him but to appeal.

And such is the course indicated by the land department; see *Laws and Opinions*, 2d vol., p. 489; "It appears," said the commissioner, "that *H.* applied as early as the 12th November for the purchase of a tract of land, then subject to private entry, and tendered the money; he had undoubtedly at the time a right to enter the land, and if, when his application was refused by the Register through misapprehension, he had appealed to this office, I should have had no hesitation in directing the Register to receive it; nor could an application from any other individual during the interim have prejudiced his claim.

These instructions so completely cover this case as to leave us nothing to add, but to refer to the Act of Congress of 1836, § 1, which gives to the Commissioner a supervision over the official acts of the Register and Receiver.

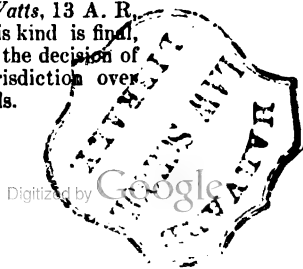
So much for the equity of the case, and the reasons of the lower court. The authorities are also clearly on our side; we made the first application; defendant's entry has been cancelled by the proper department; ours approved by the same authority; we have the patent. Are mere suppositions, that we abandoned our claim, mere surmises as to our intentions; mere charges of want of diligence, to overcome these high evidences of title?

The presumption certainly is, that the patent is valid and passed the legal title. 18 Howard, 88. The entry of *Pulliam* was set aside before the patent was issued, and it has been determined by this tribunal, that in such a case, it cannot revise the decision of the land office; *Haydel v. Nixon*, 5 A. R. 559; and the power of the Commissioner to set aside such an entry is undoubted; 2 A. R. 302; 4 A. R. 364; 9 Rob. 288; 19 A. R. 339; *Gontreaux v. Boote*, 10 A. R. 139.

It is well settled, said C. J. Merrick, in the case of *Butler v. Watts*, 13 A. R. 391, that the action of the land department upon questions of this kind is final, and that the courts, as a general rule, are without power to revise the decision of such department, specially entrusted by the government with jurisdiction over the surveys, location, settlements upon, and sales of the public lands.

Robert H. Bradford, for defendant and appellee:

This is a petitory action.



KNOX
v.
PULLIAM.

On the 11th of August, 1855, *James Barron*, as plaintiff's agent, applied to the Register of the Federal Land Office at New Orleans, to locate school warrant 1233 on the entire south half of section 35, township 5 south, of range 9 east, in the South-Eastern District, Louisiana, west of the Mississippi River. The warrant issued for 320 acres due T. 12 south, R. 17 E. The Register applied to *Mr. Barron*, in answer to the application, that the warrant could not be located on all the land applied for, because the south-east quarter of the section, and lot 2, (or the south-east quarter of the south-west quarter) had been previously disposed of by the United States. But the Register added, that the north half of the south-west quarter, and lot 1, (or the south-west quarter of the south-west quarter,) were vacant, and liable to location by the plaintiff under the warrant tendered. But *Barron* declined this offer, saying that *Knox's* letter of instructions required the entry of all the south half of the section; that plaintiff's warrant was for 320 acres; that he had no instructions from the plaintiff to locate less than 320 acres; and that, if he could not get the entire south half of the section, he could not sacrifice the warrant on the portion offered by the Register. That portion only contained 94.52 acres. The response of the Register to *Barron's* application, and *Barron's* rejoinder, are the only facts at issue. The record clearly sustains these facts as detailed above, and contains no evidence to rebut them.

The plaintiff's agent having refused to locate the lots containing 94.52 acres, defendant entered them as a *preemptor*, on the 28th November, 1855, thus allowing the plaintiff since the 11th August, 1855, the date of his application, to hear from his agent; to amend or renew his application; or to procure instructions from Washington, compelling the Register to reverse his alleged misconduct in refusing the application.

On the 20th of March, 1856, the Commissioner of the General Land Office, in answer to a request preferred on behalf of plaintiff on the 12th of March, wrote to the Register, requiring him to cancel the entry of defendant as erroneous, and to allow the entry of plaintiff. The only objection of the plaintiff to the preemption of defendant, is, that the sale to defendant was subsequent to the illegal refusal by the Register, to entertain the application by plaintiff for the land in controversy. In other respects, the preemption of defendant is unquestioned and unquestionable. Fraud is not alleged against it, yet fraud is the only ground on which it could now be attacked. Act 29th May, 1830, section 3; *Lyle v. Arkansas*, 9 Howard, 314; Public Lands, Instructions and Opinions, pp. 98 and 99; *Barton v. Hemphill*, 19 L. 510; *Morancy v. Ford*, 2 A. 299; *Courtney v. Perkins*, 5 An. 216; *Kellam v. Rippey*, 3 R. 138. The Commissioner's letter assigns the following reasons for disallowing defendant's entry:

"It is the opinion of this office that you erred, in not permitting said location, so far as the tracts in said south half of sec. 35, which were then vacant, and that in consequence, the subsequent entry of *Lewis F. Pulliam*, per certificate No. 3434 of the north half and south-west quarter of south-west quarter section 35, allowed by you on the 28th November, 1855, and predicated upon an alleged settlement in September, 1855, is without authority of law, it has therefore been cancelled." Coerced by this extraordinary instruction, the Register, on the 31st March, 1856, allowed the plaintiff, by agent, to locate the land designated by the Commissioner. On this location, a patent issued from the State to the plaintiff, who sued for the land in the parish of Pointe Coupee, where it lies.

The court below rendered judgment for the defendant. In the progress of the trial, the defendant offered in evidence a diagram of the *locus* in dispute, certified by the Register at New Orleans to be a true copy of the *original* filed in his office. The plaintiff objected to the evidence. The objection was overruled, and the plaintiff excepted, on the ground that the diagram should have been certified by the Federal Surveyor General. The bill of exception quotes the case of *Lawrence v. Groul*, 12 An. 836. That case may be invoked by the defendant, but not by the plaintiff. The facts and opinion in the case only deny to a Register the power to certify that a diagram is a true copy of certain sections "taken from the map of said township, on file in this office;" and only show that the Register must certify the diagram to be a copy of the *original* map. In the case before this court, the certificate of the Register is sustained by *Lawrence v. Groul*, for the Register distinctly states the diagram to be copied from the original. The general rule, that the Federal Surveyor General is the only person competent to certify copies of township maps, is admitted by defendant. It is sanctioned by *Millaudon v. McDonogh*, 18 L. 103, and many other authorities. But the reason-

KNOX
v.
PULLIAM.

ing which sustains the rule, sustains also the evidence excepted to in this case. The rule is founded on the assumption, that the Surveyor General possesses the original map. When, as in the present case, the Register possesses an original map also, under a law precluding the presumption that such map is a copy, Act 10th May, 1800, secs. 1 and 8, the rule applies to certificates by the Register, as well as to certificates by the Surveyor General. *Boatner v. Smith*, 1 R. 546. But, an admission that the map in the Register's office is a copy, does not destroy the efficacy of the diagram certified by him. That paper was offered merely to illustrate the basis of the sales to the plaintiff and defendant, respectively. For this purpose the diagram is competent and *exclusive* evidence. The sales in question were founded, not on the map in the Surveyor General's office, but on the map in the Register's office. Copies certified by the Surveyor General may be exclusive evidence of things occurring before the approval of the map; but they are incompetent evidence of things which, like the rival entries in this case, necessarily occur after the approval of the map, and in an office distinct from that of the Surveyor General. Between the maps in the Surveyor General's office, and corresponding maps in the Register's office, there may be, and often are, discrepancies. The sales in a township, subsequent to the approval of the township map, are required by law to be noted on the map in the Register's office only. Act of 10th May, 1800, sec. 8. These considerations show that the evidence objected to by the plaintiff, is better than any other evidence which could be produced.

The only issue remaining to be discussed is, the simple question, whether the land entered by plaintiff on the 31st March, 1856, was then liable to entry, or whether it was not rather the property of defendant, who was then in possession of the land, whilst the government was in possession of the consideration paid by him for the land.

The Register and Receiver are only *federal agents* "for the disposal of the lands of the United States, lying in the Eastern Land District of the territory of Orleans." Act 3d March, 1811, sec. 3; see also section 6 of same Act. In the sale to defendant, those officers acted within the scope of the authority conferred by section 6 of that Act. Their principal is, therefore, bound. *Smith's Mercantile Law*, 1 Am. ed. 158. And it is unnecessary for this purpose that the *form* of the contract be binding on the government, provided the government is, *ex æquo et bono*, obliged to recognise the sale to defendant. *Williams v. Winchester*, 7 N. S. 22; *Ballister v. Hamilton*, 3 An. 401; *Carlisle v. Steamer Eudora*, 5 An. 15.

In defendant's entry, the contract of sale is distinct from the *evidence* of the contract, (C. C., Art. 1755,) and was complete as soon as the agreement existed between him and the land officers, fixing the land and the price, and before delivery or payment. C. C. 2414, 2431; *Copley v. Dowell*, 1 R. 26; *Barrett v. Creditors*, 12 R. 474. Even if the officers had refused the tender of defendant, still the subsequent sale to the plaintiff would have been voidable, or void, supposing the tender to have been legal. Opinion of Benjamin F. Butler, Attorney General of the United States, Public Lands, Instructions and Opinions, pp. 213, 214, No. 149. The general maxim in the contract of sale, as enunciated in the Civil Code, 2414, 2431, is the only principle which can justify the doctrine of *Lynch v. Postlethwaite*, 7 M. 213, that the effect of the contract is governed *lege loci contractus*, although delivery should occur abroad. It is therefore unessential, that the federal patent should issue to defendant, for, to the very equivocal rule that nothing but a patent vests a perfect title to public land, the law recognizes many exceptions. *Climer v. Selby*, 10 An. 182. The federal preëemption laws, for example, vest a legal title in the preëemptor, on payment according to them, so that the government cannot afterwards wrest the land from him. *Kittridge v. Breaud*, 4 R. 82, 83, affirmed; *Climer v. Selby*, 10 An. 182; *Godeau v. Phillips*, 3 L. 62; and at best, the issuing of a patent is a ministerial act, *Stoddard v. Chambers*, 2 Howard, 284, which passes no title, but is only evidence that a title may have previously vested. *Goodlet v. Smithson*, 5 Porter, (Ala.) 245. These limitations of the dignity of patents sustain the doctrine that neither a patent, nor an Act of Congress will be suffered to impair the prior title of a holder under a conveyance from government agents. *Culliver v. Garie*, 11 L. 90; *Kittridge v. Breaud*, 4 R. 79; and sustain also the decision in *Jackson v. Wilcox*, 1 Scammon (Ill.) 344, that the Register's certificate (such as defendant holds) is of equal authority with a patent. The decision in *Jackson v. Wilcox* may be regarded as

KNOX
v.
PULLIAM.

assuming very high grounds; but the same point has been expressly decided in the federal courts, *Astrom v. Hammond*, 3 McLean, 107, and harmonizes with the fundamental doctrine of the Civil Code, and other authorities above quoted, that the patent is simply evidence of a title which really vested on the consent of the vendor and vendee, or at farthest, on payment; for if the patent is simply evidence of a prior title, the certificate of purchase is also evidence of a prior title, and the two differ, not in kind, but in degree only. The land passed to defendant with the delivery of the certificate, (*Fleckner v. Grieve*, 4 M. 694,) in virtue of the officers' consent thereby expressed or reiterated, that the vendee should take possession, (*Cuvillier v. McDonogh*, 6 M. 564,) and thereby the right of possession and the right of property theretofore subsisting in defendant, were joined to the fact of possession, so that now defendant's physical possession, which is necessarily assumed by the petitory action instituted against him in the court below, perfects his title without necessity for ulterior steps. For a written contract, whereby A declares that he has sold to B a certain lot for a certain price, is completely valid, though mentioning that another instrument remains to be executed. *Poeyfarre v. Delord*, 6 M. 11. It were better that B should have the contemplated instrument, as it is better that defendant should have the patent contemplated in his certificate; for these documents are respectively portions of the evidence of title, inasmuch, that unless the vendor be protected by the prerogatives of sovereignty, he may be sued for damages or for specific performance. But the beneficence of the law will not subordinate the rights of an innocent vendee to the caprice or fraud of a vendor, by treating the patent, or other usual consummation of title as a *sine qua non*, by demanding its production under pain of judicial reprobation. No man is required to do that which is vain, or impossible. Co. Litt. 29 a. 231 b. The law is too equitable to demand all the evidence of which a given fact is susceptible; it allows litigants reasonable choice of proofs, and will excuse the non-production of proofs which, as in this case, have been improperly withheld from a litigant by a third person for and to whom defendant is irresponsible, and from whose injustice there is no appeal save to the justice of a State tribunal.

The sale to defendant, therefore, being complete by the Register and Receiver, and the certificate which issued to him, and the patent yet due him possessing no inherent significance, but being only evidence of the precedent sale, a fact unrestricted to any specific mode of proof, it follows that the whole title, legal and equitable, was in defendant before the alleged inception of plaintiff's title, and that neither the Federal Government, in approving plaintiff's location, nor the State Government in patenting it, conferred on him any title; for it is a rule applying to all grants, that they cannot affect previous titles, so that if the thing granted was not in the grantor, no right passes to the grantee. *New Orleans v. Armas*, 9 Peters, 224; *New Orleans v. United States*, 10 Peters, 662; *Holcomb's Dig.* 374, No. 3; but the grant is absolutely void. *Holcomb's Dig.* 374, No. 4. No person can transfer to another a greater right than the transferor possesses. *Pothier Oblig.* 263. These general rules are immediately applicable to the case at bar. Plaintiff's warrant was located under the second section of the Act of 20th May, 1826, which restricts its location to "unappropriated public lands;" and the 1st section of the Act of 3d Aug., 1854, declares, that where a selection, such as plaintiff's location amounts to, covers land not intended to be granted by the Act authorizing the selection, which, in this case, is the Act of 20th May, 1826, such selection shall be void, and shall convey no right whatever. To hold that a selection or location of school lands, under the Act of 1826, can embrace lands appropriated, and thereby rendered private property, is to assign to the Act of '26 a power withheld from Congress by the Constitution. That instrument declares that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Art. 4, sec. 3, part 2. In order to sustain plaintiff's location, we must therefore admit, that on the 31st March, 1836, the date of plaintiff's location, the land located remained public, notwithstanding the prior legal sale to defendant. That this sale has been cancelled by the Commissioner, is no answer to this argument. The defendant held his land under the preemption laws, a higher authority than the Commissioner, whose cancellation of the sale, if unsanctioned by law, is a mere nullity. *Perry v. O'Hanlon*, 11 Miss. 585. The Commissioner's order to the Register, to annul the location of defendant and permit the location of plaintiff, is illegal. The Register's obedience to the order is illegal.

KNOX
v.
PULLIAM.

The duty of the Register to disobey improper instructions from the department, is expounded by the department. The Commissioner, in his letter of 27th September, 1823, to the Register at Marietta, says that instructions from the department are not paramount to the law; and that it is the duty of every officer receiving instructions from the department to compare them with the law and with previous instructions, and to construe them compatibly with the law of the land. Public Lands, Instructions and Opinions, 372, No. 295. Had this judicious and necessary rule for the construction of departmental instructions been applied by the local office to the pretensions of the plaintiff, this suit would have been prevented.

The principle announced in *Perry v. O'Hanlon*, 11 Miss. 585, is sanctioned by a subsequent decision of the same court, that a vendee of federal lands, after doing all that the law requires to entitle him to a patent, cannot be affected by the ignorance, negligence, or unfaithfulness of the government or its officers. *Nelson v. Sims*, 23 Miss. 383. These decisions of a sister State are commended to this court, no less by the contiguity of the jurisdiction in which they originated, than by the consideration that until 1831, the land in controversy in those cases was, in common with that involved in the case at bar, under the official control of the Surveyor General then presiding in Mississippi, Act 3, March, 1831, and is still subject to common rules for interpreting titles issuing from the Federal Government. They are likewise vindicated by the instructions of the department. A settler, who applies to prove and enter his preëmption before the end of the period limited by law, cannot be defeated by a vacancy in the Register's office. Public Lands, Instructions and Opinions, 639. When a person, conformably to an Act of Congress, enters land and does all he can to fulfil the law, but is prevented from completing his purchase and paying the money by failure of the United States to perform its obligations, he cannot, therefore, be deprived of his rights. *Ib.* 213.

It is admitted that the State and Federal Courts have, in many instances, attributed more importance to mere patents than consists with the preceding authorities. In *Pepper v. Dunlap*, 9 A. 137, for example, the court remarked that a Federal patent for land conclusively proves a severance and a divestiture of the Federal title, which until then may have remained unchanged, notwithstanding a sale and the receipt of the price by the government. But, even this sweeping case is ineffectual to sustain plaintiff's pretensions; for it decides, also, that the patent, to whomsoever issuing, always enures to the benefit of him to whom the patentee is bound to convey it, or for whose use he ought legally to hold it. Thus qualified, the decision favors the defendant. What matters it, whether the government retains the fee or not, so long as the land is in defendant's possession and paid for, and that, too, under the guaranty that the patent whensoever, howsoever and to whomsoever issuing from the United States, must enure to his benefit? So, in *Metoyer v. Larenandière*, 6 R. 139, it is distinctly enunciated that until patent, the title is unchanged; but there the court only referred to an ordinary settlement claim for 640 acres—an inchoate right scarcely attaining the dignity of an equitable title—a mere gratuity, petitioned for by the party under a latitudinous construction of the treaty of Paris, and thereby tacitly admitted by him to require the interposition of the Legislature to donate to him the land settled, and the interposition of the executive to enforce the donation by patent. The party begged that a boon might issue to him *ex gratia*. The defendant demands the recognition of a preëxisting title, *ex debito justitiæ*. For defendant's equitable title of preëmption has merged by payment into a mature legal title, investing him with the same right to the tract in controversy, with which Spain, France and the United States were successively invested, and with such additional rights as accrue to him from specific severance and specific divestiture in his favor. Moreover, *Pepper v. Dunlap* and *Metoyer v. Larenandière*, though negatively sanctioning the title of defendant, cannot be invoked by the plaintiff. Those cases apply to Federal patents. Plaintiff does not pretend to hold the Federal patent. No Federal patent has ever issued either to him or to his grantor.

Without attempting a further discussion of the hasty decisions and dicta which the books contain to the effect that patents are essential to complete a title, it is better to state some general doctrines which underlie all the cases on the subject; and here the admission implied above is repeated, that in different courts and cases, and at different times, various and conflicting views have been expressed,

KNOX
v.
PULLIAM.

amplifying or restricting the dignity of patents. Many of the decisions, explain them as we may, assign to patents an authority not justified by the nature of the instrument.

In the early history of our State and Federal jurisprudence, the questions most frequently arising in land cases were those relating to Spanish patents. The law and learning applicable to them will be found chiefly in Martin's Reports, and in the contemporaneous Federal Reports. These decisions have too often served to interpret and apply the patents emanating from the General Government upon sales of the domain, irrespective of the distinctions between Spanish and Federal patents. But, really, between these venerable precedents and cases involving titles by purchase from the United States, there is little congruity. Spain disposed of her crown lands gratuitously and solely with a view to their settlement by Spanish subjects. American State Papers. Public Lands III, 62. The fee, therefore, until patent, was necessarily in the sovereign, and, when the fee passed, the patentee paid no consideration. The patent issued *ex gratia*, and not as a *quid pro quo*. It was a royal charity, hostile to the assumption of a previous title in the subject. It remained defeasable for nonperformance of conditions subsequent, laws, &c., relating to the public lands, 2 Appendix, 204, in which case the government could lawfully grant the land to another subject. *Id.* ib. 204. *Bossier v. Metoyer*, 5 M. 679; *Pontalba v. Copeland*, 3 A. 86. But the United States alienates the public land for a fixed pecuniary equivalent, which vests in the purchaser a title untrammelled by conditions, and therefore indefeasible. Had the land officers, in selling the tract in question, been agents of a company, they could have refused defendant's tender of money, could have preferred plaintiff's subsequent tender, and the defendant would have been remediless. But, being Federal agents, and being properly applied to, they were constrained to sell. Public Lands, Opinions and Instructions, 213, 639. *Marsh v. Gonsoulin*, 16 L. 84. The General Government bought the province of Louisiana from France for a valuable consideration, which, practically considered, was paid by the people. The land, therefore, is held in trust for the people. The provisions in the Federal Constitution for the sale of the public domain, the Act of 4th Sept., 1841, and the implied terms of the trust, compel the sovereign trustee to sell; for otherwise the trust is unavailing. The treaty of the 30th April, 1803, was founded chiefly on the theory that the prospective Federal population would need the land acquired by the treaty for purposes of settlement and cultivation. Our benevolent preëmption system is an illustration of that theory. It follows, that the essential design of this trust was amply fulfilled when the land officers in New Orleans, as agents of the trustee, transferred the land in question to the defendant, in consideration of his preëmption and of the price paid by him.

In sales of realty the vendee generally receives his deed when the vendor receives the money for the land. Had this usage prevailed in the sale to defendant this suit might have been averted. Why did it not prevail? Why was the evidence of title suspended after the title had passed? It was to subserve the questionable convenience of the government; to gratify a vague apprehension that if the ultimate evidence of title should emanate from New Orleans instead of Washington, collusion between the vendee and the Federal agents to sell might, by possibility, ensue. The injustice, litigation and confusion resulting to the people from the harrassing suspension of their patents at Washington, is matter of general history, of which this court will take judicial notice. Many of the public lands remain unpatented, though sold years ago. Not a title of the private claims in the State have been patented. The treaty of 1803 contained a solemn guarantee that the citizens of the ceded province should be protected in their rights of property. Those rights have not been protected. Their very evidence has been withheld by the power which bound itself to maintain them. The great mass of titles in Louisiana, at the date of the treaty, were unpatented, and existed only in the imperfect form of permissions to settle, orders of survey, and plats and certificates of survey. The patent of Spain was essential to clothe these equitable titles with legal vestments. Had the title of the province remained unchanged, these inchoate rights would soon have been perfected, for the interval between a Spanish survey and the patent issuing upon it, was never greater than the necessity of each case required, and was usually but a few months. See American State Papers. Public Lands III, D. Green's ed., p. 35, et seq.

It is the doctrine of the Supreme Court of the United States, that the government, by the treaty, assumed all the obligations in regard to inchoate titles, which

KNOX
v.
PULLIAM.

had previously devolved on France and Spain. This doctrine results from the principles of international law and from the terms of the treaty. Prominent among the obligations thus imposed on the government, is the duty of issuing Federal patents to parties claiming under Spain by inchoate titles. Has this duty been performed? Claimants under Spain, in common with claimants under the United States, have suffered so long from the apathy of the government, that their grievances have become part of our judicial annals. The delay in issuing patents is frequently prolonged until intervening descents and sales raise serious questions as to the right of any particular person to receive the patent. Meanwhile, receipts and other original evidence of property are often lost, thus compelling the true owner of the land either to abandon all hopes of getting his ultimate evidence of title, or to apply for such evidence to tardy officials, to assume the burden of proof in the essential allegations, to resort to formulas and technicalities alien or hostile to the civil law, and to suffer all the expenses and embarrassments incident to business transacted with a remote and irresponsible office, through the instrumentality of lengthened correspondence or distant agents. The government, instead of attempting to remove the difficulties necessarily caused by these delays in issuing patents, has enhanced those difficulties in many cases by executing resurveys of land sold or confirmed. These resurveys are always *ex parte*, and occasion endless confusion among the lines and corners of the tracts resurveyed. They frequently occasion gross departures from original locations and areas, and too often afford pretexts to the government for coercing land owners to receive titles according to the modified locations and contents, or to abandon their lands to the government. England, France and Spain properly empowered their several colonial authorities to issue ultimate evidences of title without the intervention of the crown, and without any necessity for appealing in each case to the home government. We are accustomed to regard the year 1803 as the dawn of superior enlightenment and of superior civil liberties; but the relations between the government and the land owner in Louisiana, prior to the treaty of Paris, exhibited a regard for the rights of the owner, and a promptness in the completion and protection of his title which the American Government has never imitated. A review of the land system of our Government, as practically administered in the departments at Washington, affords us but little reason to congratulate ourselves upon the change of government resulting from the treaty of Paris.

The indifference of the government to the discharge of its duties, should stimulate the courts of the country to mitigate, as far as possible, the hardships resulting to the people. Since the government will not issue patents when they become due; since the excellent precedents of England, France and Spain, in empowering the local officers to issue patents, have been aljured by the United States, the judiciary should, on all proper occasions, sustain and enforce such primary evidences of title as the defendant produces in the case at bar and should not demand evidences which are merely cumulative in their nature, and which depend for their very inception upon the caprice of an unknown and irresponsible ministerial officer. If the sovereign vendor, after receiving the consideration from the vendee, delays for his own exclusive convenience, the transfer of the acquittance or evidence usually given by private vendors, and thereby, as in the case at bar, extends to third persons facilities for filching the land from the true vendee, and that too by *ex parte* proceedings, it is respectfully contended that the State courts should rebuke such oppression by the federal authorities, preclude those authorities from taking advantage of their own wrong, and prevent the second vendee from degrading the authority of a court to the consummation of injustice. That the defendant cannot sue the United States for the patent due him, and cannot sue for damages for its detention, constitutes a powerful argument for the defendant. If men are bound in reason and in conscience to comply voluntarily with their legal duties, a *fortiori* is a government bound. The very exemption of a sovereignty from suit should render the sovereignty anxious to discharge its liabilities. The very dependence of the citizen should secure in his behalf the parental solicitude of his government. Governments, and the attributes of governments, are devised for the protection of the people; and the immunity of the government from litigation is designed, not to protect the government in acts of oppression, but to contribute to its authority and permanency, and to afford its beneficence and magnanimity an opportunity of securing to the government the veneration and devotion of the citizen.

KNOX
v.
PULLIAM.

The power of this tribunal to apply the general principles of right and of our State jurisprudence to the case at bar, is apparent from the case of *Widow Dufresne v. Haydel*, 7 An. 660. In that case the defendant, a back preëmtor, held under a federal survey, duly approved and patented. Plaintiff held a contiguous preëmption under the usual certificate of purchase, but contended that an equitable division of the land had not been made, and that she was entitled to buy land embraced in the defendant's patent entry. The court sustained her claim on the broad ground, that in selling its domain, the federal government and the vendees were bound by the principles applicable to ordinary vendors and purchasers, and that, therefore, although the issuing of a federal patent irrevocably vests the title in the patentee, yet, if the land already belonged to another person, such subsequent patent enures to the true owner's benefit. And see *Sprigg v. Hooper*, 9 R. 248. The doctrines governing the relationship of principal and agent, also show that the solution of the case at bars depends on local law. Contracts with an agent are construed according to the law of the agent's domicile, and not according to the law of the principal's domicile. *Oliver v. Lake*, 3 An. 78; *Bent v. Lauve*, 3 An. 88; *Kling v. Sejour*, 4 An. 128. In defendant's case, the vendee and government agents reside in Louisiana, the subject of the sale is land in Louisiana, the agreement was made and the money was paid in Louisiana, the certificate of purchase, which represented the land, was delivered in Louisiana, and the contract must, therefore, be governed by Louisiana law.

The reports of our own State, and of other States in the Union, abound with cases illustrating the application of local law to the interpretation of titles issuing upon sales of land by the general government. Many of these decisions are immediately in point. An unpatented certificate of entry is a better equitable title than a junior patent certificate, so that the patented title will be avoided in equity at the instance of the first purchaser. *Hester v. Kembrough*, 12 S. & M. 659. See *Climer v. Selby*, 10 An. 82; and *Holcomb's Dig.* 481, No. 14. Patents are voidable or void for mistake or fraud, or if sustained, may inure not to the patentee, but to the party actually entitled. *Ann. Dig.* for 1847, p. 334, No. 56; *Nelson v. Moon*, 3 McLean, 319; 10 An. 133; *Bell v. Hearne*, 10 An. 515; *Davis v. Fletcher*, 11 An. 506; *Jackson v. Hart*, 12 Johnson, 76; *Wilcox v. Jackson*, 13 Peters, 498; *Stoddard v. Chambers*, 2 Howard, 284; *Kittridge v. Breaud*, 4 R. 83. The case last cited is conclusive. In that case, *Kittridge*, a back preëmtor, bought certain land in the vicinity of his front tract under the 5th section of the Act of 3d of March, 1811, as revived by the 7th section of the Act of 11th of May, 1820, S. C. 2 R. 40. Afterwards, discovering that he had not bought his complement of acres, he purchased another parcel. Both sales were sustained by corresponding surveys, but the second one was not shown on the approved township map. After the second sale an ordinary preëmtor, having no notice of the second sale upon the face of the map, entered part of the land embraced in that sale. Pending the litigation which ensued from these conflicting sales, defendant, by concealing the conflict, got a federal patent for his entry. There was judgment for plaintiff, reversing the judgment below. The court remarked, that "the patent, in this case, bears date August 31st, 1842, since the period when this case was last before us, and the judgment in favor of the defendant reversed. He, therefore, knew of the existence of the claim of the plaintiff, and must have concealed it from the knowledge of the Commissioner of the General Land Office, and the President, otherwise a patent would not have been issued. We will not permit a party to benefit himself by suppressing a portion of the facts when he applies for a patent, when they are within his knowledge. The benefit of the patent must inure to the plaintiff, who is, in our judgment, entitled to recover the land." *Kittridge's* case had much to weaken it, and *Breaud's* case had much to render it plausible. *Kittridge* had been guilty of laches. His right of entry accrued on the 3d of March, 1811. He suffered years to elapse without making the entry, and when he did tardily comply with the offer of the government, he neglected to enter as much as he was entitled to enter, and did not buy the deficit in the rear of his front tract until after the Act of May 11, 1820. No sale under the 5th section of the Act of 3d of March, 1811, was legal without a corresponding survey. To admit, therefore, that a back preëmtor, who is bound to know the size of his front tract, can, to humor his own whim or interest, enter part of his back preëmption at one time and enter the remainder many years after, is to admit that the surveying department is the mere slave of the preëmtor's caprice, and is bound to make surveys, *ad infinitum*.

KNOX
"POLLIAM.

tum, until the aggregate of such surveys may amount to the contents of the entire front tract. The *argumentum ab inconvenienti*, if not fatal to such a theory of partial entries, shows at least that those entries can only be upheld by a very strained interpretation of the equity of the Act of 3d of March, 1811, and the Acts reviving its provisions from time to time. On the other hand, the position of *Breaul's* entry was a strong one. The department had neglected the duty of delineating *Kiltridge's* last entry on the map. * * * *

The preceding portion of this argument has proceeded on the supposition that the formalities accompanying the inception of plaintiffs' title are legal. But, the legality of those formalities is very questionable. Plaintiff's title is founded on the first and second sections of the Act of 20th of May, 1826. The second section of the Act declares that the school land, authorized to be located by the first section, "shall be selected by the Secretary of the Treasury." The obvious intention of the Act is, that the selection shall precede the appropriation, and shall be made by an indifferent and sworn agent of the government. In the case at bar both the intent and letter of the law have been violated. Selection and appropriation occurred contemporaneously, and were effected not by an agent of the government, but by the agent of the plaintiff, by a party whose interests are opposed to the interests of the government, and who is not restrained by the obligations of an oath or of an official station from pursuing his interests.

The policy of the Act of 1826 has been evaded, as well as the spirit and letter of the Act. Its policy is to discourage *floats*, but the evasion by the plaintiff, if upheld, destroys this policy and makes the location of a school warrant dependent on the pleasure of the holder. Floats are always mischievous. They are continually perverted to purposes of speculation at the expense of the actual settler. The case before this court is a significant illustration of the inconvenience, immorality and injury resulting from floats. Had the Act of 1826 been complied with in this case, the defendant would only have been opposed by the government; private interests would not have intervened to defeat an investigation of the conduct of the Register, and the title of defendant; and this suit would have been obviated. There can be no float by intendment of law; for it is a title *sui generis*—conferring extraordinary power on the holder, and is never created but by express law, to meet an express emergency. No such law has been invoked by plaintiff. None such is in existence. And the very proceedings on which he relies to maintain his float commend the consideration of defendant's title to the attention of this court. Plaintiff's entry is embraced in Report 28 of the Register at New Orleans. That entry, in obedience to the 3d section of the Act of 3d August, 1854, was affirmed by the Secretary of the Interior, "subject to the legal rights of others, existing at the time said selections were made known at the District Land Office." The Record throughout shows that defendant had an incontestible title to the land in question, at the time of plaintiff's entry. Therefore, the rights of the defendant were saved, and plaintiff took nothing by the affirmance in Washington of his pretended location.

It is important to observe, that the register did not refuse plaintiff's application on the ground of the entry by *Gayle* of the whole S. W. quarter of sec. 35; he "refused on the ground that the S. E. quarter of section 35 had been selected for schools, per State school warrant No. 655, under Act of 20th May, 1826, and the lot No. 2 of the S. W. quarter of said section was claimed by *Mathew C. Gayle*, per certificate No. 3395, under Act of Congress of 4th September, 1841." *Gayle* had entered the whole quarter, but the entry had been partly cancelled, and only covered the S. E. quarter of the S. W. quarter, or lot two of the S. W., at the time of plaintiff's application.

MERRICK, C. J. The plaintiff claims, in virtue of a patent issued by the State of Louisiana, the north half of the south west quarter and lot No. 1, of section 35, in township 5, range 9 east, in the south eastern district of Louisiana, west of the Mississippi, containing 94 54-100 acres.

The defendant claims to be the equitable owner of the land, and alleges fraud on the part of the plaintiff. The judgment of the lower court being in favor of the defendant, the plaintiff appeals.

It is conceded, that the title is out of the government of the United States.

It appears that "on the 11th of August, 1855, *James Barron*, as *W. K. Knox's*

KNOX
v.
FULLIAM.

agent, applied to the Register of the Federal Land Office at New Orleans, to locate school warrant 1233 on the entire south half of section 35, township 5 south, of range 9 east, in the south eastern district, Louisiana, west of the Mississippi river. The warrant issued for 320 acres due T. 12 south, R. 17 E. The Register replied to *Mr. Barron*, in answer to the application, that the warrant could not be located on *all* the land applied for, because the south-east quarter of the section, and lot 2, (or the south-east quarter of the south-west quarter,) had been previously disposed of by the United States. But the Register added that the north half of the south-west quarter, and lot 1, (or the south-west quarter of the south-west quarter,) were vacant, and liable to location by the plaintiff under the warrant tendered. But *Barron* declined this offer, saying that *Knox's* letter of instructions required the entry of *all* the south half of the section; that plaintiff's warrant was for 320 acres; that he had no instructions from the plaintiff to locate less than 320 acres; and that, if he could not get the entire south half of the section, he could not sacrifice the warrant on the portion offered by the Register. That portion only contained 94.52 acres."

On the 28th day of November, 1855, the defendant entered the 94 52-100 acres by preëmption, and obtained the receiver's receipt for the purchase money.

Thus matters stood until the 20th day of March, 1856, when it appears that the Commissioner of the General Land Office was induced by *ex parte* misrepresentations contained in a letter dated March 12th, 1856, to order the defendant's entry to be cancelled and the land to be entered as school land, under *William K. Knox's* warrant for 320 acres. The misrepresentation, (as it is quite transparent from the letter of the Commissioner,) consisted in suppressing the fact, that *Knox's* agent had refused, on the 11th of August, 1855, to enter the smaller quantity of land under his warrant for 320 acres, and inducing the Commissioner to suppose that the plaintiff had applied to the land office to make such entry prior to the entry of defendant by preëmption; whereas, in truth, he had refused to sacrifice his warrant. The defendant, therefore, by his entry, which was legally and rightfully made, obtained an equitable right which cannot be defeated, and plaintiff's title must be held to enure to the benefit of the defendant.

In a recent review of the law on this subject the Supreme Court of the United States said :

" The question is, have courts of justice power to examine a contested claim to a right of entry under the preëmption laws, and to overrule the decision of the Register and Receiver, confirmed by the Commissioner, in a case where they have been imposed upon by *ex parte* affidavits, and the patent has been obtained by one having no interest secured to him in virtue of the preëmption laws to the destruction of another's right, who had a preference of entry, which he preferred and effected in due form, but which was defeated by false swearing and fraudulent contrivance brought about by him to whom the patent was awarded ?"

" The general rule is, that where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and the Government, regardless of the rights of others, the latter may come into the ordinary courts of justice and litigate the conflicting claims. Such was the case of *Comegys v. Vasse*, 1 Peters, 212, and the case before us belongs to the same class of *ex parte* proceedings; nor do the regulations of the Commissioner of the General Land Office, whereby a party may be heard to prove his better claim to enter, oust the jurisdiction of the courts of justice. We announce this to be the settled doctrine of this court."

The court proceeds, "It was in effect so held in the case of *Lytle v. State of Arkansas*, 9 Howard, 328, next in the case of *Cunningham v. Ashley*, 14 Howard, and again in the case of *Bernard v. Ashley*, 18 Howard, 44." *Jones v. McMasters*, 20 Howard Rep. p. 8.

This court held the same doctrine in the case of *Wiggins v. Guier*, 13 An. 356. The plaintiff, *John H. Knox*, has no better right than his immediate vendor, *W. K. Knox*.

The judgment of the lower court, which deprives the plaintiff of the unjust advantage obtained by his *ex parte* representations, must be affirmed.

Judgment affirmed.

KNOX
v.
PULLIAM.

RIDDELL v. JACKSON.

Plaintiff and defendant purchased on the same day contiguous lots of ground, from the same vendor, with valuable improvements thereon, the buildings on the one lot being divided from the buildings on the other lot, by a wall in common; both acknowledged possession of the lots, &c., thus sold; and both acts of sale referred to the same plan for limits. In a contest of boundary between plaintiff and defendant, a survey was ordered, which showed that the plan referred to was erroneous, and that plaintiff, to get the quantity of land called for in his title, made in accordance with this erroneous plan, would encroach upon the improvements of defendant. *Held*: That as the buildings designated in the act of sale appear to constitute by far the most valuable part of the thing sold, they must control an alleged measure of invisible lines falsely stated in the plan referred to, by a careless or incompetent surveyor.

APPEAL from the Sixth District Court of New Orleans, *Howell, J.*
J. Dunlap, for plaintiff. *Durant & Hornor* and *L. Peirce*, for defendant and appellant.

BUCHANAN, J. Plaintiff and defendant purchased on the same day, of the same vendor, contiguous lots of ground, with buildings erected thereupon, the buildings on the one lot being separated from the buildings on the other lot by a wall in common at the time of the sale.

The description of the thing sold, in plaintiff's title, is as follows:

"A certain lot of ground, lying and being in the square bounded by Canal, Common, Circus and Phillippa streets, designated by the number one on a plan drawn by *Henry Mullhausen*, architect and civil engineer, on the 13th day of July, 1846. Said lot No. 1 measuring 29 feet 1 inch front on Phillippa street, 26 feet 3 inches in the rear, 135 feet 10 inches and 4½ lines on one line, and 134 feet on the line separating it from lot No. 2; on which lot of ground is a three story brick dwelling house, kitchen and dependencies; the whole rented at the rate of nine hundred dollars per annum to the 1st of November, 1846."

The description of the thing sold, in defendant's title, is as follows:

"A certain lot of ground, lying and being in the square bounded by Canal, Common, Circus and Phillippa streets, designated by the No. two, on a plan drawn by *Henry Mullhausen*, architect and civil engineer, on the 13th of July, 1846. Said lot measures 30 feet 2 inches front on Phillippa street, 26 feet 6 inches in the rear, 134 feet on the line dividing the same from the lot No. 1, and 132 feet 4 lines on the line dividing the same from lot No. 3; on which lot of ground is a three story brick dwelling house, kitchen and dependencies, the whole now rented at the rate of one thousand and fifty dollars per annum to the 1st of November, 1847."

RIDDELL
v.
JACKSON.

The vendees acknowledge possession of the respective lots, &c., thus sold, and have been in possession thereof, respectively, ever since.

On the 1st of May, 1855, nearly nine years after the sale, the plaintiff instituted this suit, alleging that the line of one hundred and thirty-four feet, mentioned in both conveyances as the line dividing the two lots numbers one and two, had never been run and marked by meets and bounds; and that defendant, adopting another and false boundary line, has taken possession of and has occupied and enjoyed, since the 8th of August, 1846, a large and valuable portion of plaintiff's lot, number one.

The petition prays that the line of division between lots number one and two, may be fixed and marked by limits, and established by a decree, and for damages. The answer is a general denial.

Surveyors were appointed to run this division line; and by their report and testimony, it appears that a line following the party wall which separates the houses of plaintiff and defendant, will not give plaintiff the quantity of land called for by his title; but that *Mullhausen's* plan is erroneous, and the line of 134 feet called for by the title, and exhibited on that plan, can only be had by drawing a crooked line from front to rear, which, while it enlarges the apartments of plaintiff will encroach upon those of defendant.

One of the surveyors who ran the line testifies. "The line which is claimed by the plaintiff as the true line, would run through the entry of defendant's house; at the widest part it is four feet, four and a half inches from the center of the wall. The next door to the defendant's house are the parlors of plaintiff. If this line were to be made, it would enlarge the parlor of *Dr. Riddell*, plaintiff, and his yard and the rooms up stairs over the parlor. The line claimed by plaintiff would not give him any additional front on *Philippa street*, or on the alley in the rear. It would involve an entire new wall between the parties—and would compel a modification of defendant's passage way or entry, and of the upper portion of his house also above the entry."

This claim of plaintiff cannot be sustained. It is founded upon a plan exhibiting a line, which is admitted on all hands to be erroneous; and it leaves out of view that important portion of the description of the thing sold, which concerns the improvements. The titles of the two parties are of equal dignity. Both are of the same date, and have the same author. The plaintiff acquired a three story brick dwelling house, kitchen and dependencies, then under lease at a rent of nine hundred dollars. The defendant acquired a three story brick dwelling house, kitchens and dependencies, then under lease, at a rent of one thousand and fifty dollars.

These designations of visible objects, constituting by far the most valuable part of the thing sold, must control an alleged measure of invisible lines, falsely stated by an incompetent or careless surveyor.

The plaintiff knew what he was purchasing, for he acknowledged himself, in the act of sale, to be in possession of the thing purchased.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed; and that there be judgment in favor of the defendants and appellants, with costs in both courts.

E. HIESTAND v. CITY OF NEW ORLEANS.

14	137
124	1089

An assignment of errors in the Supreme Court, under Art. 897 of the Code of Practice, is not necessary when the case was decided in the court below on an exception to the sufficiency of the plaintiff's petition.

The plaintiff is not bound to administer proof of the allegations of his petition which are not denied by the answer.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Plaintiff in *pro. per.* *J. J. Michel*, for defendant and appellant.

SPOFFORD, J. The defendant has appealed from the judgment of the District Court in favor of the plaintiff.

There is neither evidence, statement of facts, nor bill of exceptions in the record, and the case was not tried by a jury.

In such cases the rule of practice is imperative. "The appellant who does not rely, wholly or in part, on a statement of facts, an exception to the Judge's opinion or special verdict, to sustain his appeal, but on an error of law appearing on the face of the record, shall be allowed to allege such error, if within ten days after the record is brought up he files in the Supreme Court a written paper stating specially such errors as he alleges; otherwise, his appeal shall be rejected." C. P. 897.

It being too late to file an assignment of errors now, and none having been filed, the motion to dismiss must prevail.

Appeal dismissed.

SAME CASE—ON A RE-HEARING.

SPOFFORD, J. Considering that the case went off in the court below upon an exception to the sufficiency of the plaintiff's petition, which admitted all the allegations of fact therein contained to be true, and that in *Wood v. Henderson*, 2 An. 220, no assignment of errors was held necessary in this class of cases.

It is ordered, that the judgment dismissing this appeal be set aside, and the cause set down for trial upon its merits.

SAME CASE—ON THE MERITS.

MERRICK, C. J. The plaintiff alleges that he was elected Assistant City Attorney in the month of April, 1855, for the city of New Orleans; that he entered upon the duties of his office and continued to discharge the same until the 19th day of July, 1856; that, while in office, he instituted suits and obtained judgments in favor of said city, in the various courts and before the several justices of the peace, on tax bills, licences, &c., due the city, amounting in the aggregate to upwards of \$400,000; that he is entitled by law to five per cent. upon the amount of the judgments so obtained; that when he went out of office there remained, and still remain, uncollected judgments to the amount of \$167,793 36, as set forth

HUSTAND
v.
NEW ORLEANS.

in the account annexed to the petition, on which his commissions amount to the sum of eight thousand six hundred and two 22-100 dollars; that since he went out of office petitioner has offered to the city authorities, if they would authorize him so to do, to collect and pay said judgments into the city treasury without any charge whatever to the city, except the commissions to which he is by law entitled for obtaining said judgments, which liberal offer was rejected by the city; that judgment was rendered against the defendant in said suits, for the amounts claimed and the interest allowed by law, and five per cent. on the amount of the judgment for Assistant City Attorney's fees, costs, &c., and that the city having so refused to permit him to collect said judgments, in order to get his commissions, he is wholly without remedy for the collection thereof, and that said city is in law and equity bound to pay him for his said commissions. He prays for judgment for \$8602 22.

To this petition the defendant first filed an exception, averring "that plaintiff by his own showing, sets forth no ground of action against the exception," and prayed for a dismissal of the suit.

Afterwards, on motion of defendant's counsel, it was ordered that the exception should be "transferred, to be tried with the merits, and that said exception be taken as answer to plaintiff's petition herein."

The plaintiff having filed a supplemental petition, praying for a trial by jury, it was agreed by counsel that the jury should be waived and the cause submitted to the court on the pleadings, either party having the right to file a brief.

There was judgment in favor of the plaintiff for the amount sued for, and the city appeals.

The first point made by the counsel for the appellant is disposed of by the single remark, that after the parties had consented that the exception should be taken for an answer, it could no longer be treated as an exception. It was what defendant's counsel intended, viz: an answer, and his defence must stand or fall with it.

The second ground is, that the District Judge erred in considering the plea as an answer admitting all the facts when in truth the answer admits nothing. When we come to examine the answer we do not find any denial of the allegations contained in the petition. The only issue raised is one of law.

The plaintiff is not bound to administer proof of the allegations of his petition which are not denied by the answer. *Akin v. Bedford*, 4 N. S. 616; 19 L. R. 90.

The allegations contained in the petition must, therefore, be taken as true or proven.

But it is contended, that the judgment when rendered against a party on a tax bill embraces two objects, one the tax and interest belonging to the city, the other the five per cent. allowed the City Attorney by the Act of 1853, p. 86. The answer to this is, that the judgment with its incidents is rendered in favor of the city, and after the city has refused to allow the City Attorney to collect these judgments, it cannot be heard to say that the City Attorney has an interest in them still to the amount of his fees, and that he can claim them when collected of his successor.

Our attention is called to the case of *Hustand v. Labat*, 11 An. 30, and the correctness of that decision is questioned. It was there admitted, that the question decided in that case was not free from difficulty. But after due reflection we are not satisfied that any principle more satisfactory can be adopted than the one upon which the decision is based.

It is urged against that decision, that it declares that the fee of the City Attorney is earned by the rendition of the judgment, and that his successor will not receive anything for collecting these judgments, and, therefore, will be negligent, because without interest, in their collection. He will have the same interest in the fees in the hands of *his* successor, and it will be in the power of the city, if sued for the fees of the Assistant City Attorney, to defend the suit on the ground that he has been negligent in the discharge of his duties, if such be the fact.

Judgment affirmed.

SPOFFORD, J., took no part in the decision of this cause.

HIRSTLAND
v.
NEW ORLEANS.

J. F. RIVIÈRE v. J. McCORMICK.

Where an instruction to the jury was asked for, which might have been understood by the jury as intimating the opinion of the Judge upon the facts of the case—*Held*: That such instruction was properly refused; that the instructions of the Judge to the jury should be embodied in a form to avoid instructing the jury upon the facts.

A PPEAL from the District Court of the Parish of Lafourche, *Roman, J. Beatty & Bush*, for plaintiff. *C. Belcher*, for defendant and appellant.

BUCHANAN, J. The question involved in this case, is the right to a note for six hundred dollars, made in favor of a person deceased, of whom plaintiff is administrator. The note is in possession of the defendant, who pleads that it was transferred to him for a valuable consideration by the deceased.

The issue was tried by a jury, who found for the plaintiff.

The case turned in a great measure upon the credit to be attached to the testimony of witnesses examined for defendant. Those witnesses were seen and heard by the jury, and were probably known to them, being residents of the same parish. An inspection of the record has not convinced us that the jury has done injustice by their verdict.

A bill of exceptions was taken by the counsel of defendant to the refusal of the District Judge to charge the jury, that the possession of the note by defendant was a circumstance which might be considered by the jury as corroborating the testimony of the witness offered to prove the transfer, under the Article 2257 of the Code. The Judge charged that the fact of possession might be considered and weighed by the jury together with the other circumstances and the evidence of the case. There was no error in this ruling. It is the duty of the Judge to avoid instructing the jury upon the facts, and the form in which the Judge embodied his instruction conveyed the proper idea to the jury. The instruction asked and refused might have been understood by the jury as intimating an opinion of the Judge upon the facts of the case, and thus have produced an illegal effect.

Judgment affirmed, with costs.

FROST & Co. v. J. B. WHITE—WHITE & WHIDDEN, Intervenor.

The interest of a non-resident in the property of a foreign commercial firm, may be attached for a debt due to a citizen of this State.

When parties intervene, and bond property attached, they are estopped from denying the fact that there is any property attached, having by the act of giving bond judicially admitted it.

APPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Simonds & Fenner, for plaintiffs and appellants. *Singleton & Clack*, for defendant.

LAND, J. This suit was commenced by attachment for the individual debt of the defendant, a partner in the commercial firm of *White & Whidden*, domiciled in the State of Arkansas, and property belonging to the partnership was seized under the writ. The defendant was personally cited. The firm of *White & Whidden* intervened in the suit, bonded the property attached, and moved to dissolve the writ of attachment substantially on the following grounds :

1. Because the partnership property of the firm of *White & Whidden* was not subject to attachment for the individual debt of *White*.

2. Because the surety on the attachment bond did not possess the qualities required by law.

3. Because no property was in fact attached.

First. The defendant is a non-resident, and his property, rights and credits of every kind, are liable to be seized for the payment of his debts under our attachment laws. C. P., Arts. 239, 256.

The partner of the defendant is also a non-resident, and cannot invoke in his behalf the rule recognized in the case of *Shirley et al. v. Owners of Steamer Bride*, 5 An. 260.

The attachment in this State, of the interest of a non-resident in the property of a foreign commercial firm, for a debt due a citizen of this State, is not forbidden by any law, or opposed by any consideration of public policy, but on the contrary, is recommended as a matter of remedial justice in favor of our own citizens.

The claims of partnership creditors or other persons, will be heard and enforced when properly presented and satisfactorily established. It will be a proper time to consider such claims, when the parties in interest present them for adjudication. The court will not presume the existence of demands against the property attached in the absence of evidence to the contrary.

Secondly. The surety on the attachment bond possessed all the qualities required by law. He was capable of contracting, was solvent, and had property sufficient to answer for the amount of the obligation, and resided within the jurisdiction of the court. C. C. 3011.

Thirdly. The intervenors judicially admitted that property had been attached by the Sheriff under the writ issued in this case, bonded the property attached, and gave a description of it in their bond for its release.

Under these circumstances, they are concluded by their judicial admission of the fact, and are estopped from denying its truth. *Denton v. Erwin*, 5 An. 18.

The writ of attachment was erroneously set aside by the District Judge.

It is, therefore, ordered, adjudged and decreed, that the judgment be avoided

and reversed, so far as it dissolves the writ of attachment issued in this case, and that said writ be reinstated, and the privilege of plaintiffs on the property attached be recognized and enforced; and that the judgment be affirmed so far as it condemns the defendant to pay the debt sued for, with interest and costs. It is further decreed, that the defendant and appellee pay the costs of both courts.

FROM
v.
WHITE.

THOMAS K. PRICE et al. v. C. M. EMERSON.

A party claiming title to a promissory note under an order and sale made in proceedings in bankruptcy, is not bound to produce in evidence a transcript of all the proceedings.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*
Benjamin, Bradford & Finney, for plaintiffs and appellants. *Durant & Hornor*, for defendant.

LAND, J. The defendant is sued as maker of three several promissory notes, payable to the order of *John McHenry*, and by him endorsed in blank.

The defendant pleaded, with other matters of defence, the want of title in the plaintiffs to the notes sued on.

On the trial the defendant offered in evidence a transcript of the record of the proceedings in the matter of the bankruptcy of *Thomas K. Price*, (the original holder of the notes,) in the United States District Court for the Middle District of Tennessee, to prove that the plaintiff, *Price*, had surrendered his interest in said notes, and that it had thus passed to his assignee in bankruptcy. To rebut this evidence the plaintiffs offered a transcript from the same court for the purpose of showing an order to the assignee to sell the choses in action of the bankrupts with their other property, and that a sale of the same had been made to *A. W. Johnson*, one of the plaintiffs in this suit.

To the introduction of this evidence the defendant objected on the ground, that the transcript did not purport to be a complete and perfect record of the proceedings in bankruptcy, but only contained extracts from the same. This objection was sustained by the court, and the plaintiffs excepted.

The District Judge erred. It was held by this court in the case of the *Succession of Stafford*, 2 An. 886, that in mortuary and insolvent proceedings the production of the entire record has never been required in practice, and that there is no reason why it should be.

A party claiming title to a promissory note, under a decree and judicial sale, is not bound to produce in evidence the whole of the record. *Wilson v. Munday*, 5 L. 483.

It is, therefore, ordered, adjudged and decreed, that the judgment be reversed, and the cause remanded for further proceedings according to law, with instructions to the District Judge to receive in evidence the transcript offered by the plaintiffs. And it is further ordered, that the defendant pay the cost of this appeal.

MARCUS HUNTER et al. v. J. M. BELL, Sheriff.

The prescription of sixty days against ships and vessels, has reference to the time of asserting the privilege by suit. The right of privilege is fixed by the judgment.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
Gaither & McPheeters, for plaintiffs. *C. A. Taylor*, for defendant and appellant.

BUCHANAN, J. This is an appeal by the Sheriff of the parish of Orleans, from a judgment condemning him in damages for seizing the ship *St. Peter*, under a *feri facias* issued upon a judgment, which gave a privilege upon the ship *St. Peter*.

This case cannot be distinguished in principle from that of *Elmore v. Hufty*, 13 Am. 227.

The appellee's counsel contends that the privilege was lost by the lapse of sixty days between the judgment allowing the privilege, and the levying of the *fi. fa.*

The prescription of sixty days against privileges upon ships and vessels, recognized by many decisions, has reference to the time of asserting the privilege by suit. We have been referred to no authority for the doctrine maintained by appellee. The right of privilege is fixed by the judgment.

It is, therefore, adjudged and decreed, that as regards the appellant, *John M. Bell*, the judgment of the court below be reversed, and that there be judgment in favor of said *Bell*, and against plaintiffs and appellees, with costs in both courts.

C. H. HORTON v. THORNEHILL & Co.

14 148
 Case 2
 1108 496

An interlocutory order upon a party to a suit, to produce on a given day and hour the books named, and file the same with the Clerk, is not such an order as will work an irreparable injury, and, consequently, it cannot be appealed from.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
J. Henderson and Glenn & Chalmers, for plaintiff. *Kennedy & Miles*, for defendants and appellants.

MERRICK, C. J. There is a motion in this case to dismiss the appeal.

The suit is brought to recover a salary as a book-keeper. The defence to the action is incompetency. Defendants allege that plaintiff's work was most unskillfully done—errors of the gravest kind frequently occurring in his entries and calculations.

Plaintiff, in order to show his competency, obtained an order upon the defendants to produce on a given day and hour the books named in the order, and file the same with the Clerk.

The defendants, after an unsuccessful attempt to set aside the order, take the present appeal, alleging that the order will work an irreparable injury. A witness says that it would be impossible for such a use as that of defendants to get

HOBSON
v.
TROWBELL.

along for a single day without the books named in the order ; that they could not make out an account of sales or write letters, and that the whole business would be in fact locked up, and the result would be a very great injury to the house.

It does not appear that it is the object of the District Court to detain the books longer than a few hours during the trial in order that they may be examined by the Judge or experts to rebut the allegations in defendants' answer. It is not to be presumed that the District Judge will allow them to be detained one moment longer than required, or that he will withhold them from defendants except while they are actually under examination. The law requires him to fix a day certain for their production, and we will presume that it is the day fixed for the trial. 2 An. 12.

The order made by the District Judge appears to be clearly within the powers conferred upon courts of justice ; C. P. 140, 473, 475, 918 ; and we must suppose he will exercise the same in a manner to occasion the least inconvenience to the parties.

A witness has testified that this order if enforced even for a day, will work a very great injury.

His opinion must be construed by the provisions of the Code of Practice.

The law gives to the suitor the right to the production of books for certain purposes, and has made no exception on account of mere inconvenience to the opposite party. This inconvenience the law does not admit as an element of damage in the controversy, and has provided no mode for its estimation. How, then, can this collateral matter be made an independent ground of appeal ? How much damage will it occasion ? Will it amount to over three hundred dollars ?

The same sort of inconvenience occurs when a party is called upon to answer interrogatories on facts and articles. It will be no defence to say, that his operations are large and that the time required to answer will interfere with large contracts and speculations, and occasion him much damage. The excuse cannot be admitted ; he must answer or suffer the penalty fixed. So, too, of the witness brought in by attachment ; he cannot prove by his clerks the very great injury his business will sustain in his absence, and appeal from the order directing the attachment.

These inconveniences, as already observed, the law does not admit to be injuries and will not permit to be estimated further than is done in the taxed costs.

Viewing the testimony of the witness under the light of the Code of Practice, we are unable to say that the order complained of can work an irreparable injury which will sustain the appeal. 12 An. 87.

Appeal dismissed.

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C. RICHARD v. BEN. BUTMAN.

Where a suit is brought against the surety who is bound *in solido* with the drawer of the draft for its payment, prescription is thereby interrupted as to the principal debtor; it will commence to run again from the date of the judgment against the surety.

APPEAL from the District Court of the Parish of St. Tammany, *Beale, J.* *J. C. David*, for plaintiff. *T. A. Bartlett*, for defendant and appellant.

LAND, J. The defendant is sued as the drawer of a draft, dated March 1st, 1850, payable ninety days after date, to his own order, and accepted by the drawees, *Butman & Co.*

The draft has the following endorsement upon it: "I agree to bind myself for the amount of this note when due."

(Signed)

A. WINTERCAST.

After maturity, the plaintiff sued *Wintercast*, obtained judgment against him, and caused an execution to issue, which was returned *nulla bona*.

The citation was served on *Wintercast* on the 31st of January, 1851.

The plaintiff alleges that *Wintercast* was a debtor *in solido*, with the defendant, and that the judgment against him, is a bar to the plea of prescription by the defendant.

The defence in the lower court, was the general issue. The want of protest and notice of non-payment, and novation—and in this court, the defendant has pleaded the prescription of five years.

Whether the defendant was a member of the firm of *Butman & Co.*, the acceptors of the draft does not appear. It is, however, only necessary, as the case is before us, to consider the plea of prescription filed in this court.

The suit against *Wintercast* interrupted prescription as to the defendant, for the reason, that the former was the surety of the latter, and bound with him *in solido* for the payment of the draft. *McCausland v. Lyons*, 4 An. 273; *McGuire v. Bosworth et al.* 1 An. 248; *Drew v. Robertson*, 2 An. 592; C. C. 2086, 3004, 3517, 3518.

Prescription, however, commenced running again in favor of the defendant, at least, from the date of the judgment against *Wintercast*, and more than five years had elapsed from that date, before the commencement of this suit, in which the defendant was cited, on the 3d of May, 1858. *Millaudon v. Beazley*, 2 An. 916. *Hite v. Vaught*, *ibid* 970; *Dwight v. Brashear*, 5 An. 551.

The plaintiff's action is, therefore, prescribed, unless he can show some other interruption, than the suit against *Wintercast*. C. C. 3505.

It is, therefore, ordered, adjudged and decreed, that the judgment be reversed, and that the cause be remanded for further proceedings, on the plea of prescription, according to law; and that the plaintiff pay the costs of this appeal.

L. GEORGE v. H. DEMOUY.

Proof that the owner of a slave intended he should be free, and that neither he nor his heirs after his death claimed his services, will not entitle the slave to his freedom, it not being shown that he had ever enjoyed his liberty for the space of ten years.

A PPEAL from the District Court of the Parish of Pointe Coupée, *Ratliff, J. T. J. & W. H. Cooley*, for plaintiff. *Provosty and Phillips*, for defendant and appellant.

MERRICK, C. J. The plaintiff sues to recover his freedom. Since bringing the suit he has become a fugitive from the services of defendant. Under such circumstances, we have some hesitation on the question whether plaintiff's action ought not to be dismissed, as in case of nonsuit, and whether we ought to decide the case on the merits. But, as the defendant is appellant, we have concluded he has a right to a judgment upon the merits of the controversy.

It appears that *Leon George*, the plaintiff, and his mother were the slaves of one *Guy Richard*. *Leon George* was born in 1833, and, at the time the suit was brought, was about twenty-four years of age. In 1834 *Guy Richard* desired to place the plaintiff under the charge of the wife of the overseer of *Benjamin Poydras*, the plaintiff then being about twelve months old, the reason given was the bad behavior of the mother of the child. *Richard* died the next day of the cholera, and the child, with a servant to take care of him, was sent to the house of the overseer by *Poydras*.

Leon George with his mother and her other children were inventoried as belonging to the estate of *Guy Richard*.

Benjamin Poydras acted for the heirs (who resided in France) as agent, and made sale of the property with the exception of *Leon George*.

In 1838 he sold the mother of *Leon George* and her other children to the defendant and one *Josephine*. *Leon George* himself was expressly exempted from sale, though then but about five years of age.

In 1843 the defendant obtained possession of the plaintiff, and kept him and enjoyed the benefit of his labor until he ran away, after the institution of this suit.

There is much testimony in the record introduced to show, that *Guy Richard* and his heirs intended that *Leon George* should be free, and some conversations are testified to in which the defendant promised to procure the freedom of the plaintiff, and one or two in which he said he was free. Witnesses also swear to some conduct of defendant which would be inconsistent with the idea of the plaintiff's condition as a slave, were it not for the supposed defective title under which the defendant held *Leon George* with reference to the heirs of *Guy Richard*. Notwithstanding this proof, it is shown by witnesses of great respectability, that defendant treated *Leon George* as he did his other slaves. The plaintiff, so far as the record discloses, never asserted his freedom, and never left the service of defendant until he absconded, after the bringing of this suit. The plaintiff appears to have only availed himself of the indiscreet indulgences of the defendant, without any thought of thereby claiming or asserting his freedom. On the contrary, he admitted he was a slave, to a person who wished to bargain for him.

GEORGE
v.
DEMOUR.

However desirous the heirs of *Guy Richard* may have been that the plaintiff should become free, their wishes alone could not make him so.

This being a matter affecting the public order required the action of the public authorities before it could be brought about.

It is clear that in this controversy it is a matter of no consequence who is owner. Whether the defendant or the heirs of *Guy Richard*. C. C. 177; 4 M. 580; 8 M. 149.

The only question which we can consider is, whether the plaintiff had acquired the *status* of a free person of color prior to the promulgation of the Act of 1857, which now prohibits emancipation.

Waiving the question whether a slave child or a slave under twenty-one or even thirty years of age could have the legal intention to become free and exercise acts of freedom under our previous laws, it is quite clear that the plaintiff has never enjoyed his liberty for one week, much less the space of ten years. He has been all his life under the control of others, who have enjoyed the benefit of his labor. It matters not so far as this controversy is concerned, whether the defendant has acted in good or bad faith, nor whether he has acted against the wishes of the heirs of *Guy Richard*; if the plaintiff cannot show the facts on which the law declares his emancipation or freedom he must fail in his action.

See *Carmouch, administrator, v. Carmouch*, 12 An. 721; and *Verdun v. Splane*, 6. Rob. 531.

The judgment of the lower court, which was in favor of the plaintiff, must be reversed.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that there be judgment against the demand of the plaintiff and in favor of the defendant, and that the plaintiff pay the costs of both courts.

COLE, J., dissenting. Article 3510 of the Civil Code provides, that "if a master suffer a slave to enjoy his liberty for ten years, during his residence in the State, or for twenty years while out of it, he shall lose all right of action to recover possession of the slave, unless the slave be a runaway or fugitive."

The prohibition of emancipation in the State does not apply to the acquisition of freedom by prescription.

The statute of 1857 reads thus: "That from and after the passage of this Act no slave shall be emancipated in this State." Session Acts, 1857, p. 55. The statute is entitled "An Act to prohibit the emancipation of slaves."

Emancipation is used technically, and according to its meaning in the jurisprudence of Louisiana, it signifies the obtaining of freedom, after certain preliminary proceedings, by the decree of a court of justice. *Eulalie and her children v. Long et al.*, 9 An. p. 10; Bullard & Curry's Digest, p. 427 to 430; Sess. Acts 1852, p. 214; C. C. Arts. 184, 185.

Article 3510 is not repealed by the statute of 1857; they are not upon the same subject-matter. The former provides for the loss of action of the master to recover possession of the slave after he has been permitted to enjoy his liberty for a certain time; the latter forbids the enfranchisement of slaves by the technical mode of emancipation.

According to Article 3510, if a master suffer a slave to enjoy his liberty for a certain time, he loses all right to recover possession of him. The use of the word "slave" in the third line of this Article merely designates the person already spoken of in the first line, and it does not signify that he is a slave after the ten or twenty

years. The slave after that time must then be free, and he becomes subject to the laws relative to free persons of color, for if the master cannot claim him, certainly no other person could. If the slave were not then free, there would be no sense in the Article, for if the master could not assert title to him, no other person ought to be allowed to do so, and if no one can claim him he is free. *Spalding v. Taylor*, 1 An. 197; *Eulalie v. Long & Mobery*, 11 An. 463.

The signification of enjoyment of liberty in Article 3510 is, that the master does not exercise any control over his slave. If the intention of the owner be clear, that for the time required by law he has not exercised or wished to exert any control over him, it is then evident that the dominion exercised over the slave by a stranger cannot interfere with the right of the slave to his liberty.

This Article does not limit its provisions to slaves over twenty-one years of age. The word slave applies to a minor as well as a major, and where the law makes no distinction the judiciary cannot.

The case of *Verdun v. Splane*, 6 R. 531, does not apply to the one at bar. In that case the mother had been emancipated when the slave claiming his freedom was about eight months old, and the infant was permitted to remain with the mother for ten years, in order to be suckled and raised. It was clearly shown that the master had not ceased to exercise control over his slave, and had had no such intention. The court very properly decided that the owner had not lost, under Article 3510, the right to claim him.

The old Code did not contain the provisions of Article 3510 of the Code of 1825; the case of *Meilleur et al. v. Coupry*, 8 N. S. 129, is not, therefore, applicable to the present controversy.

Under Article 3510 plaintiff ought to succeed in this suit.

It appears that since the death of his master, in 1834, he has not been under the control of his master's representatives and heirs, and they have never claimed him as a slave.

The intention of the heirs to allow plaintiff to enjoy his liberty is clearly established.

Benjamin Poydras Delallande was the testamentary executor of the master of plaintiff and agent of his master's heirs. In 1838 he sold the mother of plaintiff and two of her children, and in the act of sale it is expressly stipulated that he did not sell the plaintiff "*Leon*" with his mother: "N'entendant pas comprendre dans la présente vente le fils aîné de la dite négresse *Olive*, nommé *Léon*, condition sans laquelle la présente vente n'aurait pas lieu, et serait de droit annulée si les dits acquéreurs venaient à l'exiger.

Delallande, the agent, having sold all the property of the estate, except plaintiff, went to France and accounted to his constituents.

This clause in the act of sale and the conduct of the agent and heirs show that it was the intention of the master of plaintiff to allow him to enjoy his liberty, and that they did not wish to oppose this intention.

The evidence shows that in 1834, *Richard*, the master of plaintiff, died, and the plaintiff was then a year old.

That *Richard* had much affection for the infant, and said a day or two before his death that he wished to place *Leon* under the care of *Mrs. Willis*.

He died before sending the child, but shortly after his death the executor of *Richard* sent him to her, and he remained with her till 1843.

After the death of the executor, defendant, who is the god-father of plaintiff,

GEORGE
v.
DEMOCR.

asked *Mrs. Willis* to send plaintiff to see his mother at his house, saying also, that he desired to make him some presents, and that he would not keep him but a week.

Defendant having thus obtained possession of plaintiff refused to return him to *Mrs. Willis*, and has thus kept him at his house up to about the time of the institution of this suit in 1857.

It is shown that defendant treated plaintiff as a free child and admitted that he was free.

One of the witnesses also states, that defendant told him in the court-house yard, when he was there as a witness cited in this suit not to say too much, "*ne parle pas trop.*"

The evidence in the record, establishing that the owners of plaintiff had not exercised the control of masters over him for the last twenty-five years, being full and clear ought to be at least considered sufficient when the contest is with a mere usurper, with one who got possession of plaintiff under the pretence of affection, of being his god-father, and in order to enable him to see his mother. One who could thus act ought not to have the favorable consideration of a court of justice in his attempt to reduce to slavery one over whom he has no right, but that of the strong over the weak.

Even if plaintiff never asserted his freedom until this suit, and did not leave the service of defendant until recently, still ignorance of his rights cannot divest him of them.

Besides he had no reason to abandon the domicil of defendant, as long as he was treated not as a slave, but a friend.

The control exercised over plaintiff during the greater part of his life by defendant, was not that of a master and owner, for defendant cannot, by his own will, change the nature of his tenure of plaintiff. He got possession of him under false pretences, and he ought not to be allowed to derive any benefit from a possession obtained by treachery, and from a control over the plaintiff, exercised without any permission from his master or heirs.

During the time of the residence of plaintiff with defendant, his master exercised no control over him. This action of the master for fourteen years, shows that his intention for the ten years previous was to allow plaintiff to enjoy his liberty. The residence of the first ten years of his life with *Mrs. Willis*, might not of itself be deemed absolute proof of the intention of the owner in leaving him with her, but when conjoined with the subsequent freedom from the control of the master, the intention of the owner, since, 1834, becomes conclusive.

When a slave has thus, by prescription, obtained freedom from the right of action of the master, it is not necessary to have any action of the public authorities to enable him to be free of the control of private usurpers of his rights.

If the master could not successfully institute an action to recover possession of his former slave, certainly the latter must have the right of action to assert his freedom from the control of a mere trespasser; otherwise the latter could exert a greater power over the plaintiff, than his ancient master.

If there were any doubt as to the right of plaintiff to recover his freedom as against the defendant, the doubt ought to be decided in favor of plaintiff.

For twenty-five years he has not been claimed by his former owners, and they have not for that time exercised any control over him. He now asks to be allowed to enjoy what they willingly gave him.

If defendant succeeds in this suit, his conduct will enable him to be enriched

at the expense of the former owners, and plaintiff will be reduced to slavery and the dominion of one who has no title whatever to him.

GEORGE
v.
DEMOUR.

In such a contest, the technical rules of law ought to be construed with as much rigidity in favor as against him, whose only hope is in the protection that this court may afford him.

I am, therefore, of opinion that the judgment, which was in favor of the freedom of plaintiff against the defendant, ought to be affirmed.

YEATMAN, WOODS & Co. v. JAMES ERWIN.

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Where the seizing creditor becomes the purchaser of property at Sheriff's sale, retaining in his hands part of the price to pay a prior special mortgage on the property, which mortgage was afterwards discharged by the debtor himself—*Held*: That the seizing creditor, having a privilege on the proceeds of the sale, had a right to apply the amount thus remaining in his hands, to the unsatisfied balance of his own debt.

The purchaser, who is allowed to retain in his hands the amount of prior special mortgages, as part of the price, is bound for the interest accumulated on such mortgage debts after the sale.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
L. M. Day, for plaintiffs. *Durant & Hornor*, for defendant and appellant.
MERRICK, C. J. The plaintiffs, in 1847, recovered judgment against *Erwin*, the defendant, for \$6,480 18 and interest. In 1850, they issued an *alias fi. fa.*, on which they caused real estate of the defendant to be sold to the extent of \$23,800, they becoming the purchasers for cash. The sale was made April 22d, 1850.

There were several anterior special mortgages in judgment, which the Sheriff authorized the plaintiffs, the purchasers, to retain in their hands. They paid the costs, \$197 50. They retained \$9,414 93, the amount of a judgment in favor of the Bank of Kentucky, to which they were subrogated; also, a judgment in favor of the Bank of Louisiana, (out of which the present controversy arises,) amounting to \$5,668 73; and also a judgment in favor of the Union Bank for \$5,854 60, to which they were subrogated.

These sums being deducted, left only \$2,664 24, to be applied to plaintiff's judgment.

The debt to the Bank of Louisiana was suffered to remain unpaid until the 2d day of April, 1852, when it was satisfied by the defendant, *Erwin*, or by the sale of his property, and not by *Yeatman, Woods & Co.* This payment released the amount of the price retained by plaintiffs to pay the Bank of Louisiana.

The present proceeding is a rule taken by *Charles Fonda*, as curator of the *Succession of James Erwin*, upon the plaintiffs, to show cause why they should not pay over to him the \$5,668 73, retained to pay the Bank of Louisiana.

There was judgment in favor of *Yeatman, Woods & Co.*, and *Fonda* appeals.

He contends, in this court, that inasmuch as the application of that portion of the price retained in the hands of the purchasers to pay the mortgage of the Bank of Louisiana, would overpay the remainder of the judgment of *Yeatman, Woods & Co.*, and leave a surplus of \$523 57, he is entitled to recover that sum even if the whole amount set apart by the Sheriff to pay the bank judgment, should not be held subject to the control of the curator.

YEATMAN
v.
ERWIN.

We think it is quite clear that the seizure and sale of the property of *Erwin*, under their execution and judicial mortgage, gave *Yeatman, Woods & Co.* a privilege upon the proceeds of the sale. And this they would have had, though some third person had been the purchaser of the property. Their right is not the less valid because they, themselves, became the purchasers. When, therefore, so much of the price in their hands, as had been retained to pay the judgment in favor of the Bank of Louisiana, was released from such destination by the payment of the judgment by the sale of other effects of *Erwin, Yeatman, Woods & Co.* might well insist upon the application of that portion of the price in their hands to their debt; for the seizure had given them a privilege, and as between *Erwin* and themselves, he might also, as remarked by the District Judge, have been repelled by the plea of compensation.

It being conceded, then, that the plaintiffs, *Yeatman, Woods & Co.*, had the right to apply the amount retained by them to pay the judgment of the Bank of Louisiana, to their own debt, the next question is, as of what time it must be applied? for the Sheriff's sale was made, as we have already observed, on the 22d of April, 1850, and the judgment of the bank was not released until April 2d, 1852, almost two years afterwards.

If applied as of the day of sale, the surplus in the hands of *Yeatman, Woods & Co.* would be about the amount claimed, viz, \$515 21. If applied on the day the bank judgment was extinguished, (no interest being allowed on the amount retained,) there would be nothing due the curator, as it would not pay the interest which had accumulated on the judgment of *Yeatman, Wood & Co.*, between the sale and the 2d day of April, 1852. How, then, ought the matter to be adjusted?

We think that as the amount retained to pay the bank judgment was so far due the bank, as to be subject to its demand in the hands of *Yeatman, Woods & Co.*, and as the property even might have been re-sold to pay the same under the older bank mortgage, the application of this sum to the plaintiffs' judgment must be made as of the 2d day of April, 1852; the day on which the debt was extinguished.

But the property was of the kind which produces fruits, and it would be unjust that plaintiffs should retain the price in their hands and not pay interest, whilst their judgment, to pay which the property was sold, was bearing interest.

It appears to us, that the Articles of the Code of Practice which authorize the purchaser to retain in his hands the amount of the prior special mortgages and privileges, imply that the purchaser himself, like the property which he has bought, must become responsible and bound for the interest which may accumulate on such mortgages after such sale. Otherwise it would be to the advantage of the purchaser to delay the payment of the portion of the price left in his hands as long as possible, and the debtor would be deprived of his property, while interest would be constantly accumulating against him. C. P. 683, 706.

The purchaser, in the language of the Article cited, is authorized to retain in his hands, out of the price, the amount required to satisfy the privileged debts and special mortgages. If he delays payment, the accumulations of interest on these privileged debts and special mortgages must be at his own cost and charge, for the property is bound for the same, and he can have no action against the debtor to recover the interest which he appears to assume with the principle debt.

If we apply these principles to the present case, the interest on the bank judg-

ment would somewhat exceed the interest on the plaintiffs' judgment, and there would still be as much due on the 2d day of April, 1852, as there would have been if the calculation and application of the money had been made, as of April 22, 1850, viz, \$515 21. And for this sum the plaintiff must have judgment. See 10 Rob. 65; and *Perry v. Holloway*, 10 Rob. 107.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed; and that the said *Charles Fonda*, in his said capacity of curator, do recover of said *Yeatman, Woods & Co.*, the sum of five hundred and fifteen dollars and twenty-one cents, with legal interest thereon from the second day of April, 1852, until paid; and that said *Yeatman, Woods & Co.* pay the costs of both courts.

J. M. TIMMONS v. E. WHITE.

Where the plaintiff has resided out of the State, he is entitled to the benefit of the double term of prescription up to the date of the promulgation of the Act of the Legislature in 1848, placing residents and non-residents on the same footing as to prescription.

APPEAL from the District Court of the Parish of East Feliciana, *Ratliff, J. W. F. Keenan and J. B. Smith*, for plaintiff. *Muse & Hardee*, for defendant and appellant.

LAND, J. In the partition of the estates of *John and Lydia White*, deceased, the defendant obligated himself to pay to the plaintiff six hundred and sixty-six dollars and thirty-six and five-thirteenth cents, with ten per cent. interest from the 4th of June, 1845, and to pay to *William J. Timmons* the sum of six hundred and fifty dollars and ninety-seven and nine-thirteenth cents, on account of the portions coming to them from the estate of *Lydia White*, their mother.

This suit is to recover the debts mentioned—the plaintiff alleging the transfer to himself of the debt due to *William J. Timmons*.

The defence is, the prescription of five and ten years.

The obligation of the defendant bears date the 4th of June, 1845, and citation was served in this suit on the 7th of January, 1857.

The plaintiff was an absentee, residing in the State of South Carolina, and entitled, for a part of the time, to the prescription of twenty years, that is to say, from the 4th of June, 1845, to the 14th of March, 1848—but still, according to the rule of computation in such cases, his right of action was prescribed, at the time of the commencement of this suit, and we regret to say that the evidence in the record is insufficient to establish an interruption of prescription.

It is, therefore, ordered, adjudged and decreed, that the judgment be reversed, and the verdict of the jury set aside. It is further ordered and decreed, that there be judgment in favor of defendant, with costs in both courts.

MARY A. LEFTWICH v. THE MAYOR AND SELECTMEN OF THE TOWN OF
PLAQUEMINE.

Where a public square is bounded on one side by private property, the owner cannot require that the town authorities, when the square is enclosed, should leave a space for a public way between the enclosure and the line of his property.

APPEAL from the District Court of the Parish of Iberville, *Wilson, J.*
S. Mathews, for plaintiff. *Z. Labauve*, for defendant and appellant.

MERRICK, C. J. The controversy in this case is in reference to a public square in the town of Plaquemine, known as St. John's square. It appears by the map offered in evidence, that the square is bounded on two sides by public streets, viz. Main and Church streets, and on one side by the property of plaintiff, and on the remaining side by property pertaining to the Catholic church. The town authorities having passed an ordinance to inclose the public square, leaving gates only on two sides, the plaintiff has enjoined the execution of the work, and demands that the authorities shall leave a space sufficient for a public way on all sides of the square, or desist from inclosing the same. Her injunction was perpetuated.

The square would doubtless partake more of the nature of a public square, if a carriage way were to be left open on all sides of it, as then there might be entrances from all sides. But on referring to the map, it does not appear to have been originally laid out in this form; for streets are laid out only on two sides of it. The plaintiff's vendors bought with reference to this plan.

Now, as a public square is not designed for a highway or a thoroughfare for all sorts of conveyances, but is intended as an ornament of a town, and place of recreation and amusement, the city authorities appear to injure no one when they enclose the same. In this case the town authorities have ordered carriage ways on two sides, and entrances on each side of said carriage ways for persons on foot.

This ordinance may occasion the plaintiff some inconvenience, but it violates none of her rights.

There is a motion to dismiss the appeal, because it is said we have no jurisdiction of the demand. The corporation has expended \$450 for the fence, which the Sheriff is ordered to remove. The defendant, it would thus seem, was injured to this extent by the decree, besides being deprived of the control of a public place. The motion cannot prevail.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed; and that there be judgment in favor of defendant as in case of nonsuit; the plaintiff paying costs of both courts.

JAMES MOODIE v. J. B. L. CAMBOT—B. N. FORTIER, Under-Tutor, Intervenor.

When the under-tutor having intervened in a suit against the tutor for a debt of the minor, prosecutes an appeal from a judgment against the tutor, the appeal will be dismissed if the tutor is not made a party to it.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*
C. Dufour, for plaintiff. *P. E. Théard* and *J. W. Duncan*, for intervenor appellant.

COLE, J. The defendant being sued as tutor of his minor daughter, for work done by plaintiff upon a house belonging to the minor, the under-tutor intervened upon the ground that the tutor had contracted without the authorization of a family meeting; that the minor was not responsible for a debt so created, and that there was a conflict of interest between the tutor and minor.

From a judgment against the defendant, in his capacity of tutor, the under-tutor has appealed.

A motion has been made to dismiss the appeal, because the tutor was not made a party thereto.

Although the under-tutor was entitled to intervene to watch over the trial and see that justice was done to the interests of the minor, yet the proceedings were conducted, not only contradictorily with him, but also with the tutor; the latter was not ousted from his position of defendant by the intervention.

The defendant, as tutor, had the right to maintain the legality of his conduct, if it were in his power so to do; and he appears to have succeeded, for the judgment was against him, as tutor.

The intervention was based upon the alleged infidelity of the tutor and a supposed disposition in him to allow a judgment to go against the minor to save himself from future liability to plaintiff, on the ground of his personal responsibility for having contracted with plaintiff, as tutor, in the absence of any legal right so to do.

We are of opinion, that the tutor ought to have the opportunity of showing his good faith and the legality of his contract as tutor, and that he ought to have been made a party to the appeal. If he were not a party, his contract might be avoided, the minor declared free from responsibility, and the tutor left subject to a personal action.

Besides, the tutor is defendant in the action, and the judgment was against him in his capacity of tutor.

How then could this court affirm or reverse the judgment against him, when he is not a party to the appeal.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed, at the costs of appellant.

SAME CASE—ON A RE-HEARING.

COLE, J. The application for a re-hearing is refused with the same remarks as in No. 5734 of *Toussaint v. Cambot*.

Re-hearing refused, with costs.

W. SHAFFET et als. v. JAMES C. JACKSON et als.

The father, although he has not been confirmed as tutor of his minor children, may provoke a partition between himself and his minor children, by the appointment of a curator *ad hoc* to the minor, under Art. 116 of the Code of Practice.

The inventory of the property to be divided, may be made after the sale is ordered.

Where minors are sued for a partition, a family meeting is not necessary to authorize the suit, or to fix the terms of sale, and it is not necessary the property should sell for its appraised value to make the sale valid.

A PPEAL from the District Court of the Parish of East Feliciana, *Ratliff, J.*
Muse & Hardee, for plaintiffs and appellants :

William and Catharine Shaffet, the plaintiffs, seek to recover of the defendants, *James C. Jackson and others*, each one their portion of an undivided section of land situated in the parish of East Feliciana, which belonged to the community of acquets and gains which existed between their deceased mother, *Mary Shaw*, and *John Shaffet*, also deceased. They seek to recover their portion of the land in controversy upon the ground, that the entire tract of land was illegally sold by their father after the death of their mother, at a probate sale made in 1829. Having asserted their rights to the land claimed as heirs of their mother, they allege the following nullities in the probate sale, under which the defendants claim the land, viz :

1st. That petitioners and their co-heirs were minors, and no tutor nor under-tutor was ever appointed to represent them.

2d. Because no tutor nor under-tutor having been appointed, nor a special tutor, the Probate Court could not render any decree which would in any manner bind petitioners, they being no parties to the same.

3d. Because no inventory had been made previous to the decree of sale.

4th. Because no family meeting was convoked to deliberate upon the terms of sale; and said pretended sale was made without the advice of a family meeting.

5th. Because said land did not bring the appraisement at said sale.

6th. Because said *John Shaffet*, the father of petitioners, and the said *James C. Jackson*, pretended to become responsible for the price of said pretended bid at said sale, whereas no person had been appointed to represent petitioners, who were minors of tender age, or collect such sum as might (had the proceedings been legal) have been due them.

7th. Because the said proceedings and pretended sale, under which said *James C. Jackson* claims, are absolutely null and void, illegal and irregular, as will the more fully appear when produced by said *James C. Jackson* or petitioners.

The petitioners pray that a partition may be made between them and the said *James C. Jackson* (who represents one heir, by inheritance from his two children, born of his marriage with one of plaintiffs' co-heirs,) and the other co-heirs of petitioner. They pray that the said *James C. Jackson* may be decreed to pay them ten dollars per month for the use of their portion of the said land so long as he retains it; also, for an inventory and for general relief in the premises, &c

The defendant, *Jas. C. Jackson*, answers by general denial; admits his possession of the land claimed, and pleads title under the probate sale, which he alleges was regular and legal; refers to suit 588 for a more perfect description of his title. He also pleads the prescription of five, ten and twenty years.

The defendant, *S. W. Newport*, pleads title to one undivided half of the tract of land in controversy under a syndic sale made in the suit of *James C. Jackson* against his creditors. He admits the probate sale as the foundation of his half of said land, and avers that it was regular. He also pleads title to two heirs' portion of the remaining one-half, by purchase from two of the plaintiffs' co-heirs. He admits the heirship of plaintiffs, and adopts the answer of his co-defendant, *James C. Jackson*. He also avers that he sold his entire interest in the said tract of land of *R. W. Newport*, before his death—all the heirs of whom adopt and join in his answer.

There having been a verdict and judgment in favor of the defendants, the plaintiffs have appealed to this court.

For a reversal of the judgment appealed from, and for a judgment in their favor, the plaintiffs rely upon the points stated in their petition, and before stated in this brief.

In support of the first, viz ; "That petitioners were minors, and no tutor nor under-tutor was appointed to represent them," the court is referred to the following authorities : C. C., Art. 1269 ; 2d Hen., p. 955, Nos. 42 and 43, and authorities there cited ; also, p. 959, No. 3. The court is also referred to pages 15 to 25 of the record inclusive, in which the entire mortuary proceedings of the deceased, *Mrs. Shaffet*, will be found, including the probate sale ; from which it will be apparent that the first point relied upon is fully sustained by the facts. There was no family meeting ever convened to deliberate upon the interests of these plaintiffs, who were children of tender age when their mother died. There was no under-tutor ever appointed to them. There was no oath of fidelity ever taken by their natural tutor, as the law and the repeated decisions of this court require. The record also shows that the present defendant, *James C. Jackson*, was a party to all those proceedings, and cannot plead ignorance of them. On the first point, the court is also referred to 2d Hen., p. 977, No. 12.

In support of the second point relied upon, viz : "That the plaintiffs could not be bound by a decree of the Probate Court, to which they were not parties," the court is referred to the 5th N. S., p. 655, *Donaldson v. Dorsey*.

In support of the third point, viz : "That no inventory of the estate of the deceased mother of the plaintiffs was made previous to the rendition of the decree for the sale of the same," the court is referred to Articles 329 and 333 of the Civil Code.

In support of the fourth point, viz : "That there was no family meeting convoked to fix the terms of sale, &c.," the court is referred to 2d Hen., p. 969, No. 35, and the authorities there cited ; also, p. 970, No. 46.

The fifth point relied upon by the plaintiffs is, "That the said land did not bring the appraisement at said pretended sale."

On page 15 of the record, the court will perceive that the land in controversy was appraised on the 4th of April, 1829, at nineteen hundred and twenty (\$1920) dollars. On page 22 of the record, the court will perceive that the said tract of land was adjudicated to the defendant, *James C. Jackson* for five hundred and ten (\$510) dollars!! We invoke, in behalf of these children, the 337th Article of the Civil Code, which has been wisely designed to save the unprotected minor from such sacrifices as this. Nor will it be permitted to an unnatural father, (as we suppose,) under the pretence of obtaining a *partition* with his own motherless children, thus to sacrifice their little patrimony.

The sixth point relied upon is, "That the father of plaintiffs became responsible, as the surety of the purchaser, *James C. Jackson*, for the purchase money." See process verbal, p. 22 of the record. This surely cannot be regarded as a sale of minor's property!

The seventh and last point relied upon for the reversal of the judgment of the court *a quo* is, "That the entire proceedings, under which the property of these plaintiffs was sold, are absolutely null and void." See 2d Hen., p. 967, No. 8.

The defendants have relied upon the plea of prescription of five, ten, and twenty years, which, in the opinion of plaintiffs' counsel, cannot prevail.

In the notes of testimony, on page 11, the court will find the following admissions, viz : "The heirship as set forth in this case is admitted. It is admitted that *William Shaffet*, one of the plaintiffs, was born in July, 1825. It is admitted that *Catharine Shaffet* was born in 1817, or 1818."

On the 6th of October, 1852, the citations in this case were served upon the defendants. From these facts it will be apparent, that but seven years and three months had elapsed from the date of the majority of the plaintiff, *William Shaffet*, when the citations were served. It will, however, be apparent, that some fourteen years had elapsed from the date of the majority of *Catharine Shaffet* before the institution of this suit. But we submit, with great confidence, that none but the *longi temporis* can avail the defendants in this case. See 2d Hen., p. 1270, No. 2 ; p. 1265, No. 2 ; p. 1266, No. 4.

Should the court come to the conclusion that the plaintiffs are entitled to their respective portions of the land in controversy, the court will perceive that they are also entitled to recover their portion of the revenues of the land claimed, according to the evidence to be found on pages 11, 12 and 13.

SHAFLET
v.
JACKSON.

P. Pond and J. B. Smith, for defendants :

This is a suit to set aside a probate sale of a tract of land made in 1829, and to subject one-half of it to the ownership of plaintiffs, who claim solely by inheritance from their mother, *Mary Shaffet*. They allege that the land was held in common between their father and mother; that their father, *John Shaffet*, provoked a probate sale; that the proceedings under which the sale was made were illegal, and did not divest them of their mother's half of the land; that there were seven heirs at the death of their mother, one of whom subsequently died without issue. They ask that the sale be set aside, and they be decreed to be the owners of one undivided half of said land, by inheritance from their mother.

The defendant, *R. W. Newport*, admits the heirship as alleged; denies any illegality in the proceedings and sale of the land, and alleges that he is the owner of one undivided half by virtue of a purchase at the syndic sale of the property of *J. C. Jackson*, made to *R. W. Newport*, and subsequently transferred to him; that he also owns the undivided interest of *Daniel* and *John C. Shaffet*, as alleged in plaintiffs' petition, by sale before a notary, and two-sixths of the heir's portion that died, he having died before the transfers made by said *John* and *Daniel*. He pleads the prescription of five, ten and twenty years.

Since this suit was instituted, *R. W. Newport* and his wife died. At their probate sale *Mrs. Susanna Mills* became the purchaser of the *Newport* interest in the land. The heirs of *Newport* now unite with *Mrs. Mills*, and ask that she be decreed to be the owner of one undivided half.

The plaintiffs disclaim all ownership, except by inheritance from their mother. To sustain the probate sale of the land made in April, 1829, reference is prayed to the brief of *J. C. Jackson*. It is thought that the plea of prescription of ten and twenty years will relieve the defendants from plaintiffs' claim, and cure any defect as to form that may be found to exist.

The sale was made in April, 1829, and duly recorded in the office of the parish Judge.

Jackson held possession as owner under a title translatif of property, until the syndic sale; that *Newport* and *Jackson* continued their possession under the syndic sale until this suit was instituted, 6th October, 1852, a period of twenty-three years.

To sustain the plea of prescription, your honors are referred to 2 An. 466; C. C. 1024.

The only grounds plaintiffs rely on is the absence, in the record, of some forms of law in the probate proceedings of *Mrs. Mary Shaffet*. This, they think, raises the presumption that there were defects in the proceedings, and the forms of law were never complied with, and throws the burden of proof on the defendants. This, after the lapse of near thirty years, would be requiring them to prove a negative. When it is known how very defective and irregular the papers have been kept and preserved at that early period, this court will hesitate before requiring a negative proof. The presumption is, that all legal proceedings and orders of court are regular; that courts do their duty, and he who alleges otherwise, must show it. It is respectfully suggested that a mere certificate of the Clerk that a certain number of papers referred to is all that he can find or knows anything about in his office, is not a presumption sufficient to satisfy the court, that there were no other proceedings had therein. A presumption of such a nature should be so strong, that the absence of other papers could not be otherwise accounted for. May not some of the papers, orders and proceedings have been lost?

If your owners should come to the conclusion that the probate sale was defective, and the plea of prescription will not prevail, then it is respectfully submitted that *R. W. Newport* was the owner by purchase from *John C.* and *Daniel Shaffet* of two-sixths of said land, and that he also is the owner of the father's undivided half of one other sixth part of the land, the plaintiffs only claiming by inheritance from their mother's one-half. Five-twelfths, therefore, of the tract of land must, according to the petition of plaintiff, and acts of sale from said *John C.* and *Daniel* belong to the defendant, *Susan Mills*, who purchased the *Newport* interest.

LAND, J. This is a petitory action for a tract of land, in which plaintiffs claim title by inheritance from their mother, *Mary Shaffet*.

They admit a probate sale of the land in 1829, under which defendants claim title, but allege its nullity, substantially on the following grounds :

First—Because the plaintiffs were minors, and no parties to the judgment, under which the land was sold, for the reason, that no tutor, nor under-tutor, nor special-tutor was ever appointed to represent them.

Secondly—Because no inventory of the property had been made previous to the decree of sale.

Thirdly—Because no family meeting was convoked to deliberate upon the terms of sale, and said sale was made without the advice of a family meeting.

Fourthly—Because the land did not bring its appraised value at the probate sale.

In 1829 *John Shaffet* instituted suit against his children, the issue of his marriage with *Mary Shaffet*, deceased, for a partition of the community property. At the time of the commencement of the suit for a partition the plaintiffs were minors. In pursuance of the prayer of the petition, a curator *ad litem* was appointed to represent them and their co-minor heirs. Experts were also appointed to determine whether the property could be divided in kind. They reported that a sale was necessary to effect a partition.

On the 23d of February, 1829, a judgment was rendered, ordering the property to be sold, and on 6th of April, 1829, the sale was made and the land in dispute was adjudicated to *James C. Jackson*, at the price of five hundred and ten dollars, on one and two years credit, with ten per cent. interest after maturity.

The defendants claim title under this sale, and plead the general issue and the prescription of five, ten and twenty years.

As to the first ground of nullity alleged by plaintiffs, it does not appear that the father of the minors was ever confirmed by a judgment as their natural tutor, or that an under-tutor was ever appointed, but it does not follow from these facts that the minors could not be sued, and that a judgment rendered against them would be necessarily void. Article 116 of the Code of Practice provides, that if the minor against whom one intends to institute a suit has no tutor nor curator *ad litem* the plaintiff must demand that a curator *ad hoc* be named to defend the suit.

In the suit for partition, the plaintiff prayed for and obtained the appointment of a curator *ad litem* for the minors to defend the action, and as against the purchaser in good faith at the judicial sale, the minors must be held at this distant period to have been properly represented in the suit, or at least to have ratified the proceeding by their long silence and acquiescence.

The second ground of nullity is untenable. The evidence shows that an inventory of the property was taken on the 4th of April, 1829, two days before the sale, which was sufficient. *Molinari v. Fernandez*, 2 An. 553.

The third and fourth grounds are also untenable.

Where minors are sued for a partition a family meeting is not necessary to authorize the suit or to fix the terms of sale. C. C. 1237. Nor is it necessary in such a suit, that the property should sell for its appraised value to make the sale valid. *Jacobs v. Lewis*, 8 L. 179.

Sales directed by the court of probates are judicial sales, and the purchaser is protected by the decree ordering them, and if the court has jurisdiction the purchaser need not look beyond the decree itself. *Lalannes' Heirs v. Moreau*, 13 L. 431.

SHAFETY
v.
JACKSON.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.

MERRICK, C. J., having been of counsel, recused himself.

A. B. FOREE v. J. H. MCINTYRE et al.

In a sale under execution, when all the installments of a debt are not yet due, an appraisalment of the property is nevertheless essential.

Where the amount of the matured installments is less than the price for which the property is adjudicated, the surplus of the price only becomes exigible at the maturity of the other installments, adding interest to such surplus, so as to correspond with the term of credit allowed.

APPPEAL from the District Court of the Parish of Carroll, *Farrar, J.*
Jones & Dougherty and L. Selby, for plaintiff and appellant. *Sparrow & Montgomery*, for defendant.

VOORHIES, J. This is an injunction suit, presenting the question whether an appraisalment is essential in a sale under executory process, where all the installments of the debt are not yet due.

It is urged by the defendants' counsel, that in a sale under Article 686 of the Code of Practice, where such installments are not all due, an appraisalment, instead of being essential, has in fact the effect of impairing the right thus secured to the seizing creditor.

The Article relied upon provides as follows, to wit :

"When a seizing creditor has a privilege or special mortgage on the property seized, for a debt of which all the installments are not yet due, he may demand that the property be sold for the whole of the debt, provided it be on such terms of credit as are granted to the debtor by the original contract for the payment of such installments as are not due." C. P., 686.

The interpretation thus urged appears to us inadmissible. We think it is clear that a sale under that Article may as easily be effected with the benefit of appraisalment as in any other cases of forced alienations. Such appraisalment obviously secures to the debtor the protection of his property from sacrifice. A waiver of the benefit thus conferred upon him can only be derived from an express stipulation in his contract, or clear intendment of the law. Neither of which, we apprehend, can be fairly deduced in this case. It is true that cases may and must necessarily occur, in which the amount of the matured installments will be less than the price of adjudication ; but in such cases the surplus of the price only becomes exigible at the maturity of the other installments, adding interest to such surplus so as to correspond with the term of credit thus allowed.

It is, therefore, ordered and decreed, that the judgment of the court below be avoided and reversed ; that the injunction sued out in this case be made perpetual, or the Sheriff enjoined from making said sale without previous appraisalment, the defendants and appellees to pay the costs of both courts.

UNION BANK OF LOUISIANA v. FOSTER AND MARY BRADFORD.

A credit endorsed on a bond at a time not suspicious by an officer of the bank in the regular discharge of his duty is sufficient evidence of the payment to interrupt prescription.

A PPEAL from the District Court of the Parish of East Baton Rouge, *Beale, J. Fuqua & Kilbourne*, for plaintiff and appellant. *A. M. Dunn and T. G. Morgan*, for defendants.

COLE, J. This suit was instituted by the Union Bank. Afterwards *Henry Marston*, having purchased the assets of the branch at Clinton and having been subrogated to the rights of the bank, was substituted for the original plaintiff.

This action is to recover a balance due on a bond executed in favor of the bank by *Foster Bradford* and his wife, *Mary*, on the 30th December, 1834, for eleven hundred dollars, payable in twelve months from that time, and secured by mortgage.

The suit is carried on against *Foster Bradford*, who plead the prescription of ten years. This plea was sustained and plaintiff has appealed.

The bond matured on the 30th of December, 1835; service was made of the citation and petition in this case on the 24th of June, 1848, and prescription had accrued, unless it had been interrupted.

There is a credit upon the bond, as follows :

"January 1st, 1859. Received installment.....	\$137 50
Interest on balance.....	39 06
	<hr/> \$176 56

HENRY MARSTON, Cashier."

This indorsement is in the hand-writing of *Marston*, and he was cashier at the time it purports to have been made.

This is not of itself sufficient to interrupt prescription, for the indorsement may have been written after the bond was prescribed.

It is, however, established that the bond was protested for non-payment on the 27th January, 1840, nearly six years before prescription could accrue. In the protest the notary copies at length the bond and all the credits indorsed upon it, and, among others, that by *Henry Marston*, of January 1st, 1839.

Notices were given of the protest by the notary by a letter addressed to the defendant at his residence. The act was recorded in the book of protests by the notary on the day after it was made.

It is thus shown that the credit was indorsed upon the bond at a time not suspicious by an officer of the bank in the regular discharge of his duty. It is true that the indorsement does not state by whom the money was paid, but it is unreasonable to suppose it to have been paid by any other person than the defendant or his agent.

This protest also shows that the indorsement was made nearly eleven years before the purchase of the assets of the bank by plaintiff.

The evidence of the cashier could not be introduced, for he purchased the assets on the 25th of November, 1851, and among the rest the bond sued upon with the

UNION BANK
v.
BRADFORD.

indorsement in his hand-writing, and on the 31st October, filed his intervention and became the real plaintiff in the suit. *Beatty, syndic, v. Clement*, 12 An. 82 ; C. C. 3508 ; *Barelli v. Réviere*, 3 An. 46 ; 13 An. 294.

It is, therefore, ordered, adjudged and decreed, that the judgment be avoided and reversed, and that the intervenor, *Henry Marston*, recover of the defendant, *Foster Bradford*, five hundred and fifty dollars with interest thereon at the rate of ten per cent. per annum, from the 30th day of December, 1839, until paid, and four dollars cost of protest, and the costs of both courts, subject to a credit of four hundred and fifty-one dollars and ten cents, made at Sheriffs' sale on the 1st of May, 1847 ; it is further decreed, that the mortgage of the intervenor, *Marston*, be recognized upon the two slaves, *Pinah* and *Elloch*, mentioned in the Act of mortgage of *Foster Bradford* and wife to the bank of the 13th December, 1834, and that they be seized and sold to satisfy this judgment.

A. D. GRIEFF & CO. v. McDANIEL & WATSON.

A notice sent to the Post-Office, where an endorser usually receives his letters, at the time the protest is made, is sufficient, although there be another Post-Office nearer his residence, at which he has not been in the habit of receiving his letters.

APPEAL from the District Court of the Parish of St. Helena, *Beale, J. Penn & Martin*, for plaintiff. *Thompson & Sheafe*, for defendants.

LAND, J. The only parties before this court are the plaintiffs, and *John G. Watson*, who is sued as the endorser of a bill of exchange, and the single question for decision is, whether he was legally notified of the protest of the bill.

The evidence shows, that *Watson* was Sheriff of the parish of St. Helena at the date of the protest, and that he was in the habit of receiving his letters at the Post-Office in Greensburg, the seat of justice for that parish, and that a letter containing the notice of protest was mailed by the Notary to him at that place. The evidence also shows, that *Watson* resided in the country, and that St. Helena Post-Office was nearer to his residence than the office at Greensburg ; but the evidence does not show that he ever received any letters at the St. Helena office.

A notice sent to the office, where the indorser usually received his letters, at the time of protest, is sufficient, although there be another office nearer his residence at which he had not been in the habit of receiving them.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.

PAULINE, f. w. c., v. L. A. HUBERT et al.

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An administrator has the capacity to stand in judgment in a suit by a slave, inventoried as part of the succession, to have her freedom established.

It must now be considered settled, that effect will be given to parol proof of the sale of real estate, if it is received without objection.

The heirs and creditors of the estate will be bound by the acts of the administrator, as to the mode of proceeding in the defence of a suit and the reception and rejection of evidence.

The child of a *status libera* who, by Art. 196 of the Code, is to become free at the time fixed for the enfranchisement of the mother, requires the consent of the public authorities to her emancipation, and since the Act of the Legislature of 1857, the emancipation cannot be affected.

A PPEAL from the District Court of the Parish of Pointe Coupée, *Ratliff, J. T. J. & W. Cooley*, for plaintiff. *T. H. Farrar and J. Yoist*, for defendants and appellants.

MERRICK, C. J. The plaintiff and her mother, *Arsène*, were the slaves of *Onil Bourgeat*. *Arsène* contracted, in 1850 or 1851, with *Bourgeat*, for the emancipation of herself and *Pauline*. The condition (it seems) being the payment of \$1,500. *Arsène* not being able to raise the whole sum paid \$600, the price of herself, and received an act of emancipation for herself alone. Subsequently a friend advanced the nine hundred dollars, and tendered the same to *Bourgeat* for *Pauline*, in her behalf, or as her agent. In the mean time *Pauline*, had given birth to a child named *Julie*, the subject of the present controversy. At the time of the tender of the \$900, *Bourgeat* insisted on being paid one hundred dollars more as the price of *Julie*. This was paid, also, on behalf of *Pauline*. In three or four days afterwards, it being in the year 1852, *Bourgeat* passed the act of emancipation of *Pauline*. Mention of the child was omitted in the act. It is conceded, that the acts of emancipation of *Arsène* and *Pauline*, were in due form and made with the consent of the proper authorities.

After the death of *Onil Bourgeat*, *Julie* was inventoried as the property of his succession, and an order obtained for her sale.

This suit is brought against the administrator and the auctioneer, to restrain them from selling, and to have the freedom of *Julie* recognized.

There was judgment for the plaintiff, and the defendant, *Moore*, the administrator, appeals.

The appellant relies for a reversal of the judgment, upon two grounds, viz :

1st. That the administrator has no capacity to stand in judgment ; and

2d. The proof of the contract for emancipation of *Pauline* and her child being parol, no effect can be given to the same by the court.

I. We see no objection to the form of the action. The heirs may not have accepted the succession, and as the administrator must represent the creditors also, we see no objection to his standing in judgment for the protection of the rights of all parties in the effects entrusted to his administration. The Article of the Code of Practice relative to testamentary executors (Art. 123), is not applicable. The powers of the testamentary executor at the time of the adoption of the Code of Practice, were very different from those of the administrator.

II. The testimony to prove the contract for the emancipation of *Pauline* and her child, was parol. It was admitted without objection. It is conceded by

PAULINE
v.
BURGEAT

defendants' counsel, that if effect must be given to the parol contract proven in this case, there should be judgment in favor of the plaintiff. But it is contended "that the contract for the emancipation of the slave is but a sale of the slave to herself, and that under Article 2415 C. C., a verbal sale of a slave is null as well for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted. That the law does not say that parol evidence of a verbal sale of a slave is inadmissible, if objected to; but it says, that the verbal sale of a slave is void, even as between the vendor and vendee, and to say, that a certain *form* of sale declared void by express law, because made in *that form*, shall nevertheless be held valid because it is proved to have been made in the very form reprobated by the positive law, is an absurdity."

Were the Articles of the Civil Code on the subject of verbal sales a new question, the argument urged might have occasioned us much trouble, for it is in the light of a sale, we think, in which the contract between *Pauline* and *Bourgeat* for *Julie*, should be viewed in the present controversy.

But the Article in question has been so often and with so much uniformity construed adversely to defendants, that the law on the subject must be considered as long since settled.

Article 2415 of the present Code is identical with Art. 2, p. 344, of the Code of 1808. Under that Code the Article was construed, first, as contended for by defendant's counsel, but, after much discussion, it was held that a party who would object to parol evidence must except to its introduction. 5 M. R. 442. In the case of *Bateman v. Cormier*, 1 N. S., the court said, parties have certainly a right to acknowledge a parol contract for land and they have a right to consent that their stipulations in regard to it, may be proved by parol. In the case of *Mills v. Hunter*, 5 N. S. 121, the court, after comparing the other Articles of Code of 1808 on the same subject, arrived at the same conclusion. In the case of *Strawbridge v. Warfield*, 4 La. 22, the court considered the corresponding Articles of the present Code and amendments, and adopted the same construction as had been given to them in the old Code, and gave effect to parol proof of the sale of a slave, such proof having been received without objection. This decision has been uniformly adhered to since. *Hopkins v. Lacouture*, 4 La. 64; *Brown v. Frantum*, 6 La. 46; *Henry v. Dinkgrave*, 19 La. 483; *Jacob v. Davis*, 4 An. 39; 7 An. 33, *Packwood v. White*; see also 3 An. 136. The question must, therefore, be considered as at rest.

But it is said that the administrator acting as he does in a representative capacity, cannot bind the heirs and creditors by the admission of illegal testimony. As the administrator has the capacity to stand in judgment, the usual rules as to the mode of proceeding and the reception and rejection of evidence must bind him.

The conclusion to which we have arrived, leaves the case where it is conceded by defendant's counsel, there must be judgment for the plaintiff, for if the slave is not free, she was sold; *Bourgeat* and his estate is not the owner.

But it has been observed, that the child *Julie* has never been emancipated by her former owner; nor have the public authorities ever authorized her emancipation. It is contended, by plaintiff's counsel, that she is free by the express terms of Article 196 of the Civil Code, which is in these words: "The child born of a woman after she has acquired the right of being free at a future time, follows the condition of its mother, and becomes free at the time fixed for her enfranchisement, even if the mother should die before that time."

PAULINE
v.
HUBERT.

We think this Article must be construed with reference to the other provisions of the Code, and that the child of the *statu libera*, like the *statu libera* herself could only become free by the consent of the public authorities. For the public have an interest in the emancipation of slaves, both that they should be of good character, and that the person emancipating should support them, should they be unable to support themselves. C. C. 185, 188; *Henriette v. Barnes*, 11 An. 454; *Louisa Marshall v. Watrigant*, 13 An. 619. And of this the courts ought to take notice, although not formally called to their attention.

The judgment of the lower court, therefore, so far as it decrees the freedom of the slave *Julie*, must be reversed; but the contract of sale having been proven, the injunction can be maintained to prevent the sale of *Julie*, by the defendants, as the property of the *Succession of Onil Bourgeat*, deceased.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed; and it is now ordered, adjudged, and decreed by the court, that the injunction granted in this case be perpetuated; that said slave *Julie* be delivered to the plaintiff, she paying the costs of the appeal, and the defendants, those of the lower court.

COLLÉ, J., dissenting. I am of opinion that the contract of emancipation is established by the parol evidence, which was admitted without objection.

I cannot, however, concur with the interpretation given by the court to Article 196 of the Civil Code.

This Article reads as follows :

"The child born of a woman after she has acquired the right of being free at a future time, follows the condition of its mother, and becomes free at the time fixed for her enfranchisement, even if the mother should die before that time."

This Article plainly declares, that at the moment the mother is entitled to be enfranchised, the child becomes free. The child being free, no ratification of it by a court of justice is necessary. It is different as to the mother; for the Article says, "after she has acquired the right of being free." The Article distinguishes between the two, giving to the mother a "*right of being free*," which implies a *right of action* to have her freedom judicially pronounced, and giving to the child freedom at the moment the right of action of the mother commences.

Besides, the Article, as to the mother, speaks of her "*enfranchisement*," which implies some action for becoming free; whereas, as to the child, it says it "*becomes free*," even if the mother should die before the time fixed for her enfranchisement.

If my interpretation of Article 196 be incorrect, another serious question would arise, whether the plaintiff had not acquired under this Article, even as interpreted by the majority of the court, such a vested right to her liberty as she could not be divested of by subsequent legislation, prohibiting the emancipation of slaves. Sess. Acts, 1857, p. 55. Art. 174 of the Civil Code declares, "that a slave is incapable of making any kind of contract, except those which relate to his own emancipation."

This Article, then, so far as emancipation is concerned, treats slaves as persons capable of contracting, and they are vested with the same right of contracting as to their emancipation, as freemen are as to any other species of contract.

Why, then, should slaves be deprived of the benefit of Article 105 of the Constitution of 1852, which prohibits the passage of any law impairing the obligation of contracts, or the divestiture of vested rights.

The law having authorized the contract of emancipation, and as to that, having

PAULINE
v.
HUMBERT.

treated slaves as persons capable of contracting, money having been paid according to the terms of the contract, and all upon the faith of the legislation which declared that the slave would become free at the time agreed upon by the parties to the contract, it becomes a serious question as to the power of the State to practically annul, by a subsequent statute, the anterior contract.

Another question also presents itself, whether the statute of 1857, prohibiting emancipation, would apply to one claiming freedom under Article 196 of the Civil Code. Vide *George v. Demouy*, 14 An., dissenting opinion.

I deem it unnecessary at this time to express any opinion upon these topics, on account of the manner in which I understand Article 196 ought to be interpreted.

I am of opinion that the judgment ought to be affirmed.

THE POLICE JURY OF WEST BATON ROUGE v. A. CROSELY.

The recording of the *proces verbal* of adjudication of work to be done on the road and levee, without giving the name of the proprietor or a description of the land, will not create a privilege on the land on which such work is done.

A PPEAL from the District Court of the Parish of West Baton Rouge, *Beale, J. H. M. Favrot*, for plaintiff and appellant. *D. N. Barrow*, for defendant.

COLE, J. In the year 1849, plaintiff caused the work to be done on the road and levee of land of defendant to be sold at public auction, and it was adjudicated to one *Marcelin Major*.

The land was supposed to belong to one *Wethersby*, and the notices required in the proceeding for the sale of the work were addressed to him.

The *proces verbal* of adjudication of the work declared that the work adjudicated was to be done upon "land belonging or said to belong to the estate of *Dr. Wethersby*, deceased."

The parish having paid *Major* for the work done by him according to the price of adjudication, now claims a privilege by virtue of the recording of the *proces verbal* of adjudication, and asks to have the land seized and sold to satisfy the privilege for the amount paid by it.

There was judgment for defendant and plaintiff has appealed.

It is clear that the recording of the *proces verbal* cannot give any privilege upon the land of the defendant, *Crosely*, for neither his name nor a description of the land are given. This is not an action on a *quantum meruit*, and if it were, it could not be maintained, for there was neither personal service nor attachment of property.

The District Court properly dismissed the suit.

Judgment affirmed, with costs.

SUSAN KING v. J. G. NEELY et al.—HEIRS OF L. INGE et al., Intervenor.—ELLEN D. KING, Intervenor.

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The son-in-law of one of the parties to a suit is a competent witness. The interest of the mother of the witness in the property in dispute, as belonging to the marriage community, she not being a party to the suit, is too remote to exclude her son's testimony.

The title to slaves may be proved by parol when it is shown that, by the laws of the State where the facts testified to took place, and where the slaves then were, they could be transferred by verbal sale and delivery.

By the laws of Mississippi, among collaterals, the kindred of the whole blood are preferred to the kindred of the half blood in the same degree; and by effect of representation, nephews and nieces of the whole blood will exclude a sister of the half blood.

A PPEAL from the District Court of the Parish of Concordia, *Ratliff, J.*
J. W. Montgomery and *P. Alexander*, for plaintiff. *T. P. Farrar* and *A. N. Ogden*, for the heirs of *Inge*. *L. V. Reeves*, for *Ellen D. King*, intervenor.
H. B. Shaw and *Durant & Hornor*, for defendants and appellants.

BUCHANAN, J. These are two appeals from the same judgment rendered on the verdict of a jury; one appeal being taken by defendant, and the other by two intervenors.

As regards the defendant, *Neely*, the issue is purely one of fact, namely, whether or not a retrocession was made by *Neely* to *Albert Milton King*, of certain slaves which *King* had sold and conveyed to *Neely* several years previously to the alleged retrocession.

The first question for our examination is presented by a bill of exceptions taken by defendant to the admission of the deposition of *Robert King*.

Defendant objects to the competency of *King*, because he is the son of the wife of *Neely*; that although the witness's mother is not a party to this suit, yet the same involves the interests of the community of acquets between the defendant and his wife. In support of this objection, the defendant relies upon Article 2260 of the Code, which provides that descendants cannot be witnesses for or against their ascendants.

We held, in the case of *Porche v. Leblanc*, 12 An. 782, that the Article in question is to be construed as applicable to cases in which the interests of an ascendant or descendant of the witness is directly involved in the controversy. That is not the case here. The mother of the witness is not a party to the suit. And her alleged interest in the marriage community is altogether too remote and contingent to have been considered by us as a sufficient objection, even had we not the case of *Porche* before us. The husband is the head and master of the community, and may alienate its effects, without the consent of his wife, whose interest is only fixed by the dissolution of the marriage, and is subject to the discharge of debts. She, or her heirs, may even renounce the community. The general rule laid down in *State v. Levy*, 5 An. 64, is, that all persons are competent to testify, except those whose incompetency is expressly declared by law.

Another objection which is made to the witness, *King*, in common with other witnesses of plaintiff, named *Harris*, *Valentine* and *McIlvaine*, is that they are offered to prove a title to slaves by parol. It is admitted of record, that slaves are personal property in Mississippi, the State of the domicile of *Albert Milton*

KING
v.
NEELY.

King, where the slaves were occupied and worked, where the retrocession is alleged to have taken place, and where the events occurred of which the witnesses testify. The counsel of defendant, in his printed argument indeed concedes that by the law of Mississippi, slaves may be transferred by verbal sale and delivery, and consequently, that such sale and delivery may be proved by parol testimony. But he insists that a price or consideration for the sale, and an actual delivery should be proved. It appears to us that this argument goes entirely to the effect, or sufficiency of the testimony, and not to its admissibility. The forms and effects of contracts are governed by the laws and usages of the place where they are made, and intended to have effect. C. C. 10. There can be no doubt that that place, in this instance, was Mississippi. And we concur in the inference which the jury has drawn from the facts stated by these witnesses, and corroborated by others.

The defendant has objected in argument, although his pleadings contain no such exception, that the plaintiff has not brought herself within the provisions of the law of Mississippi, for claiming the half of her husband's estate by the action for assignment of dower.

It is sufficient to say, upon this point, that we have before us all the heirs-at-law of *Albert Milton King*, and that they make no objection of this sort, but concede the right of plaintiff to the half of the slaves which were in Mississippi at the time of her husband's death, as awarded to her by the verdict and judgment of the District Court.

The heirs at law of *Albert Milton King*, are the children of his two sisters of the full blood deceased, and a sister of the half blood.

The court below charged the jury "that one-half of the slaves and personal property of *King*, in Mississippi, should be divided into three parts, the minor child of *Laura King* taking one part, the minor children of *Olivia King* taking another part, and the remaining third part to be taken by *Ellen D. King*." The statute of Mississippi regulating the distribution of estates among collateral heirs, is in the following words: "When there shall be no children of the intestate, nor descendants of such children, then the estate descends to the brothers and sisters of the intestate and their descendants, in equal parts; the descendants of a sister or brother of the intestate to have, in equal parts among them, their deceased parent's share." "And there shall be no representation among collaterals, except with the descendants of the brothers and sisters of the intestate." "And there shall, in no case, be a distinction between the kindred of the whole and half blood, except the kindred of the whole blood in equal degrees shall be preferred to the kindred of the half blood in the same degree." (Revised Code of Mississippi, p. 452 and 453, Art. 110.) Portions of this Article are badly worded, and are, in some respects, vague. Two ideas, however, are distinctly enunciated in it, viz: 1st, that representation among collaterals takes place only with the descendants of the brothers and sisters of the deceased. "Representation is a fiction of the law, the effect of which is to put the representative in the place, degree and rights of the person represented." C. C. 890. By representation, then, *Hibernia Inge* stands in the same position in point of heirship to *A. M. King*, as her deceased mother, *Laura King*, deceased; and the minors, *Howard Wailes*, *Albert M. Wailes* and *Olivia Wailes* stand in the place of their deceased mother, *Olivia King*. 2d. That the kindred of the whole blood in equal degree, shall be preferred to the kindred of the half blood in the same degree. The minor children, then, of *Laura* and *Olivia King*, sisters of the whole blood, are to be preferred

to *Ellen D. King*, a sister of the half blood, and under the statute would, we presume, exclude her from the inheritance of *A. M. King*, in Mississippi.

The judgment is further erroneous in decreeing the slaves *Jack, Gardner, Dan, Ralph, Flora*, and her children *Henry* and infant and *Harriet*, and increase, and their hire, to all the intervenors indiscriminately. These slaves being found in Louisiana at *King's* death, are to be distributed among his heirs, according to our laws.

According to the provisions of Art. 909 C. C., these last mentioned slaves and their hire are to be distributed as follows, viz: the minor heirs of *Laura King* and *Olivia King*, as being of the whole blood, take together five-sixths interest therein, and the half-sister, *Ellen D. King*, takes the remaining sixth thereof.

It is, therefore, adjudged and decreed, that the judgment of the District Court, as between the plaintiff and the defendant, *John G. Neely*, be affirmed.

It is further ordered, adjudged and decreed, that the judgment appealed from be reversed as to the appellee, *Ellen D. King*, and so amended that the appellant, *Hibernia Inge*, in right of her deceased mother, *Laura King*, do recover of the defendant one undivided fourth of the slaves, *Len, Céleste, Walton, Margaret, Caroline, Jay, Milton, Easter, Munroe, Ann, Alexander, Christina, Kitty, Flora, Philip, Harp, Lydia, Ellen, George, Jinney, Sam, Elias, Letty, Angeline, Bill, Lucy, Milly, John the Baptist, Liz, Martha, Lithy, Tyler, Punch, Jake, Eli, Kate, Little Lithy, Rachael, Nat or Mat, Maria, Joseph, Bob, Lucy, Harrison, Frank, Davy, Eliza, Celia, Mandy, Rose, Milly, Mason, Charles Marshall, Nat or Mat, Sally, Armstead, Prosper, Harry, Alfred, Jim, Lewis, Ike or Isacre, Dennis, Judy and Madison*, together with one undivided fourth of their increase, and also one undivided fourth of the hire of said slaves, at the rate of \$4,200 per annum, since the last of March, 1856; and it is further decreed, that the minors, *Howard Wailes, Albert M. Wailes, and Olivia Wailes*, in right of their deceased mother, *Olivia King*, do jointly recover of the said defendant one undivided fourth of all of the aforesaid slaves and their increase, and also one undivided fourth of the hire of said slaves, fixed at the rate of \$4,200 per annum, since the last of March, 1856. And it is further ordered, adjudged and decreed, that the judgment appealed from be further amended, by dividing the slaves *Jack, Gardner, Dan, Ralph, Flora, Henry*, an infant, and *Harriet*, and their natural increase, and their hire since the last of March, 1856, at the rate of \$1,400 per annum, among the intervenors, as follows, viz: one-half of five-sixths thereof to the minor *Hibernia Inge*, another half of five-sixths thereof to the minors *Howard Wailes, Albert M. Wailes* and *Olivia Wailes*, jointly, and the remaining sixth thereof to the minor *Ellen D. King*; the costs of the District Court to be paid by defendant; and those of appeal, one-half by defendant, and one-half by the intervenor and appellee, *Ellen D. King*.

SAME CASE—ON A RE-HEARING.

BUCHANAN, J. The intervenors have brought to our notice, by a petition for re-hearing, an omission made, through inadvertence, in the decree heretofore rendered. The judgment of the court below in favor of plaintiff against defendant, *Neely*, which has been affirmed by us, allowed *Mrs. King* twenty-five hundred dollars, with interest, as one-half of a sum of five thousand dollars, the value of

KING
v.
NEELY.

mules, horses, cattle, farming utensils, &c., converted by *Neely* to his own use. Upon the principles of our decision, the minor children of *Albert Milton King's* two sisters of the full blood deceased, are entitled to the other half of this sum; and it was our intention to have so decreed.

It is, therefore, adjudged and decreed, that, in addition to the allowances made by our judgment herein, rendered on the 28th March, 1859, there be judgment in favor of *Hibernia Inge*, as heir of her deceased mother, *Laura King*, against the defendant, *John G. Neely*, for the sum of twelve hundred and fifty dollars, with legal interest from the last day of March, 1856, until paid; that, in addition to the allowances made by our judgment of the 28th March, 1859, there be judgment in favor of the minors, *Howard Wailes*, *Albert M. Wailes*, and *Olivia Wailes*, in right of their deceased mother, *Olivia King*, against the defendant, *John G. Neely*, for the sum of twelve hundred and fifty dollars, with legal interest from the last day of March, 1856, until paid; and that the judgment heretofore rendered by us herein, remain, in all other respects, undisturbed.

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INDIA BAGGING ASSOCIATION v. B. KOCK & Co.

An agreement was entered into by several commercial firms, by which they bound themselves for the term of three months, not to sell any India cotton bagging, except with the consent of the majority of them.—*Held*: That it was a combination to enhance the price of the article, which is in restraint of trade and contrary to public order, and that the agreement could not be enforced in a court of justice.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*
G. LeGardeur, for plaintiff. *E. Briggs*, for defendants and appellants.

BUCHANAN, J. On the 7th August, 1856, an association of eight commercial firms in New Orleans, holders of 7410 bales of India cotton bagging, was formed into what they called a copartnership for the sale of India bagging, but which ought rather to be called a partnership to prevent the sale of India bagging; for, by their articles of association, the subscribers bound themselves, for the term of three months, not to sell any bagging, nor to offer to sell any, except with the consent of the majority of them, expressed at a meeting; under the penalty of ten dollars for every bale so sold, or offered to be sold. It must be observed that the 7410 bales of India bagging held by the members of this association, in unequal proportions, did not cease to be the property of the individual members. It is indeed said, in the fifth article of association, that the bagging is accepted by the association for the benefit of its members *individually and separately*, at the rate of 20 cents per yard. But this clause means nothing, if it does not mean that each member of the association accepts his own stock of bagging at that price. For at the end of three months, each member was to resume the uncontrolled disposal of his own stock of bagging; and it is admitted by plaintiffs that two of the members, holders of 2605 bales, withdrew from the association before the expiration of the limited term of three months.

This suit is brought against one of the members, by the manager of this association, for the recovery of a penalty of seven thousand four hundred dollars, for having sold seven hundred and forty bales of bagging, in contravention of the articles of association.

Defendant denies having sold as alleged, and claims in reconvention, of plaintiffs, three thousand dollars and upwards, for so much paid them for sales made by him in excess of twenty cents per yard..

From the argument, the whole dispute seems to be about a lot of 101 bales of bagging sold on the 7th November, 1856; one party asserting that date to have been within the term of the association, while the other party contends that its term expired on the 6th November.

This is a case which ought never to have come before us. The agreement between the parties was palpably and unequivocally a combination in restraint of trade, and to enhance the price in the market of an article of primary necessity to cotton planters. Such combinations are contrary to public order, and cannot be enforced in a court of justice. C. C. 1889, 1887; Merlín, Rep. de Jurispr., verbo Monopole; Blackstone's Comm., book 4, chap. 12, §§ 8 and 9; Chitty on Contracts, edition 1855, p. 678; 1st Smith's Leading cases, 367, 381; French Penal Code, Art. 419; Pardessus, Droit Comm., vol. 1, p. 265; *Lang v. Weeks*, 2 Ohio Repts., N. S., 519; *Thomas v. Tiles*, 3d Ohio, 274.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and that this suit be dismissed, at costs of plaintiff in both courts.

COLE, J., recused himself in this case.

BAGGING ASS'N
v.
KOCK.

MARY J. BISLAND v. A. PROVOSTY et al.—MCKLERoy & BRADFORD, and
HALL, RODD & PUTNAM, Interveners.

The prohibition in Art. 2412 of the Code against the wife's binding herself for her husband, or conjointly with him, for debts contracted by him before or during the marriage, is, to a certain extent, one affecting the public order.

Neither the acknowledgment of the wife that the debt was contracted for the benefit of her separate estate, nor the fact that the money was actually paid into her hands, will estop her from afterwards denying her indebtedness, and the creditor is then put upon proof that the debt inured to the benefit of the wife's separate estate.

The doctrine of estoppels has no application to the contracts of married women, when they or their property are sought to be held liable for the debts of their husbands.

An exception to the rule in regard to the wife's incapacity to bind herself for a debt which does not inure to her separate benefit, may exist when she has actually committed a fraud, but not when it has been impliedly or constructively committed.

When there has been no contract of letting and hiring of slaves, a privilege on the crop raised by them cannot be asserted.

APPPEAL from the District Court of the Parish of Pointe Coupée, *Ratliff, J.*
T. J. Cooley and U. B. & E. Phillips, for plaintiff. *A. Provosty, Clark & Bayne, G. L. Lacy and R. A. Upton*, for defendants and intervenors, appellants.

MERRICK, C. J. This suit is brought to recover fifty-five slaves in the possession of the defendant, *Provosty*, and a large sum for the revenues or hire of said slaves. The plaintiff's original title to the negroes in controversy, has not been seriously questioned in this court, and for the purpose of this decision, we shall assume her title derived from her father and mother's estate in Mississippi, by inheritance or distribution, to be valid, merely remarking, that we discover no ground upon which her original title can be successfully impugned.

The controversy in this case arises out of certain acts of mortgage and the

14	100
46	243
14	100
47	1068
47	1274
14	100
51	1464
14	169
52	1103
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BHILAND
v.
PROVOSTY.

renunciations thereto, signed by the plaintiff and relied upon by the syndic and intervenors as a bar to plaintiff's action.

The first of these mortgages bears date, New Orleans, February 28th, 1856, and was executed by *Robert W. McRae*, the husband of the plaintiff alone, in favor of the intervenors, *McKleroy & Bradford*, to secure them for all advances, acceptances, &c., which they might make the said *McRea*, and the said *McRea* and partner, *C. F. McRea*, during the period of the three ensuing years.

The property mortgaged consisted of the Glen Mary plantation owned by *Robert W. McRea*, and about eighty negroes, including those claimed by plaintiff, then about fifty in number. This mortgage, after describing the land and negroes, contains the following clause, viz :

"Which land was acquired by said mortgagee on the 24th of January, 1853, from *Mrs. Widow Gondreau*, by act passed before *V. Ledoux*, Notary, in said parish, (Pointe Coupée,) and slaves from different persons at different periods by purchase."

The act also contained a covenant on the part of *McRea* to procure the renunciation of the plaintiff, (his wife,) to the same. Between the execution of this mortgage and the third day of April following, *R. W. McRea* drew drafts, having different periods to run, in favor of various persons, to an amount exceeding sixty thousand dollars, which, with other sums, were afterwards paid by *McKleroy & Bradford*. A portion of the drafts appear to have been accepted, but at what time, it does not appear.

On the third day of April, 1856, the plaintiff appeared before the notary who had received the act of mortgage of her husband, and in an act in which the object of the act of mortgage is set forth and the description of the property recapitulated, declared that she ratified and confirmed the mortgage in all its parts, without exception or reservation, meaning and intending that the act should have full effect, force and virtue, and the same validity as though she had been present at the execution of and signed the same. The act then recited, the reading of the act of mortgage, and concluded with the usual renunciation, under the Act of the Legislature of 1835.

The other act of mortgage was executed in the city of New Orleans, on the 26th day of February, 1857, by *Robert W. McRea*, acting in his own name and as agent for his brother, *Conrad F. McRea*, and the copartnership between himself and brother in favor of the intervenors, *Hall, Rodd & Putnam*, to secure them for advances made and to be made, supplies purchased and to be purchased, and for drafts accepted and to be accepted during the term of five years, and to the amount of \$35,000. This mortgage was given upon the Crescent Park place in the parish of Pointe Coupée, and twenty-nine slaves belonging to the copartnership of *R. W. & C. F. McRae*, and also upon the Glen Mary plantation and slaves, previously mortgaged to *McKleroy & Bradford*. Twenty five of these slaves were described as purchased of *Mrs. Gondreau*, and fifty, (which, with their increase, are the subject of this controversy,) are described in the act of mortgage, in these words : "And also the following named slaves for life, placed on the said Glen Mary Plantation, by the said *Robert W. McRea*, and his separate property, to wit," &c.

This act was signed by *R. W. McRae* individually, and in the name of the copartnership. On the third day of March of the same year, 1857, before a Notary in the parish of Pointe Coupée, *R. W. McRae* and his wife, the plaintiff, and *Conrad F. McRae* together with his wife, passed an act of ratification and

renunciation in favor of *Hall, Rodd & Putnam*, in which the mortgage, executed on the 26th of February, was substantially recited, and the property described with the single exception of the clause which we have just quoted. In the act of renunciation, it is recited in these words: "And also the following named slaves, placed on said plantation by the said *Robert W. McRae*, since his said purchase, which are separate property, viz," &c.

The act also declares that the parties have carefully examined a certified copy of the act of mortgage, and that they ratify the same. The act then concludes with a renunciation of the tacit mortgage by the plaintiff, and *Mrs. Georgiana McRae*, wife of *Conrad F. McRae*, in the usual form. The day the mortgage was executed, *R. W. McRae* drew drafts upon *Hall, Rodd & Putnam*, for \$32,000, which were accepted, but it does not, however, appear at what time.

Previous to the execution of the mortgages in favor of *Hall, Rodd & Putnam*, viz. on the 23d day of February, 1857, *McKleroy & Bradford*, took judgment by confession in the Fourth District Court of New Orleans, against *R. W. McRae*, for \$81,990 98, with a recognition of the mortgage upon the land and slaves. On the 3d day of March, 1857, the plaintiff, in another act which recited this judgment, released the property from her matrimonial, dotal and paraphernal rights, and from any claims, mortgages and other privileges to which she might be entitled in virtue of her marriage.

On the 20th of January, 1858, *Hall, Rodd & Putnam*, obtained judgment by confession, in the Fourth District Court of New Orleans, against *R. W. McRae*, for \$28,385 06, with interest, also recognizing their mortgage.

Execution having issued on the two judgments, and the *Glen Mary* plantation and all the slaves thereon having been seized under them, *R. W. McRae* made, on the 6th day of March, 1858, a surrender of his property to his creditors, but omitted from his schedule the negroes claimed by his wife.

The same day the defendant, *Provosty*, placed an overseer in charge of the property, including that claimed by the plaintiff. On the ninth day of March, the plaintiff and her husband executed a notarial act, by which she professed to resume the administration of her paraphernal property, and the same day her attorney made a formal demand of the defendant, *Provosty*, of her negroes, but they were not given up. On the sixteenth day of March, the creditors deliberated, and elected the defendant, *Provosty*, syndic, and he qualified the next day by giving bond.

On the 29th day of May, 1858, the plaintiff instituted the present action against the defendant, *Provosty*, both in his individual capacity and as syndic, to recover, as we have already observed, the slaves and the value of their services. *McKleroy & Bradford* and *Hall, Rodd & Putnam*, intervened in the suit.

Judgment was rendered on the 9th day of October, 1858, in favor of the plaintiff for the slaves claimed in her petition, and the sum of \$520 per month, from the 6th day of March, 1858, until the slaves shall be delivered to the plaintiff for their hire, as against the syndic, with a privilege upon the crop of 1858 in his hands. The syndic and intervenors appeal.

As the defence of the syndic and the claims of the intervenors are based upon the acts of mortgage and renunciation, we shall consider the matters discussed in the various briefs and oral arguments collectively.

The question of plaintiff's original title having been disposed of, the following points made by the appellants and appellee, seem to cover the questions in controversy, viz :

DESLAND
v.
PROVOSTY.

1st. "That plaintiff admitted the slaves in controversy to be the property of her husband, and intervenors acted upon the strength of such admission; and as a consequence, she is judicially estopped from the denying the same, even though made during coverture.

2d. "That the conduct of the plaintiff has been deceitful and unfair, not to say fraudulent; and as a consequence, *Mrs. McRea* is deprived of the right to ask assistance at the hands of the court."

3. The judgment of the lower court is erroneous if the preceding grounds are not tenable, because the amount allowed for the hire of the slaves is excessive. And,

4. The appellee contends that the judgment for the value of the services of the slaves ought to be against the defendant, *Provosty*, in his individual capacity.

I. Although it does not appear at what time the drafts of *McRae* were accepted by the intervenors, we think it must be inferred that a portion of the indebtedness, amounting to a large sum in each case, was furnished by them after the act of renunciation was passed. It is there urged that *McRae*, by the Acts of mortgage, declared that the slaves in controversy were his, and in the acts of renunciation the plaintiff, so far from setting up title in herself, recognized and confirmed the statement of her husband that he was the owner of the slaves; and it is contended that the intervenors acted upon the faith of her admission, and as a consequence, she is estopped from controverting the title of her husband. It is not pretended that the debts contracted by *McRae* enured to the benefit of his wife. They were, therefore, debts for which the wife could not bind herself in any form of contract, by reason of an express prohibition of the Code. C. C. 2412. This prohibition is, to a certain extent, one affecting the public order. *Gasquet v. Dimitry*, 9 L. R. 590. It is so imperative, that it has been held, and is well settled, that though the wife in the act acknowledge that the debt was contracted for the benefit of her separate estate, or though the money be actually paid into her hands, yet, so far from being estopped, the simple denial of the wife shall put the creditor, in each of these cases, upon proof that the debt enured to the benefit of her separate estate. *Erwin v. McCalop*, 5 An. 173; *Brandigee v. Kerr*, 7 N. S.; *Beauregard v. Her Husband*, 7 An. 294. The reason of the rule, as it has been often reiterated, is, that if the wife were to be concluded by her admissions in the contract, it would only be necessary to change the form of the instrument, in order to evade the law. In reference to this subject, the court said, in the case of *Cuny v. Brown*, 12 Rob. 84: "This prohibition cannot be evaded by disguising the suretyship under the specious form of some other contract, which the wife might validly contract. We will endeavor to look through such disguises, and give effect to the provisions of law for the protection of the rights of married women." This was reiterated in the case of *Theriet v. Voorhies*, 12 An. 852; and it was again said, "It is the uniform practice of this court to look through all disguises in which men may shroud their business dealings; to prevent, so far as possible, the property of the wife from being sacrificed for the debts of her husband, from which she derives no benefit." In *Pascal v. Sauvinet*, 1 An. 429, it was said that "whatever form the contract may be made to assume, its true character may be inquired into, and when it has not turned to her benefit, she will be relieved from the obligation." See also *Provosty v. Demoulin et al.* 14 An. In *McIntosh v. Smith* it was held, that where a wife stood by and saw her property sold to pay her husband's debts, that she was not estopped from asserting her ownership subsequently. The court said: "If she suffer it to be done without opposition, the

law presumes that she was prevented from asserting her rights. The legal presumption which excuses her when she commits a certain felony in company of her husband, must avail her also in cases of this kind." 2 An. 756.

BRISLAND
v.
PROVOSTY.

The wife is not, therefore, estopped by the assertion of her husband, contained in his act of mortgage, that the property belonged to him, nor by her act of renunciation; for the reason of the law is the same in this as in the cases cited. If the assertion of ownership in the husband, in the act of mortgage, could bind the wife, the Article 2412 of the Civil Code would be a dead letter, and this formula would be introduced into every notarial act intended to be signed by a married woman. Nor do we think the fact that the money was furnished upon the faith of the mortgage, a circumstance which distinguishes this case from all others. It was so furnished, upon the note sued upon in the case of *Brandigee v. Kerr*, and it is assumed by the court, that the money was paid into the hands of the wife herself.

We conclude, therefore, that the doctrine of estoppels has no application to the contracts of married women, where they or their property are sought to be held liable for the debts of their husbands.

II. In regard to the question of fraud, it may be observed that the supposed fraud consists in signing an act of renunciation to a mortgage in which the husband had included his wife's property with his own, and mortgaged the same, describing it as his separate property. This act of mortgage appears to have been prepared by other persons, out of the presence of the wife, and the fraud must therefore consist in having signed an act of renunciation, in which she recognized the declaration that all the slaves upon her husband's plantation were his property. In the majority of cases, on this state of facts, there would be as much reason to charge the parties who had signed the original act with fraud, as there would be to charge the wife. And this will be quite evident, if we reflect upon how little attention is given by women to matters of business, and the manner in which these prolix notarial acts are usually passed.

It is a rule of our law that fraud must be proven. A constructive fraud cannot be admitted to deprive a married woman of her estate, for, after all, it would be nothing more than an estoppel, which we have just demonstrated has no application to contracts entered into by married women for the benefit of their husbands.

The rescripts of Antoninus and Severus—*Decipientibus mulieribus Senatus-consultum auxilio non est*—is cited as making an exception to the rule. The *senatus-consultum* referred to was that of Velleianum which was much more comprehensive than the 61st law of Toro or Article 2412 of the Civil Code. *Velleiano Senatus-consulto plenissime comprehensum est, ne pro vello faminae intercederent.* D. 16, t. 1, l. 1.

The exception therefore became very important, as the *senatus-consultum* applied to women whether married or single, or under the power of others, and from its tenor and the context, it is evident it can have its application only where the woman has actively and not impliedly or constructively committed a fraud. See D. l. xvi, t. 1, lex. 2, § 2 & 3.

Under our Article 2412, which is confined exclusively to the contracts of married women, it is supposed that the wife may be induced to sign a contract injurious to her rights under the marital influence. Hence the Act of 1835 was passed which required her to be examined separate and apart from her husband before she could be permitted to renounce her tacit mortgage, and hence prescrip-

BISLAND
v.
PROVOSTY.

tion is not permitted by Article 3491 to run against her in any case during the continuance of the marriage, where her action may be prejudicial to the interest of the husband. See also *McIntosh v. Smith*, 2An. 756.

It has been demanded of us with great earnestness by counsel for the intervenors, whether we are prepared, by affirming this judgment, to sanction a doctrine which will be extremely detrimental to the commercial interest and enable married persons to commit the greatest frauds upon commission merchants and others advancing them funds?

It is a sufficient reply to this to say, that ordinary prudence requires a man who is about to purchase or to advance large sums upon a mortgage upon real estate and slaves to require a production of the title papers or, where these are wanting, certificates and affidavits of disinterested persons to supply the loss. A party who neglects these most obvious and ordinary precautions can only charge his losses to his own want of care.

We are not here to make laws for the benefit of particular classes. It is our duty to expound the laws as we find them and leave it to the Legislature to introduce such changes as the public interests require.

Again, we are admonished, and authorities are cited to show that suitors must come before courts of justice with clean hands and that courts of justice cannot come in contact with falsehood but to denounce it, and that it is an exploded and antiquated doctrine that the rights of married women are to be protected under all circumstances.

For a reply it is sufficient to say that where the law declares that the weak shall be protected, the courts are not to withhold the relief which the law grants, because such person may have been induced by improper marital influences to sign acts ratifying or confirming that which is not strictly true.

We have been cited to authorities of our sister States, supposed to be applicable to the question of fraud. It is unnecessary to consider them here, and it is a sufficient answer to whatever inference may be drawn from them, to say that they are authorities derived from other systems of law, and where the State policy may be somewhat different from our own.

We are also referred to the case of *Bein et al v. Heath*, 6th Howard, 239, as a just exposition of our law on this subject by the Supreme Court of the United States. This case, it must be borne in mind, was decided on the chancery side of the court, and was governed by the rules of chancery law rather than the laws of Louisiana. The case, therefore, though somewhat at variance with our decisions cannot be considered as furnishing a new rule for the courts of this State. We think it safer to follow in the beaten path of our predecessors.

The jurisprudence of the State had been their study during their lives, and we may safely conclude they had comprehended its spirit and its policy. If innovations are to be made, as we have already observed, they can be made by the Legislature much more appropriately than by the courts.

III. On the subject of the value of the services of the slaves, we think the District Judge has formed a just estimate. He had the witnesses before him and he appears to have selected a medium between the extremes.

IV. The appellee demands, by her answer to the appeal, that the judgment be amended, so as to give her a personal judgment against the defendant, *Provosty*. This change in the judgment is resisted by the defendant, *Provosty*, on the ground that he appealed as syndic, and not individually. On an examination of the entries on the minutes and the appeal bond we think he stands before this court

BRISLAND
v.
PROVOSTY.

in both capacities. Were it not so, it would be our duty to dismiss the appeal for the want of proper parties, viz: *A. Provosty*, in his individual capacity, in whose favor judgment was rendered in the lower court. As the mention of *A. Provosty* in the bond and motion for appeal may be construed to mean either capacity, and the addition of syndic in one part of the bond and its omission in another may be regarded as a *descriptio personæ*, we think in the absence of any phrase excluding the idea of an appeal in his individual capacity, that it may be held that the defendant intended to bring himself before us in such capacities as should be necessary to maintain the appeal.

It has been already shown that the defendant, *Provosty*, took possession of the slaves before his appointment as syndic, and that on demand he refused to deliver them to the plaintiff, having contested her title to the present time. It is therefore evident that there is no contract of letting and hiring between the parties, and, as a consequence, no privilege on the crop. See *Fisk v. Moores*, 11 Rob. 280, and *Blanchard v. Davidson*, 7 An. 654.

The right to recover the value of the services of the slaves is a part of the so called *omnis causa* of the civilians, and partakes of the nature of the real action which it follows. C. C. 491; 3 L. R. 550; 6 Savigny, 246, 251, Berlin ed. It would seem, therefore, that if the right of the plaintiff to recover against the defendant in his individual capacity be recognized, that the revenues will follow the main action by right of accession. Mackeldey, P. Speciale. §302, No. 4. In the case of *Calmes v. Carruth*, 12 Rob. 664, a case very similar to the present, it was held that the defendant was liable in his individual capacity. It is proven in this case by one witness, that the services of the negroes were indispensable to the creditors in order to take off the crop. If this be so, it will doubtless enable the syndic to charge as a part of the expenses of making the crop the sum which he is hereby condemned to pay to the plaintiff for the value of the services of the slaves.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be amended, so that in lieu and place of the judgment against the syndic for the hire of said slaves with a privilege upon the crop in his hands, it be ordered, adjudged and decreed by the court, that the plaintiff do have and recover judgment against the defendant, *Auguste Provosty*, individually, for the sum of five hundred and twenty dollars per month, from the sixth day of March, A.D. 1858, until said slaves shall be delivered to the plaintiff, and that said judgment so amended be affirmed, the appellants paying the costs of the appeal.

BUCHANAN, J., dissenting. I dissent from the decree pronounced in this case, for reasons given in my dissenting opinion in *Belouguet v. Lanata*, 13 An. 2.

JAMES J. AMONETT v. YOUNG & BEMISS.

A party who being himself the owner of property, points it out to be seized in execution for the debt of another, will be estopped from denying the title of the defendant in execution.

APPEAL from the District Court of the Parish of Madison, *Farrar, J.*
A. T. Steele, for plaintiff and appellant. *Snyder & Bemiss*, for defendant.
 LAND, J. This is a suit in which the plaintiff prays for a judgment decreeing

AMONETT
v.
YOUNG.

him to be the owner of seven hundred and twenty-five acres of land described in his petition, and quieting his title thereto as against the defendants.

The lands in dispute were purchased by *David H. Groves*, from the United States government, and were sold by him afterwards, on the 2d of April, 1841, to *Louis A. Collier*, on a credit of one and two years, retaining a vendor's privilege as security for the price.

On the 7th of August, 1843, these lands were sold by the United States Marshal, in the suit of the *Farmers' Bank of Virginia v. Thompson L. King*, to the plaintiff.

The lands had been pointed out to the Marshal by *Louis A. Collier*, as the property of the defendant in execution, *Thompson L. King*.

On the 1st of May, 1844, *Louis A. Collier* made a cession of his property, in the parish of Orleans, to his creditors.

On the 4th of September, 1847, these lands were sold by the Sheriff of the parish of Madison, in virtue of a writ issued in the suit of *Louis A. Collier v. His Creditors*, to the plaintiff, *James J. Amonett*, and to *William Amonett*.

The plaintiff claims title by virtue of the judicial sales above mentioned.

On the 30th of May, 1842, *David H. Groves* commenced suit in the parish of Concordia, on one of the promissory notes given for the price of the lands and claimed a vendor's privilege on the same.

On the 11th day of December, 1843, *David H. Groves*, obtained judgment against *Louis A. Collier*, recognising his privilege, and ordering the lands to be seized and sold for the satisfaction of his debt.

On the first Saturday in the month of October, 1848, the lands were sold by the Sheriff of the Parish of Madison, by virtue of a writ of *feri facias*, issued in the suit of *David H. Groves v. Louis A. Collier*, to the defendants, *Young & Bemiss*.

It is clear that the act of *Collier*, in pointing out the lands to the United States Marshal, as the property of *Thompson L. King*, and their subsequent sale, as the property of the defendant in execution, had the effect of divesting *Collier's* title, and transferring it, to the plaintiff in this suit, for the reason that the act of *Collier*, estopped him, from denying afterwards the title of the defendant in execution. *Marsh v. Smith*, 5 Rob. 523; *McMasters v. Atchafalaya Bank*, 1 An. 11; *Blanchard v. Allain*, 5 An. 368.

As *Collier*, therefore, was without title, at the date of his cession, the lands in dispute did not pass by operation of law to his creditors, although they had a right of action, to avoid the sale by the Marshal, on the ground of fraud.

The act of *Collier*, however, in pointing out the lands as the property of *Thompson L. King*, did not extinguish the vendor's privilege, and the plaintiff purchased the same, subject to this encumbrance.

The defendants purchased the lands at the Sheriff's sale in the suit of *David H. Groves v. Louis A. Collier*, under a writ ordering them to be sold to satisfy the privileged debt of the vendor, and thereby acquired a good and valid title as against *Collier*, and all parties holding under him. It is not pretended that *Thompson L. King* had any title.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.

W. SADLER v. WHITE et al.

14	177
45	122
45	367

It cannot affect the negotiability of a note, that its consideration is to be realized in future, or that from some contingency it may never be realized.

If the consideration of the note had not failed at the time of its transfer, the maker cannot set up as a defence, that the holder knew that there might be offsets against it.

14	177
120	911

A PPEAL from the District Court of the Parish of East Feliciana, *Ratliff, J. Muse & Hardee*, for plaintiff. *John & Charles McVea*, for defendants and appellants.

COLE, J. This suit is instituted upon the following instrument, signed by the defendants :

"On the first day of January, 1857, we, or either of us, promise to pay *T. I. Warsham* or bearer, three hundred and fifty dollars, for value received, with eight per cent. interest from maturity till paid."

There was judgment for plaintiff, and defendants have appealed.

Payment of the note is resisted, upon the ground of a failure of consideration, and that the plaintiff, a third holder, is bound by the equities between the original parties to the same.

The answer avers, that the note was given for and in part consideration of the rent for the year 1856, of a hotel and other property attached to the same ; that the hotel was rented by *White*, one of the defendants of *Warsham*, the payee, and of *Dixon* ; that on the 3d of May, 1856, the hotel was sold at Sheriff's sale, to satisfy an outstanding mortgage and vendor's privilege for a certain amount due by the purchasers thereof, *Warsham* and *Dixon*, and was bought by *J. F. McKneely* ; that the lease in favor of *White* was thus destroyed, and he was compelled to rent the property from the new purchaser, *McKneely*, at the price of \$350, for the balance of the year 1856.

That the present holder of the note well knew, before he became the owner of the same, the circumstances under which it was given and put into circulation, and that it was executed for the aforesaid consideration.

That plaintiff, knowing that the consideration of the note was not realized by the makers at the date of the same, but was future and contingent, and that there might be offsets against the note, purchased it at a usurious discount, viz, for about \$275. The answer concludes that plaintiff is bound by the equities between the original parties to the obligation, and as the consideration has totally failed, he has no right to recover upon it.

It is unnecessary to express any opinion upon the two bills of exception, relied upon by the appellants for a reversal of the judgment, because their answer sets up no legal defence.

1. As the consideration was legal in its nature, even then if it had been expressed in the note, its negotiability would not have been affected. *Canal Bank v. Holland*, 5 An. p. 364.

2. Plaintiff received the note before its maturity and before a failure of the consideration.

Even if it were known to him, taking it, that the consideration was future and contingent, and that there *might* be offsets against it, this would not make him liable to the equities between the defendants and payee.

SADLER
v.
WHITE.

If such were a sufficient defence, it would destroy materially the negotiability of notes, for in almost every case of the purchase of a note, the buyer knows, there *might* be equities between the original parties to the same.

It cannot affect the negotiability of a note, that its consideration is to be hereafter realized, or that from some contingency, it *may* never be enjoyed.

Any one, having sufficient confidence in another to give his written obligation for something to be given or enjoyed hereafter, is at liberty to do so, and the maker cannot censure any future holder of the note for having purchased it, and for seeking to hold him liable, for it was the faith of the maker in the payee, that he would execute his promise and allow no obstacles to defeat it, that created the note and gave currency to it.

In the present case, there was a valid consideration promised for the obligation and it could not be known with certainty, that it would fail, until the hotel was sold, for the payee could up to the sale have satisfied the debt due for the price of the hotel, and have satisfied the consideration by allowing defendants to occupy the same.

The case would present a different aspect, if the allegations of the answer had been, not that plaintiff knew there *might* be, but that there were equities between the original parties to the note, or that he knew not that the consideration might never be enjoyed, but that it could not or would not ever be realized. *Maurin v. Chambers*, 6 R. 62; *Barrelli v. Szymanski*, ante p. 47.

Judgment affirmed, with costs.

ROSALIE HACHE et als. v. JOHN F. AYRAUD et als.

The Civil Code of 1825, does not contain the provisions of the old Code on the subject of licitation.

The sale to effect a partition under a decree of court, must be made to the highest bidder at public auction. It is a judicial sale which, under Article 1863 of the Civil Code, cannot be invalidated on account of lesion.

Lesion will not invalidate a judicial sale to effect a partition even when the purchaser is one of the heirs of the estate to be divided.

Article 1440 of the Code, which says, that *acts of sale* which tend to the division of property between co-heirs, are subject to rescission for lesion beyond a fourth, must be construed to mean an extra judicial sale, and not one ordered by a court of justice, at which strangers as well as heirs may become purchasers for the purpose of effecting a partition.

APPEAL from the District Court of the Parish of Ascension, *Duffel, J.*
A. Gentile and Mills & LeBlanc, for plaintiffs and appellants. *J. H. Ilsey*, for defendants.

MERRICK, C. J. The plaintiff instituted an action for a partition of the property belonging to the successions of her father and mother. In her petition, among other things, she alleged that the property was burthened with debts, and that it could not be conveniently divided in kind, and she prayed that it might be sold at auction in the shortest delay, by a competent officer, for cash, each slave, &c., separately.

The defendants answered, and admitted the propriety of a partition by licitation. They prayed for a sale of the property in block, and the defendant, *John F. Ayraud*, claimed the right, as administrator, to retain a sufficient amount of

14 178
48 634

14 178
125 506

the proceeds of the property to pay the debts. After hearing the parties, (all being of full age,) the Judge decreed a sale of the plantation and fixtures, &c., certain negroes mortgaged to the Consolidated Association, and 500 shares of the stock of the said Bank to be sold for cash, in block.

The property was regularly sold by the Sheriff, and bought in by five of the co-heirs for \$15,000, it having been appraised at \$25,006 50.

The present suit is to rescind the licitation on the ground of lesion beyond one-fourth. There was judgment in the lower court against the plaintiff, and she appeals.

Assuming that the action of partition was the main action, and the demand by the plaintiff that the debts also should be paid, a mere incident to the same, the case presents only a question of law, viz., can a sale made to effect a partition under a decree of the court, where the property is adjudicated to certain heirs, be rescinded on the demand of a co-heir for lesion beyond a fourth?

The appellant contends that the following Articles of the Civil Code guarantee to her the action, viz :

Art. 1436—"They (partitions) may even be rescinded on account of lesion; and as *equality is the basis* of partitions, it suffices to cause the rescission that such lesion be of more than one-fourth part of the true value of the property."

Art. 1440—"The action of rescission mentioned in the foregoing Articles, takes place in the cases prescribed by law, not only against all acts bearing the title of partition, but even against *all those which tend to the division of property between co-heirs*, whether such acts be called *sales*, exchanges, compromises, or by any other name."

Were these Articles of the Code the only ones bearing on the subject, (elucidated as they are by the numerous authorities cited from the French writers and the decisions under the Code of 1808,) there would not be much difficulty in deciding the case in favor of the plaintiff's pretensions.

But we are met by two other Articles of the same Code, which declare that lesion cannot have place in judicial sales, even in the case of minors. C. C. 1863, 2572.

To this it is replied by plaintiffs' counsel, that the licitation by which property is adjudicated to a co-heir, is *not a sale*. The French writers appear to be unanimous on this subject, and to support fully this position of plaintiffs' counsel. The case, also, of *Porter v. Depeyster*, 18 La. 351, seems to give some countenance to this conclusion.

But we think that a careful comparison of the Code of 1825 with the Code of 1808, will leave but little room to doubt that where property is sold to effect a partition, it must be viewed in most respects as a sale.

Pothier, after giving the origin of the word licitation in matters of partition, defines it thus :

"We understand by licitation, an act by which the co-heirs or other co-proprietors of a thing by undivided interests, put it up at auction among themselves, in order that it shall be adjudged to belong wholly to him offering the most and bidding last, under a charge upon such last bidder to pay to each of his co-proprietors a part in the price equal to the undivided interest which each of the said co-proprietors had in the property offered previous to the adjudication."

This licitation, Pothier declares, is not a sale, and the heir to whom the property is adjudicated, is thought to hold directly from the intestate. Pothier, *Vente*, Nos. 638, 639; see also Merlin, *verbo Licitation*, s. 1.

HACHE
v.
AYRAUD.

The Code of 1808, follows this doctrine of Pothier, and Article 174, p. 188, expressly declares, that the "*cant or licitation is not a sale* ; it is a mode of partaking, one of the effects of the action of partition of a thing held in common ; it is the complement of the partition."

The case of *Porter v. Depeyster*, 18 La. 351, was one arising under the Code of 1808, and governed by the preceding Article.

In the Code of 1825, the Article above recited was suppressed. In the place of the provisions of the old Code on the subject of licitation, the new Code declares, that where the property to be partitioned cannot be conveniently divided, "the Judge shall order, at the instance of any one of the heirs, &c., *that it be sold at public auction.*" Art. 1261.

Arts. 1263 and 1264, provide how *the sale* is to be made.

Art. 1265 declares, that any co-heir of full age, *at the sale*, can become a purchaser, and it allows him to retain the *purchase money* until his portion is fixed by a partition.

Art. 1266 provides for the *purchase* of the property by minors.

Art. 2603 is similar to Article 1265.

Arts. 2594 and 2595 declare, sales ordered in matters of partition to be judicial sales.

But it is contended, that the adjudication of property owned in common to a co-heir, cannot, in its nature, be viewed as a sale. We find under the Code of 1825 and Code of Practice, that by adjudication alone, the interests of the other co-heirs, are transferred to the heir purchasing. C. C. 2601 ; C. P. 690. The heir to whom the property is adjudicated, acquires the interest of his co-heirs, for a price in money. It has then, to this extent, the essentials of a sale.

But Article 1440 says, all acts of sale which tend to the division of property between co-heirs, are subject to rescission for lesion beyond a fourth, and this produces a conflict with Article 1863, which declares that no lesion whatever can invalidate judicial sales. It is evident that these two Articles find their harmony in construing the act of sale tending to a division of property spoken of in Art. 1440, to mean an extra judicial sale, and not one ordered by a court of justice, at which strangers as well as heirs may become purchasers for the purpose of effecting a partition.

Notwithstanding the low price which property sometimes (though rarely) brings at probate sale, we think the provisions of law on the subject of judicial sales wise, and that they tend to the security and stability of titles. Besides, the doctrine contended for by plaintiff, would produce inconvenience and sometimes injustice.

It is conceded, that if a stranger buys property at a judicial sale made to effect a partition, there can be no lesion. Why should the heir who has out bid all strangers, be placed in a worse condition than a stranger would be placed, who had bought the property at half the price given by the heir ? If the co-heirs are to have relief for lesion, why should not the heir who has bid a fourth over the value also be relieved ?

It appears to us that our learned brother of the District Court has placed the proper construction upon the Articles of the Code in question, and we fully concur in his conclusions.

Judgment affirmed.

C. MAJOR et al. v. E. ARMANT, Administrator, et al.

The cumulation of a demand for the partition of succession property with a demand for the partition of property held in common, where there is no privity of estate between all the parties, plaintiffs and defendants, is not authorized by the rules of pleading.

An heir who purchases at the sale of the hereditary effects is not obliged to pay the surplus of the purchase money over his portion of the succession, until the portion has been definitely fixed by a partition.

14	181
46	825
14	181
47	932
14	181
51	1165
14	181
111	1062
14	181
119	19

A PPEAL from the District Court of the Parish of St. James, *Duffel, J. Legardeur, Isley, Berault & Legendre, A. & A. Pitot and C. Morel*, for plaintiffs. *Janin & Griffon*, for defendants and appellants.

LAND, J. This is a suit for a partition, and the following statement of facts will show the nature of the property to be divided and the respective interests therein of the parties to the action.

On the 15th of January, 1847, *Jean Baptiste Armant* and his wife made a donation, *inter vivos*, to their twelve children, of a large sugar estate with the improvements thereon, situated in the parish of St. James in this State, together with one hundred and fifty two slaves.

On the 23d of January, 1857, *John S. Armant*, the eldest son, and one of the donees, made a donation, *inter vivos*, to his own children, of the property donated to him by his father and mother in 1847.

In 1854 *J. B. Armant* died, and his wife in 1858, leaving some six thousand three hundred acres of land, nineteen slaves and other property as belonging to their joint successions.

This suit is for the partition of these two estates.

First—For the partition of the property of the successions of *J. B. Armant* and of his wife *Rose Carmélite Cantrelle*.

Secondly—For the partition of the property held in common by the donees under the act of donation of the 15th of January, 1847.

Five of the defendants have no interest in the succession property of *J. B. Armant* and *Rose Carmélite Cantrelle*. And one of the defendants has no interest in the property held in common under the act of donation of 1847. These parties without interest, as above stated, are *John S. Armant* and his five children.

The appellant, *Terance Armant*, objected in his answer to the petition, to the partition of these two estates *as one*. His objections were overruled, and the two estates were ordered to be sold together in *block*, to effect a partition.

The defendant, *John S. Armant*, had no capacity to stand in judgment as to the property held in common, for the reason that he was without any interest in this estate; and his five children were without capacity to stand in judgment as to the succession property of *J. B. Armant* and *Rose Carmélite Cantrelle*, for the reason that they were without interest in that estate.

Article 1252 of the Civil Code provides that the heir who wishes a division must cite his co-heirs or their representatives, that the partition may be ordered, and the form thereof determined if there should be any dispute in this respect. And Article 1253 declares, that he who sues another for a partition of the effects of a succession, confesses thereby that the person, against whom the suit is brought, is an heir.

MAVOR
v.
ARMANT.

It is evident, not only from these Articles of the Code, but from all the other provisions of law upon the subject of partition, that the suit can only be instituted, and carried on against the co-heirs themselves or their representatives.

The cumulation of a demand for the partition of succession property, with a demand for the partition of property held in common where there is no privity of estate between all the parties, plaintiffs and defendants, is no where authorized in the law, but is at variance with the well settled rules of pleading.

The law does not permit a creditor to sue all of his debtors in the same action, unless there is a joint liability or privity of contract which authorizes the joinder, nor will it permit a party to be joined in a demand in which he has no interest.

It is contended that *John S. Armant* and his five children alone have the right to make the objection, and not the appellant, against whom the plaintiffs have an undisputed right of action. This position would have great strength if the appellant's rights could in no way be affected by the cumulation of these demands.

The appellant, however, has the right at the sale of the hereditary effects, under Article 1265 of the Code, to become a purchaser to the amount of the portion owing to him from the succession, and is not obliged to pay the surplus of the purchase money over the portion coming to him until this portion has been definitely fixed by a partition.

The joinder of these two demands, and the judgment of the lower court thereon ordering the two estates to be sold together, may, and perhaps do, deprive the appellant of the right, at least the ability, to purchase the hereditary effects, by compelling him, in order to exercise this right, to buy other property to a very large amount at the same time.

The appellant, in his answer to plaintiff's petition, alleges that the lands of which he is a co-proprietor are of great extent and value, on which some three or four separate sugar plantations could be established of sufficient extent, and that as a whole, a force of fifteen hundred slaves would be required to cultivate the same profitably, and that his rights and interests would be sacrificed for the benefit of speculators should the court decree that the sale of the lands and slaves be made *in block*.

Whatever may be the ability or wishes of the appellant to purchase the property ordered to be sold in block by judgment of the lower court, *he has the right to purchase the property of the successions of his father and mother at a sale to effect a partition, with privileges not enjoyed by ordinary purchasers*, and he has demanded in his answer, that the property of these successions be sold separately from the property held in common. This right it is the duty of the court to recognize and enforce.

The court erred, in ordering these two estates to be sold in block.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be annulled, avoided and reversed, and that the cause be remanded for further proceedings according to law, and that the plaintiffs pay the costs of this appeal.

JAMES SCULLY v G. S. HAWKINS, Administrator.

A general and indefinite suretyship extends to all the accessories of the principal obligation and even to the costs of suit. C. C. 3009.

APPEAL from the District Court of the Parish of East Feliciana, *Ratliff, J. R. J. Bowman*, for plaintiff. *Hardesty & Kernan*, for defendant and appellant.

LAND, J. The plaintiff and one *John O'Callaghan* were merchant tailors in partnership. The plaintiff sued his partner for a settlement of accounts, and sequestered the partnership effects. Subsequently, *O'Callaghan* was appointed by the court receiver, and gave bond for his faithful administration of the partnership property, in the sum of two thousand dollars, with *M. G. Mills*, since deceased, as his security.

O'Callaghan failed to render an account to the plaintiff, who instituted suit against him for that purpose, and obtained judgment fixing his liability to the partnership in the sum of eight hundred and sixteen dollars, for one half of which and the costs of suit this action was instituted against the succession of the security.

The defendant contends that the security cannot be made liable upon his bond for the costs of the suit instituted by plaintiff against the receiver for rendition of account.

The condition of the bond is, that *O'Callaghan* shall faithfully discharge his duty as receiver, and render a faithful account of his acts and doings to the plaintiff.

The failure of the receiver to render his account was a breach of the condition of the bond, for which plaintiff obtained judgment against him, including the costs demanded in this suit, which formed a part of the judgment, and for which the security is also liable.

A general and indefinite suretyship extends to all the accessories of the principal obligation, and even to the costs of suit. C. C. 3009.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.

MERRICK, C. J., having been of counsel in the original case, took no part in this case.

G. CLARK AND HUSBAND v. P. HÉBERT et al.

When the appeal is from a judgment in favor of the defendant, in a representative capacity, the appeal is defective and will be dismissed if the appeal bond is made in favor of the defendant without mentioning his representative capacity.

APPEAL from the District Court of the Parish of West Baton Rouge, *Beale, J. G. L. Bright*, for plaintiffs and appellants. *A. S. Herron, Bernard & Pope*, for defendants.

CLARK
v.
MERRICK.

MERRICK, C. J. There is a motion to dismiss the appeal in this case.

The suit has been brought against the defendant in her capacity of widow in community and tutrix to the minor children of *Vincent Kirkland*, deceased, and the defendant in her capacity of tutrix has set up a reconventional demand.

The appeal bond is executed by the plaintiffs in her favor, in her individual capacity only. The appeal is defective, in not making the defendant a party in her capacity of tutrix.

It is, therefore, ordered, that the appeal taken in this case be dismissed, at the costs of the appellants.

J. D. COMAUX v. ROSALIE DOIRON AND FERGUS CLEMENT.

In a redhibitory action, the plea of prescription will be maintained if the term for bringing the suit has elapsed, although a demand is made in the petition that a note given as part of the price should be cancelled and annulled.

APPEAL from the District Court of the Parish of East Baton Rouge, *Wilson, J. J. McCutchen*, for plaintiff and appellant. *T. G. Morgan*, for defendants.

MERRICK, C. J. This is an action of redhibition. Among other defences, the plea of prescription of one year is filed.

The sale was made of the slave on the 31st day of January, 1857. Service of citation was made February 4th, 1858. To avoid the effect of the plea, the plaintiff avers that the defendants had knowledge of the redhibitory vice, and concealed the same at the time of sale. C. C. 2512, 2523, 2524.

There is no sufficient proof of such knowledge in the record.

Again, it is contended, that inasmuch as the plaintiff demands that his promissory note given as a part of the price should be cancelled and delivered to him, that the action ought to be maintained to this extent, because defendant can make his defence to an action upon the note available, whenever he is sued upon the note.

We cannot disregard the forms of proceeding in this manner. The plaintiff is the actor, and the law says his demand as such is prescribed. It will be time enough to consider what his rights are as a *defendant*, when he is sued upon the note.

Judgment affirmed.

MARY M. MORRIS et al. v. ELIZABETH HARRELL, Tutrix.

A motion to dismiss an opposition filed to an act of partition is not in the nature of an exception, which admits the allegations contained in a petition, and does not dispense with proof on the part of the opponent.

An agreement in the act of partition, that the same shall be irrevocable, is, in the absence of proof of error or fraud, binding on the parties to it.

APPEAL from the District Court of the Parish of St. Helena, *Beale, J.*, presiding. *Thompson & Russel*, for opponent and appellant. *G. W. Watterston*, for appellees.

LAND, J. The property of the succession of *Abram H. Morris*, deceased, was sold to effect a partition between his heirs, the plaintiff, a married woman, and two minors represented by the defendant.

After deducting the sum of \$817 42, claimed by the widow in community as her separate property, and the sum of \$974 75 for the purpose of paying debts, the balance of the proceeds of the sale was divided in equal parts between the plaintiff and her co-minor heirs.

The plaintiff, authorized by her husband, filed an opposition to the homologation of the partition, on various grounds.

The defendants filed a motion to dismiss the opposition, on several grounds, one of which was, that the opponent had agreed absolutely to said partition, and had ratified the same by her acts.

The act of partition is found in the record, is signed by the opponent, and contains the following clause :

"The parties being all present, consenting and agreeing that the above and foregoing partition shall be and remain firm, binding and irrevocable, on each and every one of said heirs, to the end and for the purpose specified in the order of the court, ordering the same."

The opponent offered no testimony to prove the allegations made in her opposition, and the Judge sustained the motion to dismiss.

The motion was not in the nature of an exception, which admits the allegations contained in the petition, and therefore did not dispense with proof on the part of the opponent.

The motion was in the nature of a rule to show cause, and put at issue the merits of the opposition.

The agreement in the act of partition, that the same should remain irrevocable, in the absence of all proof of error or fraud, was sufficient to authorize the judgment of dismissal.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.

SCHOOL DIRECTORS, &c., v. NICHOLAS D. COLEMAN.

The 34th section of the Act of the Legislature of 1857, which requires that before the sale of school lands there shall be an appraisement, and that in no case shall they be sold for less than one dollar and twenty-five cents per acre, means that the land shall bring its appraised value, but that in no case can it be appraised at less than \$1 25 per acre.

A PPEAL from the District Court of the Parish of Madison, *Farrar, J.*
P. Alexander, for plaintiffs and appellants. *Short & Parham*, for defendant.

COLL, J. The 34th section of the Act of 1855, to organize free public schools in the State of Louisiana, did not require an appraisement of the school lands before they were sold. Sess. Acts, 1855, p. 430, § 34.

In 1857, an Act was passed to amend this section. One of the amendments was, that the land should be appraised.

Section 34, as amended, reads as follows : " Be it further enacted, &c., That if a majority of the votes taken in a township shall give their assent to the sale of the lands aforesaid, it shall be appraised by three sworn appraisers selected by the Treasurer and Recorder of the parish; then they shall be sold by the Parish Treasurer at public auction, before the court-house door, or by the Sheriff, or an auctioneer to be employed by the Treasurer at his expense, to the highest bidder, in quantities not less than forty acres; but in no case at a less sum than one dollar and twenty-five cents per acre, &c." Sess. Acts, 1857, § 34, p. 239.

Certain school lands were sold under this section, and adjudicated to defendant for less than the price of appraisement.

This suit is brought to have the sale annulled, because they were sold for less than the appraised price.

There was judgment for defendant, and plaintiff has appealed.

Unless it were the intention of the Legislature that the land should not be sold for less than the appraised value, there would be no object in enacting that it should be appraised.

Neither would there have been any reason for amending the Act of 1855, by requiring that it should be appraised.

The meaning of section 34 is, that the land should bring its appraised value, but that in no case it could be appraised for less than one dollar and twenty-five cents per acre.

The section requires it to be appraised; it must, then, bring its appraised value; and as it requires that in no case it should be sold for less than \$1 25 per acre, this evidently implies that it can never be appraised for less than this sum.

It is, therefore, ordered, adjudged and decreed, that the judgment be avoided and reversed; that the adjudication and sale by *Adrian E. Adams*, the Parish Treasurer of the parish of Madison, on the 21st of November, 1857, of the following described land, being section 16, township 17, north of range ten east, in the district of lands north of Red River, containing 615 23-100 acres, be decreed to be null and without effect; and that the said land belongs to the Ninth School District of the parish of Madison, in the State of Louisiana; and that defendant pay the costs of both courts. It is further decreed, that the defendant recover from

plaintiff \$615 23, the part of the price of the land paid cash by the former ; and that plaintiff deliver to defendant the mortgage notes given for the balance of the price, and that no writ of possession issue until the \$615 23 are paid to defendant, and until the said mortgage notes are given up to defendant, or until the said money and notes are legally tendered to defendant, in the event he refuses to take them.

SCHOOL DIRECTOR'S
v.
COLLEMAN.

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BRAND & ADAMS v. B. WEST and T. G. DAVIDSON.

The appellees cannot bring up the appeal when the appeal was granted on motion, and the appellant filed no appeal bond, the appeal thus taken being incomplete without a bond.

**A** PPEAL from the District Court of the Parish of St. Helena, *Beale, J.*, presiding. *Addison & Watterston*, for plaintiffs. *Martin & Penn*, for defendants and appellants.

BUCHANAN, J. Plaintiffs obtained judgment against the defendants in the District Court. On the same day that the judgment was signed, defendants took a suspensive appeal by motion ; but no appeal bond was filed, neither did the Judge fix the security, nor cause the same to be entered upon the minutes of the court as provided by Phillip's Revised Statutes, verbo *Code of Practice amendments*, p. 98, sec. 48.

Plaintiffs have filed in this court a transcript of the record, including documents filed, and evidence oral and documentary, duly certified by the Clerk of the District Court.

On the same day this transcript was filed, the counsel of plaintiffs filed an answer to the appeal, praying for an amendment of the judgment of the District Court.

Defendants now appear by counsel, and move to dismiss this case at costs of plaintiffs, "on the ground that this court is without jurisdiction to entertain it, no appeal bond being filed, as the defendants were satisfied with the judgment rendered in the court below.

This motion has been opposed : but we have come to the conclusion that it must prevail. An appeal by motion cannot be considered as complete without an appeal bond ; for as no citation of appeal is required to issue in such a case, the bond alone shows who are intended to be made parties to the appeal.

The Articles 590 and 884 of the Code of Practice authorize the appellee to bring up the appeal when the appellant has neglected to do so. But this must be understood of an appeal complete. The appellants may have omitted to furnish bond, because they abandoned their appeal, being satisfied, upon reflection, with the judgment of the court of the first instance ; as the motion alleges was the case in this instance. The plaintiffs, if dissatisfied with the judgment, are still in time to appeal.

Motion absolute, and the case dismissed at costs of plaintiffs.

MARTHA FRANKLIN, Administratrix of GILLIS M. FRANKLIN, v. WILLIAM WOODLAND.—MISSOURI WOODLAND, Intervenor.

A Register of the State Land Office has no authority to review and reverse a decision of his predecessor.

Duly authenticated copies of documents from the State Land Office are admissible as evidence.

In matters of conflicting settlements upon public lands, the acts and conversations of parties are admissible in evidence : the objection going to their effect.

**A**PPEAL from the District Court of the Parish of Carroll, *Farrar, J.*  
*Goodrich & DeFrance*, for plaintiff. *Louis Selby*, for defendant.

BUCHANAN, J. The plaintiff sues defendant in damages for slandering her title to the north-east quarter of section twenty-seven, township 20 north, range 11 east, of the district of lands north of Red River.

Defendant answers, pleading title in himself to said land.

On the first trial, the jury who tried the cause were unable to agree. The wife of defendant then intervened, claiming the land in controversy, as heir of her first husband, *Beabout*. On the second trial, the jury found for plaintiff, without damages.

Defendant and intervenor have appealed.

The possession by plaintiff of the land, for the length of time alleged in the petition, (since the year 1847,) is admitted by the pleadings and argument. But defendant contends, that the first husband of his wife, (who died in 1844,) and himself, were in possession and cultivated the land for many years before plaintiff's possession ; and that defendant was expelled by force and violence by the deceased, *G. M. Franklin*, from the land.

These questions of fact appear to have been correctly settled by the jury. In this court, the counsel of defendant and intervenor relies upon a plea of *res judicata* pleaded by him as an exception to this action ; and upon a bill of exceptions reserved by him to the admission of evidence for plaintiff.

The plea of *res judicata* is based upon a decision of *B. Haralson*, Register of the State Land Office, in relation to the conflicting claims of plaintiff and defendant to a preëmption right upon the quarter section described above. That decision, rendered November 10th, 1856, was in favor of *William Woodland*, and a patent was issued in his favor from the State Land Office, for said quarter section, on the 17th December, 1856.

The counsel of appellant contends, that as no appeal was taken within six months, as provided by the Acts of 1853 and 1857, from this decision of the Register, the plaintiff is concluded from asserting right to the land in controversy.

But plaintiff has given in evidence a previous decision of another Register of the State Land Office, *L. I. Sigur*, of date the 2d November, 1854, upon the conflicting claims of plaintiff and defendant to this identical land ; in which, after a full recapitulation of the evidence and of the law applicable to the case, the Register comes to the conclusion, and so decides, that *Franklin's* claim is preferable to that of *Woodland*. Plaintiff also holds a patent for the land from the State Land Office, of date 24th October, 1856.

The court has been referred to no law, which authorizes a Register of the State

Land Office to review and reverse a decision of his predecessor. We remark, moreover, that the decision of Register *Sigur* is not noticed in the decision of Register *Haralson*.

FRANKLIN  
v.  
WOODLAND

The defendant's plea of *res judicata* is not sustained by the record ; even if the decision of the Register be considered a judicial decision, a point which is not raised in the argument, and which it is, therefore, unnecessary to determine. Neither of the decisions of the State Land Office passes upon any claim to the land, except those of *Woodland* and of *Franklin*. No action was taken before that tribunal by the representative of *Beabout*, the intervenor. The evidence does not show any action such as is required either by the Act of Congress or the State laws, for asserting a right of preemption upon the land in controversy in this suit. There is a declaratory notice of *Mrs. Beabout*, dated October 3d, 1844, in evidence, but it relates to the N. W. quarter of section 26 ; not to the N. E. quarter of section 27.

Defendant excepted to the admission of various documents from the State Land Office, offered by plaintiff, on the ground that they were copies of copies. The objection does not appear sustained by the facts. The documents are properly authenticated ; also to the testimony of a witness, *Tompkins*, as to declarations made by defendant, in relation to his claim. The testimony objected to, was a small portion of a great mass of testimony of a similar character, received without objection. In these matters of conflicting settlements upon public lands, the acts and conversations of the parties figure necessarily very prominently in the case. All such testimony is liable to more or less suspicion ; but the objection is more to the effect than to the admissibility ; and its effect is properly to be weighed by the jury who hear, and probably know, the witnesses.

Judgment affirmed, with costs.

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JOSEPH CHIAPPELLA v. THOMAS BROWN.

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dl15 984

A witness may be permitted to refer to accounts or memoranda made by himself to refresh his memory.

Where by due diligence it might have been discovered that a witness in the case, who had been examined on his *voir dire* and had testified that he had no interest, was security for the costs, a new trial will not be granted on the ground of such discovery being made after the trial.

The Act of Congress declaring the Mississippi river to be a common highway, free to all citizens of the United States, was not intended to interfere with the right of the State to create and regulate ferries.

A party who was present at the public sale of a ferry and bid against the purchaser, is estopped from asserting that he had an unexpired lease to the same ferry, and that it had not been properly advertised.

Damages may be recovered for an injury to a right of keeping a ferry committed by one who crosses passengers gratuitously, but receives compensation in whole or in part by keeping the horses of those crossing.

**A** PPEAL from the District Court of the Parish of Iberville, *Wilson*, Judge of the Eighth District, presiding. *Marcat & Deblieux*, for plaintiff. *W. J. Hamilton*, for defendant and appellant.

**MERRICK**, C. J. The plaintiff having purchased the right to keep a ferry across the Mississippi at the town of Plaquemine, for one year, brings the present suit against the defendant for a violation of his franchise.

CHAPPELLA  
v.  
BROWN.

There was a verdict and judgment in favor of plaintiff, and the defendant appeals.

Our attention is called to two bills of exception.

The plaintiff finding that the defendant (who had been a former lessee of the ferry,) was in the habit of accommodating numerous persons, by setting them over the Mississippi with his skiff, &c., engaged the witness to keep an account of the numbers crossing on defendant's boats.

This account was made out by the witness, the plaintiff calling on him once or twice a week, and giving him an account of the "crossings." But the witness knew of his own knowledge that two-thirds of the crossings charged in the book were correct. The Judge permitted the witness to refer to the book to refresh his memory, and defendant excepted.

We see no error in this ruling of the lower court. The account was made out by witness, and as to two-thirds of the entries he had personal knowledge. In the cases in 6 L. R. 77 and 12 An. 58, the accounts or memoranda were not kept or made by the witness. See 1 Greenleaf, 436.

The other bill of exception was to the refusal of the Judge to grant a new trial. One of the principal witnesses, *Achille Landry*, it seems was interrogated on his *voir dire* as to his interest, and on answering that he had no interest in the event of the suit, directly or indirectly, he was sworn without objection. The petition has endorsed upon it

"I am good for all costs—ACHILLE LANDRY."

The ground claimed for a new trial is, "that since the trial of the cause the defendant has discovered and ascertained that said *Landry* was at the time he was so sworn to testify touching his interest in the event of the suit, responsible in a written obligation over his own signature for all costs of said suit, which fact rendered him incompetent as a witness."

If it be conceded that after a party has examined a witness upon his *voir dire* in order to show interest, he may resort to evidence *aliunde* to show the same fact, (which we do not now undertake to decide,) still the new trial was properly refused. 1 Greenleaf's Ev. sec. 423. For, it must be manifest, that if the surety for costs indorsed upon the petition was the same as the witness sworn, there was a want of diligence in not calling the attention of the witness to the indorsement upon the petition. It is rarely if ever the case that new trials are granted on newly discovered evidence, in order to impeach a witness, much less ought they to be granted where there is an entire want of diligence, and, after all, on a further examination, the interest may be shown not to exist, or may be removed. See *Voisin v. Jewell*, 9 L. R. 112.

On the merits it is contended, that under the Act of Congress, 20th Feb. 1811, the Mississippi river is a navigable stream and a common highway forever, free as well to the inhabitants of the State as to other citizens of the United States; and that the defendant has a right not only to navigate the river up and down, but across the same.

In our opinion the Act of Congress was not intended to interfere with the right of the State to create and regulate ferries.

The only mode in which the public can be suitably accommodated upon the great lines of travel and public highways, is by creating a franchise and making it the interest and duty of some person to keep the roads on the bank of the river in order, and to be ready with suitable ferryboats and other conveniences for crossing. At some points on great routes these ferries are as necessary to the

public at large and the citizens of other States as are some of the smaller navigable streams which are protected by the Act of Congress.

On the other questions raised by defendant's counsel, without analyzing the ordinances of the Police Jury and referring to the numerous Acts of the Legislature in this opinion, it is sufficient for us to say, that in our opinion the Act of 1855, p. 367, did not repeal the ordinances passed prior to that time establishing a ferry across the Mississippi river. See *Holmes v. Wiltz*, 11 An. 439.

The sale by the Parish Treasurer, instead of the President of the Police Jury may be in itself such an informality as would enable the Police Jury to rescind the sale of the ferry to plaintiff. But they hold his obligations for the same and have power to ratify the sale and have put the plaintiff in possession of the franchise. The defendant cannot, therefore, inquire into the regularity of the sale, especially as he was present at the same and bid against the plaintiff.

And for the same reason he is estopped from asserting that he held an unexpired lease of the same ferry, or that it had not been properly advertised. *McMasters v. Commissioners Atchafalaya Railroad Co.* 1 An. 11.

It is true that the ordinance under which plaintiff holds the ferry declares, that if the adjudication be not paid quarterly that the license shall be *ipso facto* forfeited. But this provision of the ordinance does not compel the Police Jury to enter upon the franchise and oust the plaintiff, if they are of the opinion that the present lease is more advantageous to them than any other they can make. The provision is in favor of the Police Jury, and they may waive it.

The case was tried by a jury. They heard the witnesses, and if they were of the opinion that the defendant maintained within the limits granted to plaintiff a ferry gratuitously, in order to injure the plaintiff and lessen the value of the franchise purchased by plaintiff, or if they were of the opinion that the defendant received a compensation in whole or in part from the charges he made for keeping the horses of those crossing, then the testimony is ample to maintain the verdict. And there is testimony in the record from which one at least of the above facts may be inferred. The privilege of crossing one's friends cannot extend to a whole community.

Judgment affirmed.

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#### WILLIAM BANTZ v. H. B. PRICE—MARK Izod, Intervenor.

Where the plaintiff has recovered a judgment, the proceeding to render his property liable in execution for costs, is statutory, and the forms of the statute must be strictly pursued, under pain of nullity.

**A**PPPEAL from the District Court of the Parish of Tensas, *Farrar, J.*  
*L. H. Reeves*, for plaintiff. *H. B. Shaw*, for intervenor. *J. Aumé*, for defendant and appellant.

**BUCHANAN, J.** The intervenor, *Izod* having obtained judgment against *Bantz* for \$440, with interest and costs, an execution was subsequently issued by the Clerk of the Court against *Izod*, for his costs, (\$9 20) under which the judgment was seized and sold. It was bid off at Sheriff sale in January, 1850, for the sum of eighteen dollars by *Bantz*, the defendant in the judgment, in the name of his step-son, *Price*, who was not present at the sale, and a deed was made to *Price*.

BANTZ  
v.  
IZOD.

*Price* now seeks to enforce the judgment, and has seized land of *Bantz* under a *fi. fa.* *Bantz* enjoins the seizure, alleging that he is the true owner of the judgment, having bought it in reality for his own account, although he used the name of *Price* in the purchase.

*Izod* intervenes, and claims that his property in the judgment was never legally divested, because the formalities of law were not complied with ; no detailed bill of costs having been previously made out and demanded, as required by the Act of 1842, p. 440. § 12, and no notice having been given to him of the seizure.

There was judgment for the intervenor against the plaintiff and defendant. The defendant alone has appealed.

It appears from the evidence, that no detailed bill of costs was made out by the Clerk and demanded of *Izod*, previous to the issuance of the execution under which the judgment was sold. But the counsel of appellant contends, upon the authority of the case of *Copley v. Edwards*, 5th Annual, 647, that this provision of the Act of 1842 (reënacted in 1855, Rev. Stat. 124,) does not apply to executions issued for costs after judgment rendered.

In *Copley's* case, the judgment had condemned *Copley*, plaintiff, to pay the costs. Of course, the *fi. fa.* issued upon that judgment, as in ordinary cases. But this is a case where the plaintiff recovered his costs by the judgment. The proceeding to render his property liable in execution for costs, is therefore statutory, and the forms of the statute must be strictly pursued, under pain of nullity. We see here an example of a judgment bought in for less than one-twentieth of its nominal amount, by the judgment debtor, upon a sale to make the costs, for which the purchaser was already liable. No stronger case could be presented in favor of the requirement in such sales, of a strict compliance with the legal forms.

There are two letters of defendant, addressed to the intervenor, in evidence, from which it appears that after this injunction was sued out, defendant gave intervenor information of what had taken place, and made propositions to purchase of intervenor his right to the judgment against *Bantz*. This correspondence seems to corroborate the allegation of *Bantz's* petition, that he had purchased at sheriff's sale for himself, and not for *Price*.

Defendant pleads the prescription of five years in bar of this action, under Article 3507 of the Code. That Article is not applicable to this case.

Judgment affirmed, with costs.

#### B. J. SAGE v. J. C. CAIN.

Under the Pre-emption Act of the Legislature of Louisiana of 1853, it was essential to constitute a right of pre-emption that the land claimed should embrace the settlement or improvements of the pre-emptor.

**A** PPEAL from the District Court of the Parish of Pointe Coupée, *Ratliff, J.* *B. J. Sage, pro. per.* *T. I. Semmes, D. C. Labatt* and *T. H. Farrar*, for defendant and appellant.

**LAND, J.** This is a petitory action in which plaintiff and defendant claimed title from the State of Louisiana to lots 9 and 10 in the township 4, S. R. 7, east, situate in the parish of Pointe Coupée.

The plaintiff claims by purchase, and the defendant under the preemption Act of 1853.

It appears from the evidence, that there are three contiguous lots lying on the Atchafalaya river, and numbered 8, 9 and 10, and containing respectively about the same quantity of land. That defendant settled on lot No. 8, in the year 1848, and has continued to reside thereon ever since; and did, in the year 1853, purchase the same from the State, without making any claim of preemption to lots 9 and 10, or either of them. It further appears, that at the date of his purchase, his dwelling house, and the whole of his improvements, were on lot No. 8. That in February, 1854, several months after his said purchase, he made application to the Register of the State Land Office, and claimed the right of preference to lots Nos. 9 and 10, under the preemption Act of 1853. That his application was not regarded, and that plaintiff was permitted to purchase from the State lots 9 and 10, which purchase was afterwards contested by defendant before the Register, who decided in favor of plaintiff.

The defendant contends in this court, that by virtue of his settlement and residence on lot 8, he was entitled, under the preemption Act of 1853, to purchase, by preference, not less than forty, nor more than three hundred and twenty acres of land, and that this right was not exhausted or extinguished by his purchase of lot No. 8, containing only 122 44-100 acres. It is true, that he filed his application for a preemption right to lots 9 and 10 before the plaintiff's purchase, and whilst the Act of 1853 was still in force.

The question thus presented, is not free from difficulty, and the case of *Kittridge v. Breaud*, 2 Rob. p. 40, seems to favor his pretention.

It is, however, the opinion of the court, that his right of preemption was extinguished by his purchase of lot No. 8, which embraced the whole of his improvements. The coexistence of certain facts were required by the Act of 1853, to constitute a right of preemption—a material one of which was, that the land claimed should embrace the settlement or improvements of the preemptors. The entry of lot 8 rendered it impossible to embrace, within the lands claimed under the Act of 1853, the dwelling house or any portion of the improvements of defendant, prior to the purchase of plaintiff. It, therefore, seems to follow, that the defendant, by his own act, destroyed the coexistence of those facts which were essential to constitute his right of preemption to the lands claimed.

The judgment of the lower court was in favor of plaintiff for the land, but rejected his claim for damages, including attorney's fees.

The plaintiff is an attorney-at-law, and well qualified to represent his interests in the courts, without the aid of assisting counsel, and if attorney's fees have been paid, or promised in this case, they can form no legal charge against the defendant.

It is certainly not the policy of the law to encourage lawsuits of any character; but it is equally certain, that it is not the policy of the law to prevent or deter parties from asserting or defending their real or supposed rights, through the apprehension of damages, or penalties in the event of failure or defeat.

There is no error in the judgment of the lower court.

Judgment affirmed, with costs.

SUCCESSION OF SARAH ANN PENNY—FOSTER AND WIFE, Administrators, v. A. L. BLOOM et al.\*

The wife is liable for all debts incurred for the improvement of her separate estate, advances made for the payment of debts and supplies of necessaries for a plantation, which is her paraphernal property, whether she has retained the administration of her paraphernal property or entrusted it to her husband.

Art. 2377 of the Code has reference only to the settlement of the accounts between husband and wife, and does not control the action of creditors.

A witness cannot be permitted to state his belief as to the correctness of an account, he must testify to his knowledge of facts and not to his belief of them.

The possession by the drawee of a draft drawn by a planter upon his merchant or factor, in favor of a third person, is *prima facie* proof of the draft having been paid by the drawee.

There is now no question of the right of a married woman, above the age of majority, to renounce her mortgage upon the property of her husband, in favor of a third person.

**A**PPEAL from the District Court of the Parish of East Feliciana, *Ratliff, J. Fuqua & Kilbourne* and *J. McVea*, for plaintiffs. *Muse & Hardee, J. B. Smith* and *George S. Sawyer*, for defendants and appellants.

BUCHANAN, J. This case is before us upon oppositions to an account of administration. There are six distinct parties appellant.

1. *Dr. Huff* complains that his opposition, founded upon a bill for medical attendance, has not been sustained to the full extent. An examination of the evidence has not satisfied us that the District Judge erred.

2. *Charles Knapp*; 3. *Bowman & Gair*. These two oppositions are similar to each other in principle. *Knapp* furnished a sugar mill, saw mill and steam engine; and *Bowman & Gair* erected the buildings to contain the same. This work was done at the request of *Albert G. Penny*, and during the existence of the community between himself and the deceased *Sarah Ann Penny*, but upon a tract of land which was the separate property of *Mrs. Penny*. Subsequently to the furnishing of the materials and completion of the work, the matrimonial community was dissolved by judgment of court, in a suit instituted by *Mrs. Penny* against her husband for separation of property. The administrators of *Mrs. Penny's* succession resist the payment of these claims, on the ground that they are debts of the community. The opposers maintained that *Mrs. Penny's* estate is liable, because her separate property was enhanced in value by the sugar mill and saw mill erected upon the same. The contracts of *Knapp* and *Bowman & Gair*, were reduced to writing and recorded, as required by Article 2746 of the Code.

The doctrine of the case of *Waggaman v. Zacharie*, 8 Rob. 181, is, that the wife's estate is liable for the increased value which her separate property has received by the improvements placed upon it during the marriage; and this increased value is not to be taken as synonymous with the costs of the improvements. C. C. 2377.

But the cases of *Dickerman v. Reagan*, 2 An. 440; *Dailey v. Pearson*, 5 An. 125; and *Patterson v. Frazier*, 8 An. 512, have gone further, and are understood to establish the doctrine, that the wife is liable for all debts incurred for the improvement of her separate estate, advances made for the payment of such debts, and supplies of necessaries for a plantation, which is the paraphernal property of

\*This case was omitted in the decisions of 1857.

the wife ; whether the wife retained in her own hands the administration of her paraphernal estate, or entrusted it to her husband according to these latter authorities, the appellants *Knapp and Bowman & Gair* are entitled to recover of *Mrs. Penny's* estate. The Article 2377 of the Code, upon which the case of *Wagga-man* was decided, was held in the latter cases to have reference only to the settlement of the accounts between husband and wife, and not to control the action of creditors.

4. *Slark, Day & Stauffer*. The draft of *A. G. Penny*, held by these opponents, is proved to have been for iron, &c., used in erecting the sugar mill, saw mill and steam engine, upon the plantation of *Mrs. Penny*. The draft not being paid at maturity by the acceptor, was duly protested and the drawer notified. For the reasons given above, these opponents are entitled to be paid out of *Mrs. Penny's* estate.

5. There were two oppositions filed in the District Court, one by *A. Levi, Adler & Co.*, and one by *A. Levi, Bloom & Co.* These two firms were represented by the same counsel in the court below, who have argued the case in this court, as if there were appeals taken on both oppositions. But this appears to be an error.

The motion for appeal, as copied in the transcript, reads as follows :

"On motion of *McVea and Muse & Hardee*, of counsel for opposers, it is ordered, that they be allowed an appeal, returnable, &c., on their executing their bond with security, conditioned according to law, in the sum of two hundred and fifty dollars;" and the bond of appeal filed, is in the name of *A. Levi, Bloom & Co.* alone, as principals.

Upon a very careful examination of this voluminous record, of more than five hundred pages, we find nothing to indicate an appeal by *A. Levi, Adler & Co.* We are, therefore, constrained to consider that firm as not before this court.

*A. Levi, Bloom & Co.* except to the refusal of the District Court to allow the belief of a witness as to the correctness of an account to go to the jury. The ruling of the court was correct. Witnesses should testify to their knowledge of facts, not to their belief of them.

There are two separate oppositions filed in the name of *A. Levi, Bloom & Co.*, the first claiming \$4,950, with interest for amount of account for goods sold to *Mrs. Penny's* representatives after her death, namely, from March 3d, 1854, to January 1st, 1855 ; and the second claiming \$32 61 for lumber furnished for the use and benefit of the plantation belonging to *Mrs. Penny's* succession, in the months of September and October, 1854.

The last mentioned opposition has been allowed by the District Court ; and upon the first, we are of opinion, that *Levi, Bloom & Co.* have made sufficient proof to entitle them to recover of the estate of *Mrs. Penny*, the following items of their account, in addition to what was allowed them by the judgment of the court below :

Vouchers—13, \$100 ; 17, 10 ; 19, 1 50 ; 21, 20 ; 33, 20 ; 34, 5 ; 36, 18 25 ; 37, 16 85 ; 38, 9 ; 39, 26 95 ; 41, 6 25 ; 42, 31 37 ; 43, 10 50 ; 46, 40 80 ; 48, 183 63 ; 51, 173 ; 98, 3 ; 100, 8 72 ; 101, 2, 38 ; 105, 14 ; 106, 5 ; 109, 6 85 ; 110, 6 25 ; 111, 74 82 ; 112, 1 50 ; 114, 5 ; 115, 42 43 ; 117, 25 ; 119, 148 94 ; 120, 4 12 ; 122, 25 17 ; 123 and 124, 4 46 ; 125, 12 81 ; 126, 6 ; 127, 17 50 ; 128, 208 69 ; 132, 6 57 ; 133, 98 90 ; 134, 29 75 ; 136, 11 25—Total, \$1,327 06.

We will remark, in illustration of our views in relation to a portion of these

SUCCESSION OF  
PENNY.

vouchers, that the possession by the drawee, of a draft drawn by a planter upon his merchant or factor, in favor of a third person, is held by us as *prima facie* proof of the draft having been paid by the drawee. *Bell v. Norwood*, 7 La. 95.

6. The administrators have appealed from so much of the judgment of the District Court, as maintains the oppositions of *Ellen Gayden* and husband; of *Hazard*, executor of *Radish*; and of *Thomas W. Scott*. The opposition of *Gayden* and of *Hazard*, are based upon mortgages granted by *A. G. Penny* upon slaves belonging to him, in favor of the opponents.

*Mrs. Penny* was a party to the acts of mortgage, for the purpose of renouncing her own mortgage, arising out of dotal and paraphernal rights, in favor of the mortgagees. Subsequently, *Mrs. Penny* sued her husband for separation of property, and obtained a judgment, under which she seized and sold the property mortgaged to opponents, which she bought at Sheriff's sale, retaining in her hands, upon the price of the sale, the amount of the opponent's mortgages recorded.

The counsel of administrators now contends, that *Mrs. Penny's* renunciation of her mortgage, which was anterior in date to that of opponents, was not binding upon her and her representatives; and in support of this position, the learned counsel relies upon the case of *Gasquet v. Dimitry*, 9 La. 585.

The decision in *Gasquet v. Dimitry*, was pronounced by the Supreme Court in March, 1835, and directly overruled, (although without naming it,) the elaborate decision in the case *Trémé v. Lanauz's Syndics*, 4 N. S. 230, which was supposed to have settled the jurisprudence in favor of the binding effect of a renunciation by a married woman. In *Gasquet v. Dimitry*, however, it was certainly decided, as is now contended by the counsel for *Mrs. Penny's* administrators, that such a renunciation was equivalent to a suretyship by the wife for her husband, and, as such, was void, by Article 2412 of the Civil Code. A re-hearing was asked, however, in *Gasquet v. Dimitry*; and pending this application, the Legislature passed the Act of 27th of March, 1835, by the 2d section of which, married women aged above twenty-one years, were authorized to renounce in favor of third persons, their dotal and paraphernal rights upon the property of their husbands; provided, they were previously informed by the Notary Public receiving such renunciation, of the nature of their rights, out of the presence of their husbands. The re-hearing in *Gasquet v. Dimitry*, was only decided in June, 1836, and the original decision was then sustained by a bare majority of the court. And since that time, there has been no question of the right of the married woman, above the age of majority, to renounce her mortgage upon the property of her husband, in favor of a third person. *Breaux v. Carmouche*, 9 Rob. 37; *SucceSSION of Gremillion*, 4 An. 411.

The opponents, *Gayden* and *Hazard*, have prayed, in their answer to the appeal, for an amendment of the judgment, directing the property subject to their mortgages, to be sold for their payment. They are entitled to this relief.

We have not been able to agree entirely with our learned brother of the District Court, in his conclusions upon the oppositions of *Thomas W. Scott*.

It appears from the evidence, that as far back as the year 1842 or 1843, *Albert G. Penny* made his note for fifteen hundred dollars, in payment of the professional services of a gentleman of the bar of East Feliciana, rendered in several suits in which his wife, the deceased *Sarah Ann Penny*, was interested.

This note was negotiated in bank, with the accommodation endorsement of the opponent, *Thomas W. Scott*, and was renewed, with curtailments, from time to

SUCCESSION OF  
PENNY.

time, until in the year 1853, two different notes, (which represented the last renewals of this original note,) made jointly and severally by *Albert G. Penny* and *Thomas W. Scott*, were paid by the latter, in the hands of two distinct holders. It is not seen how *Mrs. Penny's* estate can be held for these two notes. Granting that the original note of her husband in 1843, was given in payment of a debt for which she was liable, yet the receipt of such note by her creditor was an extinction of her obligation. No subrogation, either legal or conventional, took place in favor of *Scott* to the rights of *Boyle*, the supposed creditor of *Mrs. Penny*. On the contrary, *Penny's* note for fifteen hundred dollars, with *Scott's* endorsement, was received by the bank in part payment of a larger note of *Boyle*, with *Scott's* endorsement, which was held by the bank. *Mrs. Penny* was not a party to the original note or any of its renewals. Were it even proved (which it is not) that *Mrs. Penny* contracted to discharge the notes held by this opponent, such a contract would be clearly illegal, under Art. 2412 of the Code.

It is, therefore, adjudged and decreed, that the judgment of the District Court upon the opposition of *Dr. Huff*, be affirmed; that the judgment upon the oppositions of *Charles Knapp*, of *Bowman & Gair*, and of *Slark, Day & Stauffer*, be reversed, and that those oppositions be maintained, and the opponents classed as ordinary creditors of the estate of *Sarah Ann Penny*, for the sums respectively claimed by them; that the appellants, *A. Levi, Bloom & Co.*, have judgment against said estate, as ordinary creditors, for the sum of thirteen hundred and twenty-seven dollars and six cents, with legal interest from judicial demand, in addition to the sum allowed them by the judgment of the District Court; that the judgment upon the oppositions of *Ellen E. Gayden* and husband, and of *A. Hazard*, executor of *Mary Reddish*, be amended, by decreeing that the property mortgaged to those opponents, be sold in satisfaction of their judgments, and as so amended, be affirmed; that the judgment upon the oppositions of *Thomas W. Scott*, be reversed, and that the oppositions and claims of the said *Thomas W. Scott*, be rejected.

And it is lastly ordered, that the costs of this appeal be paid, in equal proportions, by the estate of *Sarah Ann Penny*, by *Thomas W. Scott* and by *Dr. Huff*.

MERRICK, C. J., recused himself, as having been of counsel.

#### CITY OF NEW ORLEANS V. J. N. LEA.

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The Article of the Constitution which declares that the Judges both of the Supreme and inferior courts shall at stated times receive a salary which shall not be diminished during their continuance in office, exempts the salary of a Judge from taxation.

**A** PPEAL from the Sixth District Court of New Orleans, *Howell, J. Laville & Morel*, for plaintiff. Defendant in p. p., appellant.

COLL, J. The question in this case is, whether the city of New Orleans has the right, under the Constitution, to tax the salary of a Justice of the Supreme Court of the State.

There was judgment for plaintiff, and defendant has appealed.

The first Article of the Constitution of 1852 provides, "That the powers of the government of the State of Louisiana shall be divided into three distinct de-

NEW ORLEANS.  
v.  
LEA.

partments, and each of them be confided to a separate body of magistracy, to-wit : those which are legislative to one ; those which are executive to another ; and those which are judicial to another."

If the right to tax the salary of Judges be conceded, there would be no limitation but the discretion of the Legislature, to do it to such an extent as virtually to abolish the means of conducting the judicial department.

Its existence ought not to depend upon the will of a coordinate department.

Art. 75 of the Constitution of Louisiana is in these words : " The Judges both of the Supreme and inferior courts shall at stated times receive a salary which shall not be diminished during their continuance in office."

It may be, that the restriction in this Article upon the power of the Legislature refers principally to the diminution of the salaries of the Judges by a law fixing it at a less amount than that established at the epoch of their entrance into office.

The object, however, of this Article was to secure the independence of the judiciary. If the Legislature can tax the salaries, it would be deprived of its plenary effect.

In *McCulloch v. The State of Maryland et al.* the question arose whether the law of Maryland was constitutional which imposed a tax on the operations of a branch of the Bank of the United States, established in the city of Baltimore, in the State of Maryland.

The Supreme Court of the United States were of opinion that the tax was unconstitutional, because it was a tax on the operation of an instrument employed by the Government of the Union to carry its powers into execution.

Chief Justice Marshall gave the opinion of the court, in which he declares, that the power to tax involves the power to destroy ; that the power to destroy may defeat and render useless the power to create.

It is true that this case was a contest as to the supremacy of a law of the United States, made in pursuance of the Constitution of the United States, over the legislation of a State ; but there is much in the argument of the court which applies to the case at bar.

The doctrine in the case of *McCulloch* was affirmed and reiterated in *Osborn v. The Bank of the United States*, 9th Wheaton, p. 738.

If the Legislature have not the direct power of taxing the salaries of the judiciary, they cannot confer such authority upon the city of New Orleans.

It may not be improper to remark that the four Judges who decide this cause have their respective domicils out of the city of New Orleans, and are not, therefore, interested in the question as to the right of the city to tax the salaries of Judges.

It is, therefore, ordered, adjudged and decreed, that the judgment be avoided and reversed, and that there be judgment in favor of defendant against the demand of plaintiff, and that the latter pay the costs of both courts.

BUCHANAN, J., recused himself.

## NARCISSE BEAUVAIS v. GEORGIANA WALL AND HUSBAND.

The name of the vendee in the body of the act of sale was omitted, the notary and one of the witnesses to the act were offered to prove that *H. T. W.*, whose name was subscribed together with that of the vendor to the act, was the purchaser—*Held*: that the omission could be supplied by such parol evidence.

Where it was proved that the original of an act of transfer and assignment had been deposited in the General Land Office—*Held*: that the registry of it in a book in the Recorder's office, with the certificate of the Parish Judge appended, was competent evidence of the transfer and of its registry.

Where it is impossible for a party to produce an original, which is on file in the Land Office as a part of the archives of the Government, a copy is admissible in evidence.

Where the wife, as heir of the husband, applied for a patent which was issued to her as his *assignee*, a title in her, independent of her husband, cannot be inferred, and the patent must enure to the benefit of the husband's vendee.

**A** PPEAL from the District Court of the Parish of Pointe Coupée, *Ratliff, J. T. J. & W. H. Cooley*, for plaintiff and appellant. *A. Provosty*, for defendants.

BUCHANAN, J. This is a petitory action for a tract of land. The plaintiff and defendant exhibit titles derived from the same source.

The plaintiff, who is appellant, relies upon several bills of exception taken by him to the admission of evidence.

The first is to the notary and one of the witnesses of a notarial act of sale, in the body of which the name of the vendee had been omitted, offered to prove that *H. T. Williams*, whose name was subscribed, together with that of the vendor, to the act, was the purchaser of the land sold thereby. There was no error in the admission of this testimony, under the facts of this case.

There was a manifest omission of a material part of the instrument, which omission made it unintelligible; and which might, and could only be supplied by parol proof. A case in point is *Union Bank v. Penn*, 7th Robinson, p. 80, where the court allowed parol proof of the date which had been omitted in a notarial certificate of protest.

Plaintiff also excepted to the admission of a book from the Recorder's office, and therein the registry of a transfer and assignment by *Pierre David* to *E. B. Williston*, with the certificate of the Parish Judge thereto appended; offered to prove the transfer and assignment and its registry. The objections are, that it is only a copy of the original; that the original should be produced or accounted for. The copy of the act recorded and the certificate of the Parish Judge were competent evidence. See *Wood v. Harrell*, lately decided. But the original of *David's* assignment to *E. B. Williston* was sufficiently accounted for in other parts of the record. It is proved to have been deposited by plaintiff's author in the General Land Office at Washington, as one of the documents upon which the patent was issued, which is plaintiff's title to the land in controversy.

The next bill of exceptions is to the admission of a copy of *Mrs. Almira Williston's* affidavit, that she was owner of the land claimed, by device or legacy from *E. B. Williston*, on file in the General Land Office, and the certificate of the Commissioner of the Land Office. The objection is that the original should have been produced. But this is shown to be impossible, as the original is part of the archives of the Government.

Plaintiff also excepts to the admission of a notarial act of sale of the property

BRAUVAUD  
v.  
WALL.

in dispute by *E. B. Williston*, signed by said *Williston*, by *H. T. Williams*, by two witnesses and by the notary.

The objection was that there was no vendee named in the said act of sale. This objection went only to the effect of the evidence. It was offered to show that the title had passed out of *E. B. Williston* previous to his death ; and the omission of the name of the vendee was, under the circumstances of the case, properly supplied by the testimony of the notary and witness, which was the subject of the first bill of exceptions above mentioned, and by other evidence in the record.

Upon the evidence, the case is clearly with defendant, who has shown a complete chain of title from *E. B. Williston*, assignee of *Pierre David*, the preëemptor, to herself. The patent issued to *Elmira* or *Almira Williston*, as assignee of *David*, and it has been attempted to infer from this expression of the patent a title in the grantee, independent of her deceased husband, *E. B. Williston*. But the evidence establishes that the latter was the immediate assignee of *David*, and that *Mrs. Williston* applied for the patent as heir of her husband. But her husband having sold to another his right and interest, previous to his death, the patent inured to the benefit of his vendee and the assigns of that vendee in the same manner as if the vendor had been vested with the legal title at the date of the conveyance. *Landes v. Brant*, 10 Howard, 374 ; *Pepper v. Dunlap*, 9 An. 140.

Judgment affirmed, with costs.

MERRICK, C. J., concurring. I concur in the decree of the court in this case, but am unwilling to assent to so much as has been said respecting the admissibility of parol proof to supply the name of the purchaser in the body of the act of sale from *E. B. Williston* to *H. T. Williams*.

Whatever ambiguity arises upon this instrument is *patent*. The most, therefore, that could be done would be to examine it "by the light of surrounding circumstances." But these could hardly supply the want of a party to the instrument itself. 1 Greenleaf, sec. 297 et seq.

If the name of the grantee could be supplied by parol, then that of the grantor, and the subject-matter of the contract itself could be supplied in the same way, and thus the instrument would be no longer in writing.

The case cited from 7 Rob. 80 is not at all in conflict with this view. In that case the proof of demand and notice of non-payment might have been made exclusively by parol, and the courts there say that they are not prepared to say that a party should not be permitted to prove such additional facts as may be deemed necessary to establish the notice of the protest.

So, too, where a contract has been entered into without date, as the date is not essential to it, the time of its delivery may be proven *aliunde*.

In this case, however, I do not see any great difficulty in arriving at the intention of the party from the instrument itself. It is true that the name of the grantee is not mentioned in the body of the act. But *id certum est quod certum reddi potest*. The instrument shows that *Williston* was the vendor ; that he received the price which was paid him by the other party ; that there were but two parties to the act, and that they signed the act with the witnesses whose names are given in the body of the act. The names of the witnesses, the notary and the vendor being given, it is demonstrated that the only other person signing the act is the vendee, and he is *H. T. Williams*.

The parol proof in fact proves nothing more than is shown by the act of sale.

The judgment of the lower court, I think with my colleagues, ought to be affirmed.

## R. DUGAS et al. v. M. TRUXILLO.

It is too late after the delay has expired for the return of an appeal, to file in the lower court a second appeal bond to supply omissions in the first.

**A** PPEAL from the District Court of the Parish of Ascension, *Duffel, J.*  
*A. Gentile*, for plaintiffs and appellants. *Mills & LeBlanc*, for defendant-  
 BUCHANAN, J. This is a petitory action for land in possession of the defend-  
 ant.

The widow and universal legatee of defendant answered, pleading title to the land claimed ; and called in warranty various persons.

There was judgment in favor of defendant, and plaintiffs have appealed.

A motion to dismiss is made, on account of the want of proper parties, the names of several warrantors having been omitted, as obligees, in the appeal bond, contained in the transcript which was filed in this court on the 27th January, 1859, being the third judicial day after the return day of the appeal.

The appellant has endeavored to cure this defect, by filing in the Clerk's office of the court of the first instance, on the 29th day of January, 1859, another appeal bond, containing the names, as obligees, of the warrantors, who were omitted in the first bond. A copy of the bond of the 29th January, certified by the Clerk of the District Court, was filed in this court on the 31st January, 1859, without prejudice to the right of appellees to object to the same.

The appellee contends that the last named bond was too late. And we are of that opinion. The appellant had by law three judicial days after the return day to file his appeal in this court. That delay had expired before the second bond was tendered, and no order had been made for an extension of time for the return of the appeal. On the contrary, the transcript of appeal was already filed.

The appeal is, therefore, dismissed at the costs of appellants.

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LOVE, SAVAGE & Co. v. McCOMAS & CLOON—On a Rule against the surety on the bond for the release of property attached.

A judgment which decrees that a writ of attachment under which property has been seized be quashed, and that the bond given for the release of property attached under the writ be cancelled and annulled, is a judgment in favor of the surety upon the bond thus cancelled and annulled, and will become final and irrevocable by the lapse of two years from its date without any appeal being taken therefrom.

A judgment afterwards rendered on appeal, in subsequent proceedings in the same suit, by which the attachment is maintained, will not affect the surety who was not a party to the appeal.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
Duncan & McConnell, for plaintiff on rule. *Durant & Horner*, for defendant in rule and appellant.

BUCHANAN, J. The facts and dates are recapitulated in the opinion heretofore delivered in this cause.

A re-hearing having been granted, we have come to the conclusion that the plea of *res judicata*, interposed by the appellant in this court, was well taken.

LOVE
v.
McCOMAS

The judgment of the District Court, rendered on the 15th and signed on the 20th December, 1853, decreed, "that the second writ of attachment issued herein, and under which the steamboat Lewis Whiteman has been seized, which writ issued on the 29th May, 1852, be quashed and set aside, and that the bond given for the release of the property attached under said writ be cancelled and annulled."

This was a judgment in favor of the appellant, who was the surety upon the bond which was thus cancelled and annulled. This judgment became final and irrevocable by the lapse of two years from its date, without an appeal taken therefrom. Indeed it has never been appealed from to this day.

The appellant was not a party to the subsequent proceedings in the suit of *Love, Savage & Co. v. McComas & Cloon*; to the final judgment of the District Court on the merits in that case, rendered on the 7th February, 1856; to the appeal taken by plaintiffs from that judgment; and consequently not a party to the proceedings in the Supreme Court upon such appeal. As to this appellant, the judgment of this court of the June term of 1856, upon which the appellees rely, must be considered as *res inter alios acta*.

The omission of appellant to make a party who is interested in maintaining a judgment, party to the appeal, might have been the means of dismissing the appeal, if brought to the attention of the court, previous to judgment on the merits. But the neglect of the appellee to do so cannot have the effect of enabling the appellant to profit by his own omission, and to enforce a judgment of reversal against one who was not party to such judgment of reversal.

It is, therefore, adjudged and decreed, that our former judgment in this case, of the 23d November, 1857, be avoided and annulled, and that there be judgment reversing that which is appealed from, and in favor of the appellant, *Bennett P. Voorhies*, and against the appellees, *Love, Savage & Co.*, with costs in both courts.

VOORHIES, J., recused himself, on account of relationship to one of the parties.

MERRICK, C. J., dissenting. The original opinion of this court on the rule taken against the surety upon the bond for the release of the property attached, appears to me to be sustained by abundant authority. I have not heard or seen any argument or authority advanced on the re-hearing, which creates any doubt upon my mind of the correctness of that decision, and hence I do not feel at liberty to assent to the opinion of my colleagues, in part overruling the same. Indeed I do not understand the opinion of my colleagues to controvert the doctrine that all interlocutory decrees, as *between the parties* to the appeal, are open to revision of this court, on an appeal from the final judgment, although such interlocutory orders may have been rendered more than one year previous to the final trial. A contrary doctrine, it appears to me, would not only be in conflict with the Code of Practice, but with many decisions of this court. See C. P. 538, 544, 546; 12 La. 150, *Vanwickle v. Flecheaux*; *Collerton v. McCleary*, 7 La. 429; *Krautter v. Bank United States*, 11 Rob. 163; *McDonogh v. Calloway*, 7 Rob. 444; *Park v. Porter*, 2 Rob. 344; *Crane v. McGrew*, 4 An. 307.

But if I understand correctly the opinion enunciated, it is that the interlocutory judgment of the 20th of December, 1853, was a judgment in favor of the surety on the bond, as well as the party to the suit, and that as such he ought to have been made a party to the appeal, and not having been made such party as to him the judgment is still unreversed. For it cannot, I think, be maintained for a moment, that the interlocutory order, as to the defendant, was not brought

up by the appeal from the final judgment; for we reversed the judgment and reinstated the attachment.

LOVE
v.
McCOMAN.

It remains, then, only to consider whether the surety on the bond was a necessary party to the appeal, and whether the judgment could have the force of the thing adjudged as to him, notwithstanding the appeal. In the case of these plaintiffs against the defendant in the rule, it appears to me, this court has recently decided the contrary. See *Love, Savage & Co. v. B. P. Voorhies*.

The surety binds himself on the release of the property attached, that he will satisfy, to the extent of the value of such property, such judgment as may be rendered against the defendant in the suit pending. C. P. 259; Act 1852, p. 155. It is true, therefore, that he is interested in the interlocutory judgment, and he has the like interest in the final judgment, for if the final judgment be in favor of the defendant, the surety is not bound.

But this interest, in the absence of an express statute, does not make the surety a party to the suit. He would not be heard to object to evidence, or permitted to file a motion to dissolve, or take any steps in the proceeding. He is no more a party to the suit than the surety on the appeal bond is a party to the appeal.

The statute of 1839, p. 162, sec. 3, has provided the mode of rendering him liable. It requires a rule to be taken against him upon the bond after the return of *nulla bona* on an execution on the judgment against his principal to show cause why judgment should not be rendered against him upon the bond. On this rule, the decree must ascertain the value of the property attached, and the judgment is not to be beyond such value. I think it is, therefore, quite clear, that the surety on the bond releasing the attachment, unlike the surety on the injunction bond, is not a party to the suit, although he may be interested in the interlocutory orders as well as final decree.

A contrary doctrine would lead to much unnecessary expense in all proceedings of this kind, and would increase greatly the docket of this court.

OVERRULED OPINION.

MERRICK, C. J. The present proceeding is a rule taken against a surety to a bond given for the release of property attached to render him liable after the return of *nulla bona* on the execution.

The suit in the Sixth District Court pleaded as *lis pendens* in bar of this proceeding appears to be founded upon another bond given by the same parties, for the release of other property attached in the above entitled cause. Although it has for its object the security of the same debt, and would, therefore, be discharged by the payment of the bond sought to be enforced on this rule, or by the payment of the original judgment, still it is not in fact the same cause of action, *super idem corpus et eandem causam petendi*.

It is upon a different instrument, though collateral to the same principal debt. Had it been signed by different sureties there could be no question that the plea could not avail, and we do not conceive that it makes any difference that the two bonds are signed by the same surety. The exception of *lis pendens* was, therefore, properly overruled.

On a rule taken by the defendants upon the plaintiff, in the original action, to show cause why the writ of attachment issued 29th May, 1852, (under which the bond signed by the defendant in the rule was given,) should not be quashed and

LOVE
v.
McCOMAS.

set aside, it was ordered that the rule be made absolute, and that the bond for the release of the property attached be cancelled and annulled. This order was signed by the Judge on the 20th December, 1853. Final judgment was not rendered in the case until Feb. 12th, 1856, and the appeal was taken the nineteenth day of the same month, it being more than two years after the interlocutory decree. On these facts the appellant contends by counsel, that the order of 20th of December, 1853, was one which worked irreparable injury to the plaintiffs, and that "may" in Art. 566, C. P., is to be construed must, and inasmuch as plaintiffs did not appeal from said order in one year, that it has the force of the thing adjudged, which is now pleaded in bar of the present proceeding.

We have not supposed that the right of the Supreme Court to pronounce in their final decree upon all interlocutory matters and orders, entertained and decided at any time during the progress of the cause by the lower court, was at all doubtful, whether those orders did or did not produce some inconvenience to the parties which the final decree could not remedy. But this point is pressed upon the court with such earnestness by defendants' counsel, that we will look into the authorities on the subject. The Code of Practice, after dividing judgments into interlocutory and final, declares that "Interlocutory judgments do not decide on the merits; they are pronounced on preliminary matters in the course of the proceedings." Art. 538.

"Definitive or final judgments are such as decide all the points in controversy between the parties. Definitive judgments are such as have the force of *res judicata*." C. P. 539. The maxim of the French law is *ab interlocutorio potest discedere*. *Bousquet, verbo Appel*.

Savigny, in speaking of the effect of a final decree, says, that every decree which is subject to further proof or confirmation, must be looked upon as a preparatory decree, or one of the many steps in the course of a suit, which are designed to lead to a final and permanent judgment. 6 Sav. pp. 296, 297, sec. 285, Berlin edition.

Chief Justice Taney, in 16 Howard, p. 85, says "The counsel for the appellants, however, objects to the decree of dismissal, because it was made at the argument upon the exceptions to the master's report, and is contrary to the opinion on the merits, expressed by the court in its interlocutory order. But this objection cannot be maintained. The case was at final hearing at the argument upon the exceptions, and all of the previous interlocutory orders, in relation to the merits, were open for revision and under the control of the court. This court so decided when the former appeal hereinbefore mentioned was dismissed for want of jurisdiction. And if the court below, upon further reflection or examination, change its opinion after passing the order, or found it was in conflict with the opinion of this court, it was its duty to correct the error. The Circuit Court, on this occasion, has properly done so, and the decree of dismissal must be affirmed, with costs."

In the case of *Thompson v. Mylne* it was held by this court, that an order of this court remanding a cause for further proceedings in the partition of property could not be considered as a final decree upon those rights of the parties not specifically adjudicated and closed by the decree itself. The court says, "It is a preparatory decree prescribing the manner of proceeding deemed necessary by the court to arrive at a final decision, and necessarily under its control until that decision is made. 4 An. 211. The plea of *res judicata*, therefore, cannot avail the defendant.

The final decree in the original suit of *Love, Savage & Co. v. McComas & Cloon*, reversed the judgment of the lower court, and rendered one in favor of the plaintiffs, wherein the validity of the attachment of 29th May, 1852, was virtually recognized. That decree must have its effect, and the judgment of the lower court on the rule must be affirmed.

Judgment affirmed.

LOVE
v.
McCOMAS.

J. P. WALWORTH et al. v. J. ROUTH.

The law of the forum governs in matters of prescription.

The statutes of limitations of the other States are engrafted upon our law as to judgments only when two conditions concur: 1st, where the judgment has been rendered between persons who reside out of the State, and to be paid out of the State. 2dly, where the defendant removes to the State of Louisiana, after he has become entitled to the benefit of the statute of limitations of the place where the judgment was rendered.

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APPEAL from the District Court of the Parish of Tensas, *Farrar, J.*

H. B. Shaw, for plaintiff. *A. Snyder* and *T. P. Farrar*, for defendant and appellant.

MERRICK, C. J. In 1841 the Planters' Bank of Mississippi, obtained two judgments in the Circuit Court of Adams county in that State, against the defendant and certain other parties; the one for \$15,737 72, and the other for \$7,707 58, and interest. In 1843, that bank made an assignment of its effects to the plaintiffs, in trust to pay its debts. In 1845, the charter of the bank was declared forfeited.

The judgments above referred to, having been rendered in favor of the bank, the charter of which had been declared forfeited, the plaintiffs, as Trustees, were driven to obtain the aid of a Court of Chancery to enforce the judgments rendered in the name of the bank against the defendants. A suit in chancery was accordingly commenced in 1849, against the defendants, before the Vice-Chancellor of the Southern District of Mississippi.

It resulted in a decree in favor of the plaintiffs against the defendants in the sum of \$40,052 85, with eight per cent. interest, from 28th day of December, 1850. The decree was signed the 31st day of December, 1850. A writ of error was prosecuted in the name of all the defendants to the High Court of Errors and Appeals of Mississippi. The decree of the Vice-Chancellor was affirmed, with five per cent. damages in October, 1854. But the proof shows that the defendant, *John Routh*, did not authorize the prosecution of the writ of error on his behalf.

The present suit was instituted on the 10th day of May, 1858, to recover the sum and interest awarded by the decree of the Vice-Chancellor, with the damages, on the affirmance of the same, before the High Court of Errors and Appeals.

The pleas of prescription of seven years under the statutes of Mississippi, and ten under our own, were interposed by the defendant as a bar to plaintiffs' action. They were unavailing in the lower court, and he prosecutes his appeal.

Those two pleas present the only questions now insisted upon before this court.

WALWORTH
v.
ROUTH.

Since the commencement of the suit in the Vice-Chancellor's Court in 1849, to the present time, the defendant, *Routh*, has been a resident of Louisiana.

The Mississippi statute of limitations supposed to be fully naturalized in Louisiana by the Act of March 15th, 1855, is in these words, viz :

"All actions of debt founded on any judgment or decree rendered by any court of record in this State, shall be brought within seven years next after the rendition of such judgment or decree, and not after ; and no execution shall issue on any such judgment or decree, after seven years from the date of the issuance of the last preceding execution on such judgment or decree.

Our own statute authorizing the plea upon a foreign statute of limitations in certain cases, is as follows :

"Be it enacted, &c., That whenever any contract or obligation has been entered into, or judgment rendered, between persons who reside out of the State of Louisiana, and to be paid and performed out of this State, and the said contract, obligation or judgment, is barred by prescription or the statute of limitations of the place where the contract or obligation is to be performed, or judgment executed, the same shall be considered and held as barred by prescription in Louisiana, upon the debtor, who is thus discharged, subsequently coming into the State."

By Article 3508 C. C., the Act of 14th of March, 1848, (Acts 1848, p. 60,) and the Act of 30th of April, 1853, (Acts 1853, p. 250,) the ordinary prescription of a judgment is ten years.

As the law of the forum governs in matters of prescription, it is evident that the statute of limitations of Mississippi above cited, can have no force *proprio vigore*. It can have effect only in virtue of and to the extent admitted by our law. It is engrafted upon our law as to judgments, only where the two following conditions concur :

1st. Where the judgment has been rendered between persons who reside out of the State of Louisiana, and there to be paid ; and,

2dly. Where the defendant removes to the State of Louisiana *after he has become entitled to the benefit of the plea of the statute of limitations* of the place where the judgment was rendered.

The language of the statute is quite clear, and presents no difficulty of construction.

It is evident that the defendant cannot bring himself within either of the above conditions. It is needless, therefore, to inquire whether he could have successfully pleaded the statute of limitations to an action of debt brought in Mississippi on the Vice-Chancellor's decree.

The next question then is, can the law of Louisiana avail the defendant ?

The judgments rendered in 1841, in favor of the Planters' Bank, were merged in the decree in favor of the plaintiffs in 1850. Those judgments, after the rendition of the decree, would not have formed the basis for an action of debt or *servia facias*.

This suit, therefore, was properly brought upon the decree, and not upon the original judgments ; and *Routh* must have a plea, which will be a bar to the action on the decree, or fail in his defence. He is a resident of Louisiana, and no foreign law can protect him. The period required by our law (ten years) has not elapsed, since the rendition of the decree.

The plaintiff, conceding the fact that the writ of error was prosecuted without authority from *Routh*, waived the damages given by the High Court of Errors and Appeals.

WALWORTH
V.
ROUTH.

The decree of the Vice-Chancellor being in favor of plaintiffs as trustees, no question has been raised as to their capacity to bring this suit, and that decree is a bar to all defences which might have been pleaded to the suit in chancery.

The judgment of the lower court rests upon true principles and cannot be disturbed.

Judgment affirmed.

R. R. BARROW v. E. G. ROBICHAUX.

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Where it was alleged that the clerk retiring from office had forfeited his fees by failing to file an explicit fee bill within the term prescribed by the statute—*Held*: That the allegation, although of a negative character, must be proved.

The law requiring that the clerks shall endorse upon or annex to all writs of *feri facias* issued by them, specific bills of the taxed costs, is directory, and no penalty is incurred for the non-observance of the requirement.

When there has been an error committed in issuing a writ of *feri facias* for more than the plaintiff is entitled to under the judgment, the right to enjoin is limited to the amount for which it has erroneously issued.

A PPEAL from the District Court of the Parish of Lafourche, *Roman, J.*
F. S. Goode, for plaintiff. *Beatty & Bush*, for defendant and appellant.

LAND, J. This is an injunction suit to restrain the sale of certain property seized by the Sheriff in virtue of a writ of *feri facias*.

In 1855, after a protracted litigation, *John McDonald* obtained judgment on three promissory notes, in the parish of Terrebonne, against *Robert R. Barrow*, the plaintiff, for the sum of five thousand dollars, with five per cent. interest.

After an appeal to this court by *Barrow*, and the affirmance of the judgment, *John McDonald*, in 1858, caused a writ of *feri facias* to issue on his judgment, directed to the Sheriff of the parish of Lafourche, who proceeded to execute the same, by seizing and advertising for sale the plaintiff's property situate in that parish.

R. R. Barrow filed his petition, and obtained an injunction inhibiting the Sheriff from selling the property seized under the writ.

He alleges in his petition six different grounds for injunction, as follows:

First. That the writ issued for a large amount of costs, the greater part of which was due to a former clerk and two former Sheriffs, who had retired from office without filing or presenting specific fee bills, as required by law; and that the clerk in office had neglected to endorse on the writ specific bills of the taxed costs, and that said costs were therefore forfeited, and could not be collected.

Section 3 of the Act of 1855, p 162, provides, that whenever a Sheriff or Clerk shall retire from office, he shall cause to be filed with the proceeding in which he may be entitled to costs, within twenty days, specific bills of his fees; and in default thereof, or if any item shall be overcharged, the same shall be forfeited, and such Sheriff or Clerk forever barred from collecting the same.

Under this section of the Act, the fees of the retired Clerk and Sheriffs have been forfeited if the fact be true, as alleged by the plaintiff, that they failed to file explicit fee bills within the twenty days prescribed by the statute. But the plaintiff has failed to prove this fact, which was susceptible of proof by him, although of a negative character, and which was material to his case. It is a fact which

BARROW
v.
BOMCHIAUX.

the court cannot presume against the retired officers of the court, who are not parties to this suit. The fee bills are required to be *filed in court*, and it was not more difficult for plaintiff to prove *they had not been filed*, than to prove there is no act of sale or mortgage of record, which the law frequently requires.

The fifth section of the same act provides, that the Clerks of the District Courts shall endorse upon, or annex to all writs of *feri facias* issued by them, specific bills of the taxed costs. No penalty however is declared for the non-observance of this section of the Act.

This section, therefore, must be considered directory, as this court has no power to declare rights forfeited, in the absence of express legal authority.

Secondly. That the writ was not made returnable, in not less than thirty, and more than seventy days. The writ was issued on the 15th day of April, 1858, and made returnable within seventy days. It was received on the 21st of April thereafter, by the Sheriff of Lafourche, who seized under it the property of plaintiff on the 28th of same month.

This objection was insufficient to arrest the execution of the judgment.

Thirdly. That the description of the property in the Sheriff's advertisements was incorrect and uncertain. If there was any inaccuracy in the description of the property, it is not shown by the evidence. The certainty of the description is sufficient. The statement of every material circumstance of identity was made by the Sheriff.

Fourthly. That the property seized belonged to an ordinary partnership engaged in the cultivation of sugar, and that *plaintiff's interest* in the partnership property could not be legally sold.

This, as a proposition of law, is wholly untenable. C. C. 2794.

Fifthly. That the advertisements did not mention correctly the title of the cause, or of the court, from which the writ issued. The title of the cause is fully stated in the margin, and the title of the court in the body of the advertisements. This was sufficient.

Sixthly. That the writ did not follow the judgment, in this, that the judgment gave only five per cent. interest, and the writ was issued for eight per cent. thereon. For this difference in the interest, the plaintiff was entitled to an injunction, but for nothing more.

Where the ground of injunction is compensation or subsequent payment, the right of injunction is expressly limited to the amount pleaded in compensation or payment, and reason and public policy require that the same rule should be extended to cases of error or mistake, committed by the officers of court, in issuing writs of *feri facias*, and the right to enjoin, be limited to the amount occasioned by the error of the officer, and not suffered to extend to the whole judgment. Acts 1855, sec. 4, p. 324.

It is, therefore, the opinion of the court, that the injunction issued in this case, restraining the execution of the *whole judgment*, was improperly obtained, and was an abuse of the equitable remedy of the writ.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be amended so far as it perpetuated the injunction, as to the costs endorsed upon the writ, and reserved the right of *John McDonald* to enforce and collect the same, and that said injunction, as to said costs, be dissolved, and that the Sheriff proceed to make the same according to law, and that said judgment, in all other respects, be affirmed, and that the plaintiff pay the costs of this appeal.

T. R. SUTTON v. W. B. CALHOUN—HEIRS OF MARTIN, Intervenor.

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The defendant relying on a tax sale is bound to show not only the existence of an assessment, but also its legality.

Where the title of the owner of the land is of record, his name is required by statute, as descriptive of the land assessed, and an error in this respect is fatal to a title by a tax sale.

It is necessary that the land assessed should be designated by its boundaries, and when the boundaries given are confused and erroneous, the assessment does not possess that particularity and certainty necessary for the validity of a tax sale.

Parol evidence is admissible to show a misdescription in the act of sale of the land really sold, there being an error on the face of the act itself.

A PPEAL from the District Court of the Parish of Concordia, *Ratliff, J.*, presiding. *Thomas P. Farrar*, for plaintiff and appellant. *L. V. Reeves*, for intervenors. *A. Snyder*, for defendant.

LAND, J. This suit is brought for the recovery of a tract of land situated on Black River, in the parish of Concordia, and described as the south-west fractional quarter of section fourteen, containing one hundred and sixty-nine acres. The north fractional half of section twenty-three, containing two hundred and seventy-nine 90-100 acres, and the west half of the south-west quarter, and the west half of the south-east quarter of the same section, containing together one hundred and fifty-eight 80-100 acres, and containing altogether 607 70-100 acres.

The plaintiff contends that *Asa T. Martin*, the patentee of the United States Government, sold the whole of these lands to *W. A. Miller*, by act of sale duly recorded in the parish of Concordia, on the 3d day of December, 1844. And that *Miller* sold the same lands to him, plaintiff, by act of sale, duly recorded in the same parish on the 22d day of August, 1849, and that there is a misdescription of a portion of the land in the acts of sale conveyed.

The defendant sets up title derived from *Thomas Edwards*, who purchased these lands at two different sales for taxes.

The intervenors claim title to the north half of section twenty-three, on the ground that their ancestor, *Asa T. Martin*, never parted with his title to the same.

The validity of the defendant's title will be first considered.

The first sale for taxes was made on the 4th day of November, 1848, for the taxes assessed in the name of the patentee, *Asa T. Martin*, due on the land for the year 1847. And the second sale for taxes was made on the 1st of November, 1851, for the taxes assessed in the name of *W. A. Miller*, due on the land for the year 1850.

The first assessment or entry on the tax roll, by virtue of which the lands were sold on the 4th of November, 1848, is in these words and figures, to wit: *A. T. Martin*, 735 acres land, value \$3685, tax \$6 14½, tax \$3 68 3-6—total \$9 82 4-6, parish tax \$8 18.

The second assessment is in these words and figures, to wit: *W. A. Miller*, 606 acres, W. ½ and W. ½ of S. E. ¼ sec. 23, S. W. fractional ½ sec. 14, T. 6, R. 6, \$2000 amount, tax \$2 20, \$2 00—total \$4 20, parish tax 73c, special parish tax \$1 10.

The 26th section of the Revenue Act of 1847 provides, that if the land to be assessed, be a tract or lot which is known by a name, or if the owners name be

SUTTON
v.
CALHOUN.

known, they shall designate it by those particulars, and by its boundaries. If it have no name, or the name be unknown, and if the owner be unknown they shall designate it by boundaries alone. The 23d section of the Revenue Act of 1850 contains the same provisions.

The defendant relying on a tax sale for his title, is bound to show not only the existence of an assessment but also its legality. He has shown an assessment of the lands, and the question to be determined is, whether that assessment was legal.

In forced sales for taxes, every formality of the law must be strictly complied with, under the pain of nullity. *Nancarrow v. Weathersbee*, 6 N. S. 348; *Smith v. Corcoran*, 7 L. 50; *Reeves v. Towles*, 10 L. 283; 13 L. 205, 4. A. 248; 6 A. 542; 8 A. 19; 10 A. 329.

The inadequacy of the price in sales of this description, and the absence or incapacity of the owners, arising from infancy, coverture and other causes, have had their influence in the establishment of this rigid rule of law. And its application in this case defeats the title of the defendant.

In the first assessment there is *error in the name of the owner*, and no boundaries of the land are given.

In the second assessment there is also *an error in the name of the owner*, and the *boundaries given are confused and erroneous*, and do not possess that particularity and certainty necessary to the validity of a tax sale. *Carmichael v. Aiken*, 13 L. 210.

When the lands were assessed in the name of *Martin*, *W. A. Miller* was the owner, and his title of record. When they were assessed in the name of *Miller*, *Thomas R. Sutton* was the owner, and his title was of record. The name of the owner was required by the statute as descriptive of the lands assessed, and an error in this particular is as fatal as an error in the boundaries themselves.

It is, therefore, the opinion of the court, that the defendant is without title to the lands in dispute.

The right of the intervenors, as heirs-at-law of *Asa T. Martin*, to the north half of section twenty-three will next be considered.

In the deed from *Martin* to *Miller*, he sells and conveys all that certain tract, piece or parcel of land, lying, situate, and being in the parish of Concordia, in said State, known and described as the west half of the south-east quarter of section number twenty-three, and the west half of the south-west quarter, and the west half of the south-west quarter of section number twenty-three, of township number six of range number six, and the south-west fractional quarter of section fourteen, same township and range, containing in all six hundred and six acres, be the same more or less.

The evidence shows that the north half of section twenty-three was the property of *Martin* at the date of the sale to *Miller*, and was necessary to unite the parcels of land sold and conveyed into one tract, piece or body, and was necessary to make up the quantity of land mentioned in the act of sale, or to make up a quantity which would approximate thereto. The Receiver's receipts of the purchase or entry of the north half of section twenty-three by *Martin*, were in the possession of his vendee, and offered in evidence on the trial of this cause; and it is not pretended that his possession was improperly obtained.

The north half of section twenty-three, was always claimed by the vendee after the sale, and was not inventoried after the death of *Martin* as the property of his succession. There is in the description of the land sold evidently an error on the

BUTTON
v.
CALHOUN

face of the act itself, which gives to the circumstances stated a weight they would not otherwise possess.

The words in the act of sale, *west half of the south-west quarter, and the west half of the south-west quarter of section number twenty-three*, are either a careless repetition or a misdescription of a parcel of land in section twenty-three, which the vendor intended to sell and the vendee intended to buy. The facts established by the evidence are all consistent with the latter hypothesis, and are repugnant to any other rational conclusion.

In the case of *Palanque v. Guesnon*, 15 L. 311, the court held that parol evidence was admissible to show a misdescription in the act of sale of the land really sold; and in this case there is positive parol testimony as to the fact of a misdescription of the north half of section twenty-three, and is fully corroborated by circumstances as well as the acts of the parties, and leaves no doubt on the mind of the truth of the fact. *Broussard v. Ladrique*, 4 L. 352.

It is, therefore, ordered, adjudged and decreed, that so far as the judgment of the lower court and the verdict of the jury rejected the plaintiff's claim to the north half of section twenty-three, be reversed and set aside; and it is further ordered and decreed, that the petition of intervention be dismissed and the claim of the intervenors rejected, and that the plaintiff recover of the defendant the north half of said section twenty-three, and that he be quieted in his title thereto; and it is further ordered, adjudged and decreed, that so far as the judgment of the lower court is in favor of plaintiff, for the other parcels of land claimed in this suit, and described in said judgment, be affirmed; and it is further ordered and decreed, that so far as the judgment of the lower court and the verdict of the jury condemn the plaintiff and intervenors to pay to the defendant the sum of two hundred and fifty dollars for improvements, be reversed and set aside, and that said defendant do have and recover of the plaintiff the said sum of two hundred and fifty dollars; and it is further decreed, that the defendant pay the costs of the principal action in the lower court and one-half of the costs of this appeal, and that the intervenors pay the cost of their intervention in the lower court, and the other half of the costs of this appeal.

A. CARRIÈRE v. LABICHE et al.

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114 408

The assumption of a debt by a new firm succeeding to the business of one that has been dissolved, the transfer of the debt to the books of the new firm, and the assent of the creditor to the arrangement, will not novate the debt without an express agreement to discharge the original debtors.

The prescription of one year is inapplicable to an action for the price of wines sold in casks and boxes by a wholesale dealer.

A PPEAL from the Sixth District Court of New Orleans, *Cotton, J.*
W. O. Denègre, for plaintiff. *C. DeChoiseul*, for defendants and appellants.

MERRICK, C. J. This suit is brought by the plaintiff against certain of the partners of the late firm of *Daran, Labiche & Co.*, to recover \$377 for wine sold in casks and boxes. The defence to the action is, that the firm dissolved and transferred their business to the new firm of *Daran & Jourdan*, who assumed the

CARRIE
v.
LABICHE.

debt and transferred the same to their books, and that the plaintiff assented to the arrangement.

There is also a plea of prescription of one year. The defendant, *J. A. Carrie*, denies having been a partner, and alleges that he only acted as agent of his wife, *A. Carrie*, who is separate in property.

The promise of *Daran & Jourdan* to pay this debt, and the entry of the same on their books to the credit of the plaintiff, together with the repeated demands of the plaintiff, through his clerk, upon both firms for payment, cannot have the effect of releasing the original debtors. The law requires an express agreement to discharge the original debtor. The delegation was not complete. C. C. 2188, 2185; Pothier on Obligations, 600; 11 Rob. 511, *Muggah v. Rogers*.

The matters offered to be proven by defendants, as stated in their second bill of exceptions, would not, therefore, have formed a defence to the action, and the ruling of the Judge has not prejudiced the defendants on this branch of the case. The first bill of exceptions is defective in not stating the objection to the witness, nor by whom made, and does not enable us to revise the ruling of the Judge excepted to.

Plaintiff's debt is admitted to have been correct when originally made, and is also established by proof.

The bill of the wines does not show that the action is that of the retailer of provisions: on the contrary, it would seem that the plaintiff was a wholesale dealer. The item of December 5th is for 100 boxes of wine, and those of 17th and 27th of the same month was for barrels.

The prescription of one year is, therefore, inapplicable.

The proof does not show that the defendant *A. Carrie*, is separate in property from her husband. In the absence of such proof, her husband is bound *in solido* with her. C. C. 128.

Judgment affirmed.

SAME CASE—ON A RE-HEARING.

MERRICK, C. J. A re-hearing was granted in this case to correct an error of fact into which the court was led from the manner in which an important admission was transcribed in the record, under the testimony of *Jules Martin*.

It is admitted that *Mrs. Carrie* was separate in property from her husband.

The judgment ought, therefore, to have been reversed as to the defendant, *J. A. Carrie*.

It is, therefore, ordered, adjudged and decreed by the court, that so much of our former decree as affirms the judgment against the said *J. A. Carrie*, be set aside; and that the judgment of the lower court, as to him, be avoided and reversed; and that there be judgment in favor of said defendant, *J. A. Carrie*, and that he recover his costs in the lower court; and it is further ordered, that so much of our former decree as affirms the judgment as to said *Labiche* and *A. Carrie*, wife of said *J. A. Carrie*, remain undisturbed; and that the plaintiff pay the one-half, and the defendants, *A. Carrie* and *P. M. Labiche*, pay the other half of the costs of the appeal.

JACKSON & VAN PELT v. SAMUEL W. MOORE.

The cause which hinders a testator from signing his name when he knows how to sign, must be a physical cause. The existence of such a mental cause as delirium, incapacitates the testator from completing the will.

A PPEAL from the District Court of the Parish of Carroll, *Farrar, J.*
Goodrich & DeFrance, for plaintiff. *Sparrow & Montgomery*, for defendant and appellant.

LAND, J. On the 20th of April, 1857, *Robert A. Armstrong*, of the parish of Carroll, in this State, made his olographic will, in which he instituted as his universal legatee his cousin *Minerva Armstrong*, and appointed as executor thereof the plaintiff, *Edwin C. Jackson*.

On the 14th of January, 1858, *Robert A. Armstrong* made a second will by private act in the nuncupative form, in which he bequeathed to his cousin, *Minerva Armstrong*, the greater part of his estate, and the remainder to the defendant and other legatees, and also appointed therein his friend, *Edwin C. Jackson*, his executor.

These wills were both probated in the District Court of the parish of Carroll. The executor refused to act, under the will of the 14th of January, 1858; and the defendant, a legatee under it, applied to be appointed dative testamentary executor.

The application was opposed by the executor, *Edwin C. Jackson*, and *Henry Van Pelt*, the attorney-in-fact of *Minerva Armstrong*; and the question presented for decision is, whether the will of the 14th of January, 1858, is valid.

The plaintiffs allege two principal causes for nullity.

First. That the formalities prescribed by law were not complied with, and particularly, the will was not signed by the testator.

Secondly. That the testator was not of a sound and disposing mind and memory, at the time the will was read to him, and signed by the witnesses.

The testimony shows, that the testator was *in extremis*, when the will was read to him for the purpose of being executed, and that he did not sign it.

The causes that hindered the testator from signing are stated by the witnesses to have been weakness and delirium. There is however a conflict in the testimony, as to the condition of the testator's mind, when the will was read to him.

The testimony of *Dr. Gaddis*, the attending physician, who wrote the will, and was one of the subscribing witnesses, shows that the mind of the testator was wandering and delirious, at the time of the reading, and he deposes that the testator was prevented from signing by weakness and delirium.

The cause which hinders a testator from signing his name, when he knows how to sign, must be a physical cause, and not mental, such as delirium or insanity. The existence of such a mental cause, at the time of reading, incapacitates the testator from completing his will. C. C. 1461, 1572, 1575, 1588.

The judgment of the lower court declares the will of the 14th of January, 1848, null and void, and we think it sufficiently sustained by the evidence.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.

CITY OF NEW ORLEANS v. JOHN M. BELL, Sheriff.

The Judges of the courts in New Orleans are vested with full power to regulate the police of their courts, and to prevent a disturbance of the administration of justice.

APPEAL from the Third District Court of New Orleans, *Duvignaud, J.*
J. J. Michel, for plaintiff and appellant. *Benjamin, Bradford & Finney*,
 for defendant.

LAND, J. The opinion and decree of the District Judge are in these words :

"This is a rule taken against *J. M. Bell*, Sheriff of the parish of Orleans, to show cause why he should not be enjoined from placing a barricade on the north side of Condé Street and at the corner of Condé and St. Anne Street.

"In answer to this rule, the Sheriff says : that he has been ordered by the Honorable *I. G. Hunt*, Judge of the First District Court of New Orleans, to place the barriers or barricade complained of, during the sessions of the First District Court, and annexed to his answer the said order of court.

"Considering that the Judges in the City of New Orleans are vested with full power to regulate the police of their courts, and to prevent such noise within the precincts of their courts, as might disturb the administration of justice ; and considering further, that the continual passage of horses and vehicles at the corner of St. Anne and Condé streets, creates such a noise as to disturb the business of the First District Court of New Orleans.

"It is, therefore, ordered, adjudged and decreed, that the rule praying for an injunction be dismissed at plaintiff's costs."

For the reasons given by the District Judge, it is ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.

STATE v. HENRY RENTIFORD.

The State has no right of appeal from a judgment sustaining a motion in arrest of judgment in a case where the offence is punishable with fine only.

APPEAL from the District Court of the Parish of Iberville, *Wilson, J.*
J. D. Stuart, District Attorney, for the State, appellant. *Lea & Marr* and
A. Talbot, for appellee.

MERRICK, C. J. The defendant was found guilty by the verdict of the jury, of an offence punishable with fine only.

He moved in arrest of judgment, and his motion was sustained.

This appeal has been taken by the State.

The defendant now moves to dismiss the appeal for want of jurisdiction.

The Constitution confers appellate jurisdiction on this court in criminal cases, on questions of law only, in cases where the offence charged is punishable with death or imprisonment at hard labor, or when a fine exceeding three hundred dollars has been *actually* imposed.

As the offence is only punishable by a fine, and no fine has been actually imposed in this case, the Constitution confers no power upon this court to revise the judgment of the lower court, and the appeal must be dismissed.

It is, therefore, ordered, adjudged and decreed by the court, that the appeal in this case be dismissed.

STATE
v.
RENTFORD.

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E. TIRCUIT v. E. PELANNE et al.

In an action of boundary the costs should be equally divided between the parties, unless there is proof of a demand on one side, and refusal on the other to settle the boundary amicably.

A PPEAL from the District Court of the Parish of Pointe Coupée, *Harralson, J. A. Provosty*, for plaintiff. *T. J. & W. H. Cooley*, for defendants and appellants.

BUCHANAN, J. This is an action of boundary.

The line of division of the properties of plaintiff and defendants, being the north line of township 4 south, range 9 east, in the south-eastern district of the State of Louisiana, west of the Mississippi river, was run by a surveyor under an order of court, and with the consent of both parties.

The defendants opposed the report of said surveyor, principally on the ground, that it gave the preference to a later survey of the officers of the surveying department of the land office of the United States, over a more ancient survey of that department.

We do not find this objection sustained by the evidence.

The appellee, in an answer to the appeal, prays an amendment of the judgment of the court below, which divides the costs equally between the parties. He asks us to throw all the costs upon defendants; and relies upon the cases of *Andrews v. Knox*, 10th An. 604, and *Laves v. Watson*, 12th An. 216.

In the cases cited, the defendants were condemned to pay the costs, because they had refused to settle their boundaries amicably, and had forced thereby their neighbors to institute suit. We find no proof in this record of a demand on one side and refusal on the other to settle the boundary amicably.

The authorities quoted are not applicable.

Judgment of the District Court affirmed; the costs of the lower court to be borne one half by plaintiff and one half by defendants, those of appeal to be paid by the appellants, *Raymond Pelanne* and *Pierre Pelanne*.

J. A. FUQUA, Administrator, v. YOUNG & KNIGHTON.

Prescription against an action for the recovery of money collected by a Sheriff under a writ of *f. fa.*, will only commence to run from the date of the demand by the judgment creditor, and non-payment by the Sheriff.

APPEAL from the District Court of the Parish of East Feliciana, *Ratliff, J. Fuqua & Kilbourne*, for plaintiff. *R. J. Bowman*, for defendants and appellants.

LAND, J. The plaintiff, administrator of a judgment creditor of one *Peacock*, sued the defendants as sureties of the late Sheriff of East Feliciana, to recover the amount of the judgment, in favor of his intestate, and obtained a decree in the lower court against them *in solido*, for the sum of five hundred and thirty-seven dollars and thirty-seven cents, with five per cent. interest.

The defendants appealed, and the only defence on which they rely in this court is the prescription of two years.

The 10th section of the Act of 1855, provides, that "the Sheriffs and their securities, shall be able to prescribe against their acts of *misfeasance, nonfeasance, costs, offences* and *quasi-offences*, after the lapse of two years from the day of the omission or commission of the acts complained of." Phillip's Revised Statutes, p. 524.

There were concurrent seizures by the Sheriff under other writs, with that of plaintiff's intestate, and the Sheriff closes his return as follows, to wit, "total amount in Sheriff's hands, \$1,419 61, in cash and bonds from sales of personal property, under the several writs before named, subject to distribution among the different claimants under the order of the court."

Whether the prescription of two years, under the statute referred to, applies to actions for the recovery of money collected by Sheriffs under writs of *feri facias*, it is unnecessary to decide, for the reason, that prescription would only commence to run in such cases from the date of the demand, by the judgment creditor, and non-payment by the Sheriff; and there is no proof in the record of any such demand, two years or more, prior to the institution of this suit. C. P. 766.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.

MERRICK, C. J., having been of counsel in the original suit, declines sitting in this case.

WIDOW F. B. D'AQUIN et als. v. J. S. ARMANT.

A judicial sale of a lease imposes upon the purchaser the obligation of paying the price of adjudication to the vendor, and also that of paying the rent accruing after the sale to the lessor, according to the terms of the lease.

Where a sale is made *à la folle enchère*, and the property is adjudicated to the vendor himself, he can not recover from the purchaser at the first sale the deficiency in the price.

APPEAL from the District Court of the Parish of St. James, *Duffel, J.*
A. & A. Pitot, for plaintiff. *Berault & Legendre*, for defendant.

BUCHANAN, J. The plaintiffs sue defendant for the difference in price and expenses, caused by the failure of plaintiff to comply with his bid at an auction sale of property of plaintiffs, which was adjudicated to defendant on March 15th, 1856, for the sum of forty-five thousand dollars: the same property having been, in consequence of defendant's default, re-advertised and re-sold by auction at his risk, on the 1st of April, 1856, for the sum of forty-one thousand and forty-two dollars.

The total amount claimed by the petition, from defendant, is ten thousand five hundred and thirty-eight dollars, for which the three plaintiffs ask judgments severally, in the following proportions:

<i>Widow D'Aquin</i> , as tutrix of her minor children, owners of three-eighths of the property sold, for.....	\$3,951 86
<i>Edgar Montégut</i> , owner of three-eighths of same, for.....	3,951 86
<i>L. Lambert Bown</i> , owner of two-eighths of same, for.....	2,634 57
	<hr/>
	\$ 10,538 29

The sum thus claimed appears to be the aggregate of the following particular items:

1. Difference between the amount bid for the property at the first sale (\$45,000) and at the second sale (\$41,042).....	\$ 3,958 00
2. Amount of rent from date of first sale to the end of the lease sold, assumed by the purchaser at the first sale, but not assumed by the purchaser at the second sale.....	5,934 12
3. Advertisement of second sale in various newspapers.....	17 00
4. Funeral expenses of a slave adjudicated to defendant, which slave died in the interval between the first and the second sale.....	10 00
5. Cost of notarial act of sale and certificates of mortgage appended thereto (first adjudication).....	33 00
6. Bill of Auctioneers for charges and commissions on second sale..	586 17
	<hr/>
	\$ 10,538 29

The defendant urges the following grounds in defence of this action:

1st. That two of the plaintiffs, *Montégut* and *Bown*, gave no written authorization to the Auctioneer to sell the property which was adjudicated to defendant.

2d. That the adjudication to defendant was not made on the terms and conditions fixed by the family meeting and the order of sale; but varied therefrom in an essential particular.

D'AQUIN
v.
ARMANT.

3d. That the plaintiffs, *Montégut* and *Bown*, illegally caused a large portion of the property which was the subject of the first sale, to be adjudicated to themselves at the second sale; by reason whereof, there was not a real sale of said property at the second crying.

4th. That if said re-sale à *la folle enchère* be held valid, then the purchase at said sale by *Bown*, of the leases for \$4000, involved the assumption by the purchaser, of the payment of the rent for the unexpired term of the leases.

1. Upon the first ground, we think the consent of *Montégut* and *Bown* to the sale of the property of which they were joint owners, by auction, is evidenced in a sufficiently authentic form, namely, by the record from the Court of Probates, in which it is set forth that the sale at auction upon the terms fixed by the family meeting of the minors *D'Aquin*, is consented to by the joint owners with said minors, the said *Montégut* and *Bown*.

2. Secondly, the terms and conditions of sale prescribed by the family meeting, were as follows: "That said bakery, together with the slaves thereto attached, horses, carts, and all other implements and utensils, together with the leases of the premises, shall be offered for sale in lump, on the following terms: one-fourth cash, and the balance at one, two, and three years credit, without interest, in notes endorsed to the satisfaction of the administrator; that the stock of flour and biscuit be sold for cash, and in case said sale should not reach the valuation made of said property in the inventory, then the slaves, horses, carts, implements, stock of flour and biscuit, and lease, to be sold at public auction, on the following terms, viz: the slaves, one-third cash, and the balance at one year, payable in notes endorsed to the satisfaction of the administrator; the carts, horses, implements and stock of flour and biscuit, for cash, and the lease payable monthly; all notes to bear eight per cent. interest from maturity."

The District Court homologated the proceedings of the family meeting, and ordered the sale of the property to be made on the terms and conditions above detailed.

The material variation suggested by defendant, consists in the insertion of the following paragraph in the advertisement of the first sale, after the announcement of the terms of sale as above set forth:

"Il est bien entendu que l'acquéreur du dit établissement devra payer, en sus du montant de l'adjudication du dit établissement, les loyers à bail des terrains et édifices servant à l'exploitation de la boulangerie, conformément aux conditions des baux ci-après détaillées, et que les dits loyers ne doivent pas être déduits du prix de l'adjudication de la boulangerie et des esclaves."

We do not find, in this announcement, any variation from the terms of sale, as fixed by the family meeting. It was held by this court, in the case of *Bartels v. Creditors*, 11 An. 434, that the public sale of a lease for account of the lessee's creditors, imposed upon the purchaser the obligation of paying the price of adjudication to the vendor, and also that of paying the rent accruing after the sale, to the lessor, according to the terms of the lease. We considered the bid for the lease in such a case, as a premium which the bidder was willing to give for the transfer of the lease to himself, with all the obligations, as well as all the rights thereto attached, from the moment of the adjudication. And indeed it is difficult to perceive how we can arrive at any other conclusion. The lessee, unless prohibited by the terms of the lease, may transfer all his rights under the lease to another person. C. C. 2696. But the transferee takes those rights *cum onera* of the obligations of the transferor, under the commutative contract thus trans-

ferred. That contract is an entirety, and the transferee is put in the place and stead of the transferor.

D'AQUIN
v.
ARMANT.

It is out of the power of the lessee, if he should even desire to do so, to sever his rights from his obligations, and to transfer the one without the other. No man can transfer to another more right than he himself possesses. If, indeed, it were the lessor who sold the lease, the transferee would, of course, be vested with the right to collect and keep the rent accruing thereafter; because that is the right of the lessor under the contract.

The announcement by the auctioneer, therefore, in his advertisement of the sale of the leases of the D'Aquin Bakery, that the purchaser would be bound, over and above the price of adjudication, for the payment of the rent to the lessors, to accrue after the sale, according to the terms and conditions of the several leases, was merely a notice, out of abundant caution, to bidders who might be ignorant of the law; but which notice added nothing to the conditions of sale, as fixed by the order of court. On the contrary, the legal effect of the adjudication would have been the same, had this announcement been omitted from the advertisement.

3. Upon the third ground of defence to this action, the proof is, that at the sale made upon defendant's *folle enchère*, two of the plaintiffs, *Montégut* and *Bown*, were bidders, and that portions of the property sold were adjudicated to the former, for the price of nineteen hundred and twenty-five dollars; and to the latter, for the price of fourteen thousand and fifteen dollars.

It was held, in the cases of *Baham v. Bach*, 13 La. 287, and *Banks v. Hyde*, 15 La. 391, that it is illegal for the owner to bid at an auction sale of his property, and that he cannot enforce a sale made under such circumstances.

Also, in the case of *Municipality v. Hennen*, 14 La. 586, it was held, that the vendor could not recover from the adjudicatee at an auction sale, the deficiency in the price of the same property, when resold *à la folle enchère*, if the vendor purchased at the second crying.

Upon the authority of these decisions, which have established the law on this point for twenty years past, we must consider the defendant as released from his bid of the 15th of March, by the act of the two plaintiffs, *Montégut* and *Bown*, to the extent of the interest of those parties, being five-eighths, in the property sold.

4. The next ground of defence set up by defendant is, that *Bown* and *Rodriguez*, the purchasers at the sale, *à la folle enchère* of the leases of the premises occupied by the D'Aquin Bakery, assumed to pay the rents from the day of sale, as they should fall due.

We have already expressed our opinion of the legal effect of the sale, for account of the lessee, of an unexpired lease. And in this connection we have declared, that the express announcement at the first sale, that the rents would be payable by the purchaser, over and above the amount of his bid, was nothing more than what would have been the legal effect of the bid, without such announcement. Now, it is a fundamental principle of the sale *à la folle enchère*, that the second crying must be on the same terms and conditions as the first—"as if the first adjudication had never been made," is the expression of Article 2589 of the Code. But the plaintiffs pretend that the defendant voluntarily submitted to have the second crying made on different conditions, in this respect, from the first.

This inference is drawn from a passage in a document signed by defendant,

D'AQUIN
v.
ANNEAULT.

three days after the adjudication ; in which document defendant renounces the adjudication, from inability to comply with its terms ; waives the notice, (*mise en demeure*.) required by law for sales *à la folle enchère*, consents that the property be re-sold at his risk, after ten days advertisement ; and obliges himself to make good whatever deficit there might be at the second crying. Then follows the passage upon which the plaintiffs base their pretention to change the terms of the sale of the leases ; and which we transcribe at full length.

"Le présent consentement est donné à la condition expresse, demandée par moi à mes risques et périls, que les esclaves seront vendus séparément, aux mêmes conditions et termes que celles de l'adjudication qui m'a été faite, les effets mobiliers pour du comptant, et les baux des édifices aux conditions accordées à F. B. D'Aquin & Co., le preneur des baux devra donner cautions satisfaisantes."

We cannot agree to the construction put by the counsel of plaintiffs upon this written consent of defendant. It will be borne in mind that defendant bought the slaves, stock in trade and all the appurtenances of the D'Aquin Bakery, including several unexpired leases of the buildings and premises occupied by said bakery, in one lot, for a price payable one-fourth cash, and the balance at one, two and three years credit. But in renouncing the adjudication, and consenting to a re-sale at his risk, the defendant seems to have considered that it would be more to his advantage to have the property sold in separate lots, and some of it upon different terms from the first sale. He, therefore, required that the slaves should be sold separately, partly for cash and partly upon a credit : that the movable effects should be sold for cash ; and that the leases should be sold upon the conditions granted, (by the terms of the contracts of lease,) to F. B. D'Aquin & Co.

We can attach no other signification to these last words, than that the price bid for the leases should be made payable at terms corresponding to the falling due of the rent by D'Aquin & Co. under their leases.

The defendant cannot have forgotten that he was bound himself, under his own bid, to pay the rent, in the place and stead of D'Aquin & Co. to their lessor, over and above the price of adjudication of the lease. And we will not presume, in the absence of an express declaration by him to that effect, that his intention was to remain bound himself for the accruing rent, until the end of the lease, notwithstanding the sale and transfer of the lease to another ; in one word, to remain burdened with the obligations, although divested of the rights of lessee.

If, therefore, the plaintiffs have re-sold these leases, at the second crying, without imposing upon the purchaser the obligation of paying the rent to the lessor, (supposing such a thing possible, without the formal consent of the lessor,) they cannot be allowed to hold defendant bound for such rent, but must pay it out of of their own pockets. We will add, that the expressions of the advertisement of the second sale and of the proces verbal of the second adjudication, relative to the terms of sale of the leases, are obscure, and do not appear to us necessarily to imply the very material variation from the terms of the adjudication to defendant which the argument of plaintiff's counsel suggests.

In accordance with the above conclusions, we deduct from the claim of plaintiff, 1st, the item of \$5934 12, rent of the premises, less \$179 58, being the amount due by defendant for half-a-month, from March 15th to April 1st, 1856, which intervened between the first and second adjudications ; and 2d, five-eighths of the deficit at the second crying of the property, with five-eighths of the charges

of the second sale, being the proportion claimed by *Montégut* and *Bown* in the first, third, and sixth items of plaintiffs' account of damages, as detailed in the commencement of this opinion.

We state the account between the plaintiffs severally and the defendant, as follows :

John S. Armant, Dr., to Widow D'Aquin, tutrix, &c—

For $\frac{1}{2}$ of \$3958 difference between the two adjudications....	\$1484 25
" $\frac{1}{2}$ of half-a-month's rent of premises occupied as D'Aquin Bakery, at \$359 16 per month.....	67 33
" $\frac{1}{2}$ of items No. 3, 4, 5 & 6 in bill of particulars at page 2 of this opinion.....	242 31
Total.....	\$1793 89

John S. Armant, Dr., to Edgar Montégut—

For $\frac{1}{2}$ of half-a-month's rent of premises leased, (March 15th to April 1st,).....	\$67 33
" $\frac{1}{2}$ of items 4 & 5 in bill of particulars above.....	16 12
Total.....	\$83 45

John S. Armant, Dr., to L. Lambert Bown—

For 2-8 of half-a-month's rent as above.....	\$44 89
" 2-8 of item 4 and 5 of bill of particulars.....	10 75
Total.....	\$55 64

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed; that the *Widow D'Aquin*, tutrix of the minor-children of *F. B. D'Aquin*, recover of defendant, *John S. Armant*, seventeen hundred and ninety-three dollars and eighty-nine cents, with interest from judicial demand; that *Edgar Montégut* recover of *John S. Armant* eighty-three dollars and forty-five cents with interest from judicial demand; that *L. Lambert Bown* recover of *John S. Armant* fifty-five dollars and sixty-four cents, with interest from judicial demand; that the defendant, *John S. Armant* pay the costs of the District Court; those of appeal to be borne in equal proportions by the plaintiffs and appellees.

H. TENNY v. A. PROVOSTY, Syndic.

The creditor of an insolvent cannot litigate his demand for a privilege in a separate suit against the syndic. The privilege must be settled contradictorily with all the creditors upon a tableau of distribution filed by the syndic.

A PPEAL from the District Court of the Parish of Pointe Coupée, *Ratliff, J.*, presiding. *Brewer, Collins & Leake*, for plaintiff. *Clark & Bayne* and *A. Provosty*, for appellants.

BUCHANAN, J. This suit was brought after the surrender, and against the syndic, for the purpose of establishing a privilege upon property surrendered by

14	221
44	300
14	221
50	624

14	221
52	1617

TERRY
v.
PROVOST

McRae to his creditors, and in the hands of the syndic. The objection made to the introduction of evidence in support of plaintiff's claim, urged in this form, should have been sustained.

Privileges must be settled contradictorily with all the creditors, upon a tableau of distribution filed. The creditors cannot litigate their demands separately against the syndic. Hennen's Digest, 740, section 10, and cases there cited. See also case of *Fabre v. McRae* and *Provosty*, lately decided.

It is, therefore; adjudged and decreed, that the judgment of the District Court be reversed; and that this suit be dismissed, without prejudice, at plaintiff's costs, in both courts.

A. ROBINSON v. J. S. MILLER.

The appeal will be dismissed by the court *ex officio*, when it appears that the judgment appealed from was rendered in a suit by attachment, and the record does not show that any property or credits of the defendant were attached.

A PPEAL from the District Court of the Parish of East Feliciana, *Haralson, J.*, presiding. *J. B. Smith*, for plaintiff and appellant. *R. J. Bowman*, curator *ad hoc*, defendant.

MERRICK, C. J. We are constrained to dismiss the appeal in this case *ex officio*.

The suit was commenced by attachment and garnishment, and a verdict and judgment was rendered in favor of defendant.

The note of the evidence shows that some of the garnishees answered; and as to one, *Mrs. Law*, the interrogatories were taken as confessed. After a careful examination of the record, we are unable to find the answers of the garnishees, or the evidence that *Mrs. Law* has been served with a copy of the interrogatories or cited to answer them.

As it does not appear that there are funds in the hands of the garnishees, or any particular credits attached, it is quite evident that if we should (on an examination of the case on the merits) be of the opinion that the plaintiff had a cause of action against the absentee, we could not render judgment in his favor, for want of property attached to sustain the jurisdiction.

We observe further that the garnishees, who are to be affected by the judgment, have not been made parties to the appeal. See *Condon v. Samory*, 12 An. 801.

It is, therefore, ordered, adjudged and decreed by the court, that the appeal in this case be dismissed at the costs of the appellant.

D. ROWLAND, use, &c., v. JULES LEVY.

Where a negotiable note was made payable at the office of a mercantile firm in New Orleans, and a remittance made by the maker to such firm on account of the note—*Held*: That the remittance was not a valid payment of the note, the firm at whose office the note was payable, not being the agents of the holder.

APPEAL from the District Court of the Parish of Pointe Coupée, *Ratliff, J.*, presiding. *T. J. & W. H. Cooley*, for plaintiff and appellant. *F. H. Farvar*, for defendant.

LAND, J. The defendant made his promissory note as follows:

"\$322 25.

NEW ORLEANS, March 5, 1857.

Six months after date, I promise to pay to the order of *David Rowland*, three hundred and twenty-two dollars and twenty-five cents, at the office of *Messrs. C. W. Pollard & Co.*, New Orleans, value received."

The note is endorsed "*David Rowland*—pay to the order of *J. L. Wibray, Esq.*, cash, N. Y."

At maturity the note was presented for payment by the Southern Bank, the holder, at the office of *Pollard & Co.*; payment was refused, and the note protested.

The defendant remitted the sum of \$250, on the 7th of September, 1857, to *Pollard & Co.*, to be applied in part payment of the note. The receipt of the remittance was acknowledged on the 10th of the same month.

C. W. Pollard & Co. failed to pay the \$250 received from the defendant on the note. The question presented, under the pleadings is, was this a valid payment of the note *pro tanto*?

The defendant contends, that as the note was made payable at the office of *C. W. Pollard & Co.*, the plaintiff, *David Rowland*, thereby constituted them his special agents to receive payment of this note, and that the payment of the \$250 to them was valid.

The note was negotiable, and had been endorsed by *Rowland* before maturity, and the obligation of the defendant was to pay the holder, and not *Rowland*.

The holder was the Southern Bank, and it is not pretended that *C. W. Pollard & Co.* were the agents of the bank, with authority to receive payment of the note.

A payment is not valid unless made to the creditor or his authorized agent. C. C. 2136.

McLaren & Brown are now the holders of this note, and sue in the name of *Rowland*. The \$250 were not paid to the creditor, the holder of the note, or his authorized agent, and did not, therefore, constitute a valid payment, *pro tanto*, of the note.

It is, therefore, ordered, adjudged and decreed, that the judgment be reversed, and that plaintiff, for the use of *McLaren & Brown*, recover of the defendant, the sum of three hundred and twenty-two dollars and twenty-five cents, with five per cent. per annum interest thereon, from the 5th day of September, 1857, and costs in both courts.

DANIEL EDWARDS v. STEAMER CAHAWBA et al.

A bill of lading of gas pipes contained this clause, "not accountable for leakage, rust or breakage, if properly stowed"—*Held*: That the burden of proof in such a case is upon the carrier to show proper stowage.

APPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
Durant & Horner, for plaintiff. *Singleton & Clack*, for defendants and appellants.

MERRICK, C. J. "In October, 1857, there were shipped from New York, to plaintiff, as consignee here, on board of the steamship Cahawba, a certain quantity of gas pipes in bundles. Plaintiff claims that the pipes were rusted and that the defendants are responsible. Defendants urge that the exception in the bill of lading, (introduced in evidence by plaintiff,) 'not accountable for leakage, rust, or breakage, if properly stowed'; throws the burden of proof of the damage having been caused by the negligence or fault of defendants on the plaintiff."

It appears to us, that this defence to the action cannot avail the defendants. The proof is clear, that the iron pipes were injured by salt water, so much so, that at a sale at public auction, ordered by the Port Wardens, they did not bring one-tenth part of their value in a sound condition.

The bill of lading and the duty of the common carrier, obliged him to deliver the merchandise in a sound condition, and were it not for the clause relied upon by defendant, no one would doubt his liability. Under the commercial law, therefore, the facts present a *prima facie* case of responsibility on the part of the common carrier. But it is said that the clause, "not accountable for rust if properly stowed," relieves the carrier from such otherwise apparent liability.

A consideration of the clause, however, shows, that the exception is not absolute, but conditional, viz, *if the goods be properly stowed*, and as the District Judge correctly remarks, "the party invoking the protection of a condition, is obliged to establish it by competent testimony." The burden of proof was, therefore, upon the defendant to show proper stowage.

But there is in the record the testimony of a witness who says, the iron pipes were well stowed. The Judge of the court *a quo*, who heard the witness, seems to have disregarded his testimony, either because it is somewhat in conflict with the testimony of the other witnesses, or because of the supposed interest of the witness.

The record does not enable us to say, that the District Judge erred in his appreciation of the testimony of the witness.

Judgment affirmed.

PETER HOMMERICH v. R. A. HUNTER, State Treasurer.—Same v. same.

14	225
47	1688
14	225
49	509

The Treasurer of the State is not vested with the same powers as the Auditor to audit, adjust and settle claims against the State. He cannot refuse to pay a warrant drawn upon him in a legal form by the Auditor, if there are funds in the treasury appropriated by law for the purpose specified in the warrant.

The writ of *mandamus* is the proper remedy to be exercised by the holder of a warrant drawn by the Auditor on the Treasurer, to enforce the performance of the duty imposed by law on the latter officer.

APPEAL from the District Court of the Parish of East Baton Rouge, *Wilson, J.*, presiding. *A. M. Dunn* and *A. S. Herron*, for the relator. *J. G. Morgan*, for defendant and appellant.

COLE, J. These consolidated cases represent that plaintiff obtained from *E. W. Robertson*, Auditor of Public Accounts for the State of Louisiana, warrants directing the Treasurer of the State of Louisiana to pay to him certain sums of money out of the funds appropriated for that purpose, being for work actually performed and authorized under the Act of the Legislature No. 143 of the year 1858, "to appropriate five thousand dollars out of the funds belonging to the First Swamp Land District to drain and reclaim lands in the parish of West Feliciana."

It appears that the State Treasurer refused to pay these warrants, on this ground among others, that from his construction of Act No. 143, the money claimed by these warrants was not due plaintiff, whereupon the latter instituted these actions to compel the State Treasurer by *mandamus* to pay the warrants.

Rules were taken upon the Treasurer to show cause why the writ should not be granted, and after trial thereof, were made absolute.

Defendant has appealed.

No objection is made to the form of the warrants given by the Auditor in these cases.

The duties of the Auditor are defined by the Act of 13th March, 1855, to regulate the office of Auditor of Public Accounts. Sess. Acts, 1855, p. 125.

It is his duty, § 5, "to audit, adjust and settle all claims against the State payable out of the treasury, except such claims as may be expressly required by law to be audited and settled by some other officer or person."

"To draw all warrants upon the treasury for money, except only in cases otherwise expressly provided for by law."

By section 8 it is provided, "That all persons having claims against the State shall exhibit the same, with the evidence in support thereof, to the Auditor of Public Accounts, to be audited, settled and allowed, within two years after such claim shall have accrued; and no claim or debt shall be allowed against the State but such as shall have been exhibited to the Auditor, except only when it shall be proved that the claimant or creditor has vouchers which he could not produce to the Auditor on account of sickness, unavoidable accident, or absence from the State."

By section 10, whenever the Auditor may think it necessary for the proper settlement of any account, he may examine the parties and others on oath, touch-

HOMERICK
v.
HUNTER

ing any fact material to be known in the settlement of such account, and for that purpose may issue subpoenas or commissions, or compel witnesses to attend before him, and give evidence in such manner, and by such means as are allowed by courts of law.

Section 12 prescribes the form of the warrant to be drawn by the Auditor upon the Treasurer.

Section 15 makes it his duty, at the request of any person interested, who may be dissatisfied with his decision on any claim exhibited to him to be audited, to refer the same, with his reasons, to the General Assembly without delay.

Section 25 provides for the punishment of the Auditor if he should knowingly issue any warrant upon the Treasurer, not authorized by law.

It is clear from these provisions of the law, that the Auditor has the power to determine what claims shall be paid, except such as are required by law to be settled by some other officer or person.

Section 5 of the Act relative to the State Treasurer declares, that it shall be the duty of the Treasurer to disburse the public money upon warrants drawn upon him according to law, and not otherwise. Sess. Acts, 1855, p. 448.

The meaning of this section is, that when the warrant is drawn as provided by law, and signed by the one authorized to do so, that then he is to pay it.

It cannot be interpreted to signify that the Treasurer is vested with the same powers as the Auditor, to audit, adjust and settle all claims against the State. If such had been the intention of the Legislature, they would have specified his duty to be, not only to pay, but also to audit and settle all claims against the State, and for this purpose, to be vested with powers similar to those of the Auditor.

If the Treasurer can refuse to pay a warrant drawn upon him in legal form by the Auditor, then his power is superior to that of the Auditor, and the office of the latter becomes almost unnecessary; for, after the accounts had been audited by the Auditor, the Treasurer could require the claimant to prove again his demand before him, and the creditors of the State would be harrassed by long delays and expenditure of money at the seat of government, before their just demands would be paid.

The object of the law was to create two officers with distinct authority: the one was to audit and settle claims against the State, and to draw warrants for the same upon the Treasurer; and the duty of the latter was to pay the same.

The form of the warrant, as prescribed by the Legislature, manifests the intention of the law. It is as follows:

No. —.

"STATE OF LOUISIANA, }
Auditor's Office. }

I certify that the sum of — dollars and — cents is due by the State of Louisiana to — for —, and I do hereby direct that the Treasurer of the State of Louisiana pay to the said —, or order, the sum of — dollars and — cents, out of the funds appropriated for that purpose.

—, Auditor."

The law in this form authorizes the Auditor to *direct* the Treasurer to pay the warrant; the supremacy of the Auditor, as to the power of settling the claim, is thus recognized by the Legislature.

HOMERICH
v.
HUNTER.

Section 20 of the Act relative to the State Treasurer provides that, "If the Treasurer shall wilfully and illegally refuse to pay any warrant lawfully drawn upon the treasury, having the funds in hand to pay the same, he shall be deemed guilty of a misdemeanor in office, and upon conviction thereof, shall be fined in a sum of not less than five hundred dollars for the use of the State, and shall forfeit and pay to the holder of such warrant fourfold the amount thereof, to be recovered against him and his security on his official bond.

This section provides for the criminal prosecution of the Auditor, and does not exclude the holder of the warrant from his civil remedy to obtain payment of the same.

It is not a valid argument against our construction of the law, that the Auditor might draw warrants unauthorized by law.

Such an argument, if legitimate, would justify the interference of public officers with the peculiar functions appropriate to each, and would produce such collisions in the administration of public affairs, as to materially impede the proper and necessary operations of government.

Besides, the law has not clothed the Auditor with such great powers, without also seeking to protect the treasury; not, however, by authorizing the Treasurer to again audit and to contravene the opinion of the Auditor, but by providing a punishment for the Auditor, if he violates the law.

Section 25 of the Act relative to the Auditor declares, "That should the Auditor knowingly issue any warrant upon the Treasurer not authorized by law, or should he wilfully neglect or refuse to perform any duty enjoined by law, or be guilty of any oppression or extortion, or receive any fee or reward for the performance of any duty not allowed by law, or should he, by color of his office, knowingly do any act not authorized, or in any other manner than is required by law, or illegally use or misapply any money belonging to the State, he shall be deemed guilty of a misdemeanor in office, and upon conviction, be fined not more than one thousand dollars, and imprisoned not more than five years, and be dismissed from office."

Our opinion is, that when a warrant is drawn, to be paid out of money previously appropriated for the same, the Treasurer cannot refuse to pay it, on the ground, that according to his construction of the law, it is not due, but that he is bound to pay the same, if there are funds in the treasury appropriated for a purpose specified in the warrant.

If upon the face of the warrant, it appears that it is drawn for a consideration for which the law has appropriated funds for its payment, the Treasurer cannot refuse to pay it on the ground that the amount is not really due, or that the Auditor has misconstrued the law.

If, however, it should appear upon the face of the warrant, that it is for a consideration for which the law has made no appropriation, then he must refuse to pay it. This is in accordance with section 13th of the Act relative to the Auditor, which provides:

"That no warrant shall be drawn by the Auditor, nor paid by the Treasurer, unless the money to pay the same has been previously appropriated by law; nor shall the whole amount drawn for or paid under any one head, ever exceed the amount appropriated by law for that purpose."

The Authority given by this Article to the Treasurer to refuse to pay, is merely when no money has been appropriated to pay the consideration of the warrant.

Section 13 also explains in part the meaning of section 5th of the Act rela-

HONORABLE
v.
HUNTER.

tive to the duties of the Treasurer, which provides : " That the Treasurer shall disburse the public money upon warrants drawn upon him according to law, and not otherwise."

If, for example, no appropriation had been made for the payment of the consideration of the warrant, then it would not be drawn according to law, and the Treasurer must refuse to pay it ; he must refuse, also, if the amount drawn for or paid under any one head, exceeds the amount appropriated for that purpose, or if the warrant does not, as provided by section 12th of the Act relative to the Auditor, certify for what cause the warrant is due, and out of what funds it is to be paid, for if the warrant did not thus specify these particulars, it would not be drawn according to law.

The Auditor is obliged by section 24th of the Act relative to his duties, to submit at each regular session of the Legislature, and as often as the General Assembly may think proper, all his books, accounts, vouchers, &c., to a joint committee of the Legislature. Besides, he is obliged to give a bond for the faithful performance of his obligations.

This supervision of the Legislature, the bond and the punishment for breach of duties, appear to guard the State sufficiently from wrongful action on the part of the Auditor, particularly when it is considered that the Treasurer is empowered to refuse payment of warrants when, upon their face, they show that they are drawn to pay something for which the Legislature has not provided payment.

As the warrants in these consolidated cases are drawn according to law, and upon their face appear to be so drawn, the Treasurer is obliged to pay the same. It is not necessary for us to decide, in these cases, whether the Auditor had the right to issue the warrants.

We are also of opinion that the writ of *mandamus* was the proper remedy for plaintiff in these cases.

The payment of these warrants was a ministerial duty imposed upon the Treasurer, and if creditors of the State could not resort to this writ, but must depend upon an ordinary action, the greatest injustice might be suffered, all public works might be stopped, and the action of the government arrested.

Articles 829 to 832 of the Code of Practice declare, that the writ of *mandamus* is an order issued in the name of the State, by a tribunal of competent jurisdiction, and addressed to an individual, or corporation, or court of inferior jurisdiction, directing the performance of some certain act, appertaining to their duties ; that the object of this order is to prevent a denial of justice ; and that this order may be issued at the discretion of the Judge, even when a party has other means of relief, if the slowness of ordinary legal forms is likely to produce such a delay that the public good and the administration of justice will suffer from it.

Judgment upon the rules in these consolidated cases affirmed, with costs.

R. W. McRAE v. HIS CREDITORS.

A creditor who has a privilege on property surrendered by an insolvent to his creditors, has a right to obtain an order for the sale of the property for cash, to satisfy his debt, but the proceeds of the sale are to be distributed upon a tableau filed and homologated.

A PPEAL from the District Court of the Parish of Pointe Coupee, *Ratliff, J.*, presiding. *A. Prevosty and Clark & Bayne*, for appellant. *Brewer, Collins & Leach*, and *E. Phillips*, for appellees.

BUCHANAN, J. *Thompson, Hieronymus & Co.*, creditors upon the schedule of the insolvent, voted at the meeting of creditors for the sale, for cash, of certain mules surrendered by the insolvent, and upon which said *Thompson, Hieronymus & Co.* claimed the vendor's privilege.

This meeting of creditors was held on the 17th of April, 1858. On the 8th of June, 1858, a rule was taken, by *Thompson, Hieronymus & Co.*, on the syndic to sell the mules for cash. The syndic answered this rule by declaring that he did not know whether the mules sold by the movers to the insolvent were in his, the syndic's, possession; and that he had been informed that the insolvent had disposed of many, if not all of them, before his surrender of property. There are other matters pleaded in the answer to the rule, which do not require notice.

Upon the issue thus joined, it was proved that the movers had sold to the insolvent, before his failure, fifteen mules, of which the price is unpaid; and that twelve of the said mules are now on the plantation surrendered by the insolvent, and in the possession of the syndic.

The District Court made the rule absolute, and the syndic appealed.

There was no error in the judgment of the District Court, ordering the twelve mules to be sold; and the rights of the other creditors are sufficiently protected by that decree, which, while it recognizes the vendor's privilege, directs that the debt be paid by the syndic, *in due course of administration*. This can have no other meaning than that the proceeds of sale are to be distributed, upon a tableau filed and homologated.

There can be no question of the obligation of a syndic to sell, with all practicable expedition, according to the terms fixed by the meeting of creditors, the property surrendered by the insolvent.

The appellees have filed an answer to the appeal, asking for damages for a frivolous appeal.

As the judgment appealed from was not a money judgment against the appellant, the Article 907 of the Code of Practice cannot be well applied. *Long v. Robinson*, 13th An. 467. Besides, to mulct the syndic, appellant, in his representative capacity for a frivolous appeal, would either inflict a penalty upon innocent parties, (the mass of the creditors represented by the syndic,) or would be making a new party to the appeal, namely, *Auguste Prevosty*, personally, which we do not feel at liberty to do.

Judgment affirmed, with costs.

F. M. JACKSON et al. v. A. M. JONES et al.

Those who possess not for themselves, but in the name of another, cannot change the nature of their tenure so as to acquire the legal possession which is the basis of a title by prescription.

APPEAL from the District Court of the Parish of Madison, *Farrar, J.*
Hynes & Snyder, for plaintiffs and appellants. *Short & Parham*, for defendants.

COLE, J. On the 18th of July, 1836, by virtue of the Act of the Legislature of the 2d April, 1835, and that of the 7th of March, 1836, authorizing a certain disposition of Public School Lands situated in the parishes of Carroll and Natchitoches, the trustees for the Public School Fund for ward number one, in the parish of Carroll, caused to be sold at public auction a lease for fifty years of lot number four of section 28, in township 17, R. 13 E., containing one hundred and forty-four acres. Sess. Acts, 1835, p. 225 ; Sess. Acts, 1836, p. 102.

At the sale, *James W. Wall* became the purchaser of the lease for a certain sum, for which he executed his five several promissory notes, each for the sum of one thousand two hundred and nine dollars and sixty cents, payable to the order of, and endorsed by *H. P. Morancy*, and severally maturing on the 18th of July of each year after the date of the sale aforesaid.

This suit is instituted against the administrator of the estate of *Wall* and against *Jones*, who purchased the lease of *Wall* upon the four notes last maturing.

Plaintiffs ask that the defendants may be decreed to surrender unto them the land sold, as aforesaid, or to pay the notes and interest.

The plea of prescription of ten years was filed by the defendants and was sustained by the court.

Plaintiffs have appealed, but have made no appearance in this court.

By virtue of the resolutive condition implied in all commutative contracts, the plaintiffs are entitled to a dissolution of the lease, or to the amount of the notes. C. C. 2041. But this action is prescribed by the lapse of ten years from the time when the defendants were in default for the price. C. C., Art. 3508 ; *George v. Lewis*, 11 An. 656.

In affirming the judgment, we would remark, that we consider the plea of prescription of ten years, which has been plead in this case, as barring the action for the dissolution of the contract of lease, and not as giving a title to the land to the defendants, by virtue of Article 3437 of the Civil Code, by which immovables are prescribed for by ten years when the possessor has been in good faith, and held by a just title during that time, and so we understand the judgment of the District Court.

Defendants did not possess the land for themselves, but held it as lessees, and they cannot change the nature of their tenure. Those who possess, not for themselves, but in the name of another, as farmers, depositaries, and others who acknowledge an owner, cannot acquire the legal possession, because, at the commencement of their possession, they had not the intention of possessing for themselves, but for another. C. C., Arts. 3404, 3449, 3455.

The plea of prescription of five years was also made by the administrator of the estate of *Wall*.

This plea is also valid. The notes were prescribed after the lapse of five years from their maturity, and the mortgage given to secure their payment being a mere accessory, was extinguished with them. C. C., 3505; *Succession of Linderman*, 3 An., p. 714.

Judgment affirmed, with costs.

JACKSON
v.
JOHNS.

MARY STURGES AND HUSBAND v. THE SHERIFF—L. DOUGHTY et als.
Intervenors.

A judgment against the administrator of a succession recognizing the claim of a creditor, and ordering it to be placed on a tableau of distribution is binding upon the heirs, unless obtained through fraud or error.

APPEAL from the District Court of the Parish of East Feliciana, *Haralson*, J., presiding. *J. & C. McVea*, for plaintiffs. *J. O. Fuqua*, for Heirs of *Nettle*. *R. J. Bowman*, for intervenors and appellants.

LAND, J. A slave belonging to the succession of *John B. Gerald*, late of the parish of East Feliciana, was sold in pursuance of an order of court by the Sheriff, to effect a partition between the heirs of the deceased.

The plaintiffs enjoined the Sheriff from paying the proceeds to the heirs, on the ground that they are creditors of the succession, and are entitled to the same in payment of their debts.

The heirs opposed the demand of the creditors with the plea of prescription of one, two, three, five and ten years.

Theodore B. Gerald was appointed administrator of the succession. He filed an account and tableau of distribution, which were opposed by the plaintiffs.

The claims of the plaintiffs had been previously approved by the administrator.

On the trial of the oppositions, the administrator was condemned to pay the amount claimed by the plaintiffs, and his tableau ordered to be amended accordingly.

The judgment recognizing the plaintiffs' claims and homologating the tableau, was signed on the 11th of February, 1854, and this suit was commenced in January, 1855.

The claims of the plaintiffs were merged in the judgment, which is binding upon the heirs, (unless obtained through fraud or error,) and which, of course, was not prescribed at the time of the commencement of this suit. 3 An. 36; 8 R. 497; 4 M. 456; 3 L. 194; C. P. 123.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.

MERRICK, C. J., having been of counsel, recused himself.

S. S. WHITE v. G. W. PURNELL.

A judgment in an action of boundary cannot form *res adjudicata* as to the right of property.

APPEAL from the District Court of the Parish of East Feliciana, *Ratliff, J. Muse & Hardee and Bowman & Delee*, for plaintiff. *J. & C. McVea*, for defendant.

LAND, J. This is an action sounding in damages, for an alleged trespass to a tract of land, which is claimed by both plaintiff and defendant. ●

The only question for decision is, whether a judgment rendered in "*an action of boundary*" forms *res adjudicata*, as to the title of the land, between the parties to the suit.

Article 825 of the Civil Code provides, that the action of boundary may be instituted, not only by the owner, but by any person who possesses as owner, and his neighbor cannot require proof of his right of property.

It seems to be clear that where the defendant is precluded from requiring proof of title, and the question of title therefore excluded, that a judgment in an action of boundary cannot form *res adjudicata* as to the right of property.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.

B. CAZE, Administrator, v. W. B. ROBERTSON.

The petitory action can only be maintained by one in whom the legal title is vested, or by his legal representative.

APPEAL from the District Court of the Parish of West Baton Rouge, *Beale, J. S. P. Green*, for plaintiff and appellant. *W. B. Robertson*, in *pro. per.*

LAND, J. This suit was dismissed on an exception, and the question to be determined is, whether the administrator of a deceased vendor can maintain a petitory action against a party in possession of the land sold, when the vendee himself does not complain.

Pierre Blanchard sold the land in dispute to *John Nolan*, who sold to *Henry W. Allen* and *William Nolan*, and *William Nolan* sold to *John T. Nolan*, and the plaintiff in this action is the administrator of *Pierre Blanchard*, who, after the institution of the suit, caused the dative testamentary executor of *John Nolan* to be joined as a party plaintiff.

Article 44 of the Code of Practice provides, that the plaintiff in an action of revendication must make out his title, otherwise the possessor, whosoever he be, shall be discharged from the demand.

A petitory action can only be maintained by one in whom the legal title is vested, or by his legal representatives.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.

BREAUX v. GALLUSSEAUX, Testamentary Executor.

A nuncupative will by public act is null, if dictated in a language not understood by one of the attesting witnesses.

The want of capacity of one of the witnesses to attest what was done, could not be supplied by the testimony of the notary and the two other witnesses, that the dispositions of the will were explained by the notary to the witness, who was not able to understand them from the dictation of the notary.

APPEAL from the District Court of the Parish of Iberville, *Beale, J.*
A. Talbot and Lea & Marr, for plaintiff. *Z. Labauve*, for defendant.

MERRICK, C. J. This suit is brought to set aside the last will of *Felix Breaux*, deceased. The will was a nuncupative will, executed before a notary and three witnesses.

It appears to have been dictated by the testator to the notary in the French language.

One of the attesting witnesses did not understand the language in which the will is written sufficiently to comprehend what was said, and he now says after being shown the will, that he cannot read the French portions of the will at all.

To supply the defect, defendant interrogated the witness, on the cross-examination, to show that the testator had explained in English, after the will was read, that he gave the house and lot and negro man to the legatee, *Dequese*.

The notary public was also offered (but his testimony was rejected) to prove that he had explained in English to the witness, the disposition in the will in favor of said *Dequese*.

This disposition did not even comprise the entire will, as it instituted the grandchildren of the testator his universal legatees, and appointed an executor.

It seems to us that the testimony received and offered could not be received to supply the want of capacity in the witness to attest what was done. For the notarial act is then no longer the repository of the last will of the testator, but it is confided to the memory of the notary and the witnesses speaking French, whose testimony is required to complete the will. How does the witness speaking English know but there may not have been some other thing dictated in French which was omitted by the notary, or some condition annexed to the bequest which does not now appear? The will, therefore, as written, rests upon the testimony of the notary and two witnesses, and is not a compliance with the law. See *Herbert's Heirs v. Herbert's Heirs*, 11 L. R. 361, and *Bordelon v. Baron*, 11 An. 676; 4 Marcadé, No. 59, p. 42.

If the defendant, *Josephine Dequese*, is entitled to recover for her services rendered the testator on the acknowledgment contained in the will, considered as a private writing, upon being corroborated by other proof, the decision in this case will be no bar to an action to be instituted by her against the heirs of the same.

Judgment affirmed.

A. GRAUGNARD v. J. LOMBARD.

A statement by the Clerk, in his minutes of the testimony taken on the trial, that certain evidence was objected to, does not dispense with the necessity of a bill of exceptions to the reception of the evidence.

A PPEAL from the District Court of the Parish of Pointe Coupée, *Haralson, J. T. J. & W. H. Cooly*, for plaintiff and appellant. *U. B. & E. Phillips*, for defendant.

BUCHANAN, J. *James Vignes*, who wrote the document under which defendant claims the land in controversy, was called by defendant to prove the execution of said document by plaintiff.

The same witness was called by plaintiff to rebut, and swore that the intention of the parties was, that the agreement to sell the land should be null and void, unless an act of sale was passed on or before the date specified in the document, to-wit, the 20th February, 1854. By a note of the Clerk in the minutes of testimony, we are informed that defendant objected to this testimony of *Vignes*, on the ground that it adds to and takes from the written document, and that testimony is inadmissible to vary or contradict a written act. No bill of exceptions was taken, however, in the form required by the Code of Practice.

The objection is, therefore, disregarded, and this testimony considered as if received without objection.

The last clause of the document A reads as follows: "The parties above named obligate themselves to pass the act of sale of said land on or before the 20th of February next, 1854."

The witness, *Vignes*, explains the meaning of the parties to have been, that this date, of the 20th February, 1854, was the term limited for the performance of the agreement, and beyond which it should not be operative. He says he was "directed by the parties, at the time of the drawing up of the agreement marked A, to stipulate that unless the agreement was complied with on or before the 20th February, 1854, that the agreement was to be null and void, and that he, witness, considered that the clause in the agreement was equivalent to that; and that is the reason why he drew it up in that way."

It is neither alleged nor proved, that any act of sale was made within the term they limited. The defendant's answer, setting up the agreement to sell, as his title, was filed the 22d December, 1857, nearly four years after the expiration of the term; and there is no allegation of a tender on his part of the price stipulated to be paid.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and that there be judgment for plaintiff against defendant for the possession and ownership of the land mentioned in the petition, namely, the undivided third of sections 107, 108, and 115 of township 6 south, of range 9 east; the half of section 109 in the same township; and eighty acres of section 114 in the same township; and that the defendant and appellee pay costs of suit in both courts.

SUCCESSION OF JAMES LYNCH.

The obligation of the security on an administrator's bond can be enforced at once without proceedings against the estate of the principal, which is shown to be insolvent by a tableau of distribution filed in the due course of administration.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
T. H. Clack, and *A. Robert*, for opponents and appellants. *P. E. Bonford*,
 for appellee.

COLE, J. The decedent, *James Lynch*, with his wife, *Margaret Lynch*, and their child, *Julia*, were lost on the steamship *Artic*, on the 27th of September, 1854.

The administrator of the estate of *James Lynch* having filed an account, *Jeremiah Barrett* filed an opposition to it, claiming to be placed thereon as heir of *Margaret Lynch*, alleging that he was the nearest surviving relative, being her brother; that in fact, and by presumption of law, the wife survived her child, and that therefore, the opponent as such nearest of kin, is entitled to one-half of the net proceeds of the succession, his deceased sister's portion as wife in community.

There was judgment against the claim of *Jeremiah Barrett*, and he has appealed.

The District Judge was of opinion that the relationship claimed never existed.

It appears that opponent and *Mrs. Lynch* were regarded by many of their friends as brother and sister.

Opponent was however known to some persons by the name of *Edward Wright*.

He has sought to invalidate the effect of this, by establishing it to be usual among sailors often to change their names, and that his occupation was that of a sailor.

The letter addressed by opponent to *Mrs. Lynch*, under the name of *Edward Wright*, in conjunction with his answer to interrogatories, and the declaration of *Mrs. Lynch* in her lifetime, of the nature of the relationship between her and opponent, have created much doubt in our minds as to the legitimacy of his claim.

There are certain expressions in the letter which negative the particular relationship now contended for.

A careful consideration of the effect of the whole of the testimony induces the belief that the District Judge did not err in rejecting his demand.

E. A. Bienvenu, curator of *Pierre Gabriel Clermont*, an absentee, asks to be placed on the tableau of the succession of *Lynch*, in his capacity of curator of *Clermont*, for \$8,263 17, with interest, on the ground that one *Masson* was heretofore appointed curator of *Clermont*, and that he gave bond in the sum of \$15,000, with *James Lynch* as one of his sureties. That subsequently *Masson* died, and his succession was insolvent; that consequently, *Lynch*, as one of his securities, is bound to pay the deficit due by his succession on the amount received by him as curator of *Clermont*, which is \$8,263 17; and *Bienvenu* asks that the tableau of *Lynch* be amended in this respect.

SUCCESSION OF
LYNCH.

The District Court was of opinion that this was not the proper manner of prosecuting his claim, and dismissed it without interfering in any manner with any right which the curator, *Bienvenu*, may have, to proceed by any other action.

We are of opinion that the amendment ought to have been allowed.

The sixth section of the Act of 1842 provides, "That the courts of probate shall have exclusive cognizance of all suits or actions against sureties on the bonds of appeal, and all others which they are bound by law to receive or exact from appellants and administrators, tutors, curators and testamentary executors generally; and no such suit shall be instituted against the security until the necessary steps have been taken to enforce payment against the principal." Sess. Acts of 1842, p. 302, § 6.

This section declares that the *necessary* steps must be taken to enforce payment against the principal; it does not explain what are the necessary steps. When, as in the case at bar, the principal is dead, and a tableau of his succession has been filed, from which it appears that his estate will not be able to pay the whole of his obligations, and when also the security upon one or more of his obligations is dead, and a tableau of his succession has been filed, we are of opinion, in such a case as this, that the obligation can be enforced at once against the estate of the security, and that it is not necessary, under such a state of facts, to proceed by rule or other mode against the estate of the principal, to show cause why it should not pay the amount due.

The rule or other process cannot be deemed necessary, because the tableau of the principal already filed establishes that the whole amount could not be paid, as the estate is partially insolvent.

It would be then useless to resort to a rule or other process, when it is already known that the estate of the principal cannot satisfy the whole of the claim.

If such a course were deemed necessary, it would in the present case work the greatest injustice.

The creditor would be obliged to wait until the estate of the principal was finally settled, so that it could be exactly known what portion of the obligation could be paid by the same. In the mean time, the estate of the security might be settled, and the balance of the estate might be paid over to foreign heirs, and the creditor would be obliged to resort to foreign tribunals to recover from the different heirs the portion due by each of them upon his claim. *Alley v. Hawthorn*, 1 An., p. 126; *Wells v. Roach et al.*, 10 An. 545.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be amended as follows, to-wit: that the part thereof which dismisses the opposition of *A. E. Bienvenu*, curator of *Clermont*, be avoided and reversed; that the opposition of *A. E. Bienvenu*, curator of *Clermont*, be maintained for the sum of \$8,263 17, with legal interest from the 29th June, 1856; that the account presented by *Lynch's* curator be amended so as to place thereon *Bienvenu*, curator of the absentee, *Pierre Gabriel Clermont*, for the said sum of \$8,263 17, with interest as aforesaid; that the account so amended be approved and homologated, and the funds be distributed accordingly; that the costs of the lower court upon the opposition of *Jeremiah Barrett* be paid by himself, and that those upon the opposition of *Bienvenu*, curator, be paid by the estate; that the judgment so amended be affirmed; that one-half the costs of appeal be paid by the estate, and one-half thereof by *Jeremiah Barrett*.

B. HAYNES, Liquidator, v. JOHN A. HARBOUR—GORDON A. SMITH,
Warrantor.

The property banks in Louisiana furnish an exception to the rule, that the creditor who holds under two mortgages of unequal rank on the same property, and who has caused the property to be sold to satisfy his junior mortgage, cannot be allowed to sell it a second time to satisfy his senior mortgage. The property mortgaged for the subscription to the stock of the bank is liable in the hands of a third possessor, although it has been previously sold at the instance of the bank, to enforce the payment of the stock loan secured by the same mortgage.

A PPEAL from the District Court of the Parish of East Feliciana, *Ratliff, J. J. McVea*, for plaintiff. *J. O. Fuqua*, for defendant. *U. B. & E. Phillips* and *Hardesty & Kernan*, for warrantor and appellant.

BUCHANAN, J. This is an hypothecary action against a third possessor of land mortgaged to the Clinton and Port Hudson Railroad Co., for the security of 202 shares of the capital stock of said company, subscribed by *Thomas A. Cabarras & Co.*, and for the repayment of such loans as should be made upon the said stock. The mortgage was dated 30th November, 1835.

T. A. Cabarras & Co. borrowed upon this stock of the company, on the 17th February, 1838, the sum of nine thousand and ninety dollars.

This loan was not paid at maturity nor renewed, and the commissioners of liquidation of the company caused executory process to be issued for the amount of the loan upon the mortgage, under which the land now in possession of defendant was seized, and on the 2d September, 1843, was sold by the Sheriff to *Gordon Smith* for eight thousand dollars cash.

This sale was made subject to the liens and mortgages of whatever kind they might be, contained in the certificate of mortgages produced at the sale.

In March, 1852, this court affirmed a judgment of the District Court of East Feliciana, which decreed that the liquidator of the Clinton and Port Hudson Railroad Co. should proceed to collect of the several stockholders, such contribution upon their subscriptions of stock, as should be necessary to meet certain outstanding bonds of the company, held by the New Orleans Gas-light Co. and others. See case reported in 7th An. 114.

On the 18th October, 1852, *Gordon Smith* sold to defendant, *John A. Harbour*, the land which the former had purchased at Sheriff's sale as aforesaid; the parties to this conveyance consenting to waive the production of a certificate of mortgages by the notary, and the vendor warranting the vendee specially against the Clinton and Port Hudson Railroad and Banking Co. This sale was made for the price of three thousand dollars; \$1000 in an acceptance due 1st January, 1854, \$1000 in a note due 1st January, 1855, and \$1000 in a note due 1st January, 1856. The acceptance was paid at maturity—the notes are still unpaid.

In compliance with the decree above mentioned the liquidator made a call of three-fifths of the stock; and in April, 1854, instituted this action for three-fifths of the stock subscribed by *T. A. Cabarras & Co.*, alleging *John A. Harbour* to be in possession of the land mortgaged to secure said stock, and prayed that *Harbour* might be cited, and the land sold to pay the sum of twelve thousand one hundred and twenty dollars, being three-fifths of the amount of *Cabarras & Co.*'s subscription.

14	237
44	237
14	237
46	1164
14	237
116	509

HAYNES
v.
HARBOUR.

Harbour answered, admitting his possession of the mortgaged premises ; alleged his purchase from *Smith*, his payment of one thousand dollars on account of said purchase, and that he had made valuable improvements on the land—cited his vendor, *Gordon A. Smith*, in warranty, and, in case of eviction, prayed for judgment against his warrantor for restitution of the money paid and notes unpaid, and for five thousand dollars additional, being the alleged value of defendant's improvements.

The warrantor, *Smith*, pleads the general issue, admits the sale to *Harbour*, avers that he purchased in good faith at a sale made at the instance of plaintiff for \$8000, which he paid in obligations of the company, worth at the time of payment sixty cents in the dollar ; prays that the demands of plaintiff and defendant be rejected, and, in the alternative, that he be replaced in the condition he was in before his purchase at Sheriff's sale, crediting upon plaintiff's demand the amount paid by warrantor for the property.

The case was tried by a jury, who found for plaintiff against defendant, and for defendant against *Smith*, warrantor, for two thousand dollars improvements, for one thousand dollars draft paid, and for the return of the two notes of defendant unpaid. Judgment having been rendered upon this verdict, the warrantor appealed after vainly seeking a new trial.

The appellant urges, as against the plaintiff, that the creditor who holds two mortgages of unequal rank on the same property, and who has caused the property to be sold to satisfy his junior mortgage, cannot be allowed to sell it a second time to satisfy his senior mortgage. This, as a general proposition, is true. But these property banks as they are called, of which so many were chartered by the State of Louisiana about twenty or thirty years ago, and of which the Clinton and Port Hudson Railroad and Banking Co. was one, furnish an exception to the rule, which results from their peculiar organization.

The capital upon which those banks did business was the price of bonds sold in the market, which were secured by mortgage of the property of the individual stockholders. It was confidently expected, that the profits of their business would enable those banks to pay their bonds in full at maturity, without calling upon the stockholders for contribution. The subscriptions to the stock were not payable in cash but in an hypothecation of the subscribers' land or slaves, to the amount of the subscription. The lure held out to proprietors of lands and slaves to encumber their property in this manner consisted in a credit of fifty per cent. upon their stock, to which they were entitled in the shape of loans, of which the capital was reimbursable in a long series of years. In order to secure the bank against loss upon such loans, the mortgage given by the stockholder at the time of subscribing for stock was made to include a mortgage for the repayment of stock loans. These acts of mortgage were thus double obligations with one obligor, but two distinct obligees. And this court decided in the case of *Meeker v. Clinton and Port Hudson Railroad Co.*, 2 An. 971, that the two hypothecations were of unequal rank ; that for the security of the stock, taking effect from the date of subscription ; while that for the security of stock loans, only dated from the time of borrowing. In that case it was held, that a Sheriff's sale in a proceeding upon a stock loan was null, unless the price was sufficient to cover the older, or stock, mortgage. But we have seen that in the sale of 1843, at which this appellant became the purchaser, this difficulty was obviated by his assumption of the stock mortgage, that being the mortgage mentioned in the certificate read by the Sheriff at the sale, and which is in evidence. Neither can the defendant

HAYNES
v.
HARBOUR.

any more than the warrantor pretend ignorance of the existence of this incumbrance on the property at the time of the conveyance by the latter to the former. For it is mentioned and made the subject of a special warranty, in his act of sale.

The judgment appealed from is, therefore correct, as between the plaintiff and defendant; and we have next to examine that between the defendant and the warrantor.

The verdict of the jury is without doubt correct, so far as regards the restitution of the price of sale. But we are not satisfied that the large allowance made for improvements, is justified by the record. These improvements consist of a gin-house, outhouses, fences and repairs to dwelling-house.

This court in 16th La. Rep. 421, and in 12th Robinson, 255, construed the Article 2485 of the Civil Code, as giving the right to the evicted possessor to recover of his warrantor, only the *increased* value given to the premises by the improvements. And in the case of *D'Aquin v. Coiron*, 3 La. 398, ordinary repairs, necessary for the enjoyment and cultivation of the property, are not improvements, the cost of which the vendor is bound to reimburse to his vendee. We notice, moreover, that the witnesses gave their testimony upon the trial of this case, on the 24th April, 1858, five years and a-half after the sale from *Smith to Harbour*, and that the land has been cultivated by defendant as a cotton plantation during the whole of this time. The so styled improvements proved are nothing more than what were obviously, most strictly necessary for carrying on the plantation and securing the crops. And we do not view it as either legal or equitable, that the warrantor who sold to a purchaser with notice of an incumbrance, and who has been paid but a small portion of the price for which he sold, should pay the expenses, or any portion of the expenses, of making six crops upon the land sold, without receiving any benefit from those crops. C. C. Art. 2531, paragraph 2; *Yeatman, Woods & Co. v. Erwin*, lately decided.

It is, therefore, adjudged and decreed, that the judgment of the District Court as between plaintiff and defendant, be affirmed; that as between defendant and warrantor it be reversed; that the defendant, *John A. Harbour*, recover of the warrantor, *Gordon A. Smith*, one thousand dollars; that the said *Smith* restore to said *Harbour* the two notes of one thousand dollars each, described in the answer; and that the costs of the District Court be paid by the warrantor, those of appeal one-half by warrantor and one-half by defendant.

MERRICK, C. J., recused himself in this case.

J. S. HAMPTON v. G. W. WATTERSTON.

The verdict of a jury in these words, "Verdict in favor of plaintiff," is not sufficient to form the basis of a judgment.

APPEAL from the District Court of the Parish of Livingston, *Beale, J.*, presiding. *W. E. Walker*, for plaintiff. *H. Duncan* and *C. J. Bradley*, for defendant and appellant.

LAND, J. This is a suit by the endorsee of a promissory note against the maker.

HAMPTON
v.
WATTSBROOK.

The defence is, a transfer of the note after maturity, by the payee to the plaintiff, a failure of consideration, and a claim in reconvention or set off against the payee.

The cause was tried by a jury, who found the following verdict: "Verdict in favor of plaintiff."

Upon this verdict, a judgment was rendered against the defendant, for the sum of six hundred and twenty-eight dollars and eighty cents, with interest at the rate of eight per cent. per annum, from the first day of March, 1855.

The verdict of the jury was incorrect, and not sufficient to form the basis of a judgment. C. P. 522; *Hosea v. Miles*, 13 L. 109; *Collins v. Hamilton*, 14 L. 343.

As the defendant unsuccessfully applied for a continuance on the ground of the absence of witnesses, and as the testimony of the payee of the note was improperly received, to which a bill of exceptions was taken, we will remand the cause.

It is, therefore, ordered, adjudged and decreed, that the judgment be reversed, and the verdict of the jury set aside, and the cause remanded for a new trial, and that the plaintiff pay the costs of this appeal.

14 240.
•110 736
110 737
•110 742

STATE, ex rel. DUBUISSON, v. THE JUDGE OF THE SECOND DISTRICT COURT.

A *suspensive appeal* does not lie from a judgment, removing from office the liquidator of the affairs of a partnership.

ON a *mandamus* to the Judge of the Second District Court of New Orleans, *Morgan, J. M. Grivot*, for the relator.

LAND, J. This is an application for a *mandamus*.

The relator being the curator of the succession of *John Twibell*, was appointed liquidator of the partnership affairs of *Twibell & Atkins*, and was afterwards removed from the office of liquidator by a judgment of the Second District Court.

From this judgment of removal, the relator applied to the District Judge for a *suspensive appeal*, which was refused; and he now takes the rule in this case, on the Judge, to show cause why he should not be commanded to grant the order for a *suspensive appeal*.

The answer of the District Judge shows a sufficient cause why the writ of *mandamus* should not be granted.

A *suspensive appeal* will not lie from a judgment appointing an administrator, curator, or liquidator of succession property; nor will a *suspensive appeal* lie from a judgment destituting a curator or liquidator, when a further administration of the succession property is necessary. C. C. 1113; C. P. 580, 1059; 5 An., 518.

From such judgments a *devolutive appeal* only lies.

It is, therefore, ordered, adjudged and decreed, that the rule taken in this case be discharged with costs.

Z. PORCHE v. P. M. MOORE, Administrator, et al.

14 241
60 736

The donee is a universal one in the sense of Article 1539 of the Civil Code, when the donor has given to him all his property, reserving only enough to himself for subsistence.

The specification of each particular thing given, in the act of donation, does not change the character of the donation so as to avoid the obligation, on the part of the donee, of paying the debts of the donor.

APPEAL from the District Court of the Parish of Pointe Coupée, *Ratliff, J.*
A. Provosty, for plaintiff. *F. H. Farrar* and *John Yoist*, for defendant and
and appellant.

LAND, J. This is a suit to recover from the donee a debt due by the donor to the plaintiff, at the date of the donation.

In the year 1852, *Onil Bourgeat* made a donation *inter vivos* of certain land and slaves, to *Constance Dumoulin*, which embraced nearly the whole of his property, reserving, however, as a charge upon the property, an annuity of four hundred dollars, payable to himself.

In the suit of *Blanche E. Bourgeat v. Constance Dumoulin*, this act of donation was adjudged by this court to be valid. 12 An. 204.

The only question now presented on the merits for decision is, whether the donee is liable for the debts of the donor, existing at the date of the donation.

Independently of the general rule, that the property of the debtor is the common pledge of his creditors, Articles 1538 and 1539 of the Civil Code provide, that the property given passes to the donee, with all its charges, and that the *universal donee* is bound to pay the debts of the donor existing at the time of the donation, or to abandon the property given.

Constance Dumoulin was certainly a universal donee—for the donor scarcely reserved property enough for his personal maintenance.

The Articles of the Code defining universal and particular legacies, have no application to donations *inter vivos*.

Legacies or donations *mortis causa* are different in many essential particulars from donations *inter vivos*, and are governed by different rules.

Legacies may be made of *future* as well as *present* property. C. C. 1455, 1599.

They do not divest the donor or testator of his title to the property given, and cannot take effect during the lifetime of the donor, and are revocable. C. C. 1455, 1683. They do not become null and void for want of acceptance before the death of the testator. C. C. 973. They may embrace *the whole* of the *donor's property*. C. C. 1455, 1599.

Donations *inter vivos* are different in all these respects. The donor is divested of his title, and the donation takes effect, *in presenti*, and is irrevocable. C. C. 1454. They become null and void for the want of acceptance in the lifetime of the donor, and cannot embrace *the whole* of the *donor's property*, under the *pain of nullity*. C. C. 1488, 1527. And can only comprehend *the present property* of the donor. C. C. 1514.

Where dispositions of property are so radically different in their nature, and the rules by which they are governed are so adverse, it would seem to be a mis-

PONCEAU
v.
MOORE.

application of law, to decide a question as to the *validity or effect of one*, by the rules prescribed for the other.

Under the head of donations *inter vivos*, the Code treats of universal donees; and under the head of donations *mortis causa*, it treats of universal legatees. A donation *inter vivos*, of *all the donor's property*, is expressly forbidden and declared null for the whole. C. C. 1484. A donation *mortis causa* of all the donor's property is expressly permitted, and is valid, and the *universal legatee is one to whom the whole of the donor's property is given*. C. C. 1599, 1455.

Who then is a *universal donee* in the sense of Article 1539 of the Civil Code?

If the question is decided by the law of legacies, the *universal donee* is one to whom the *whole* of the donor's property is given—but such a donation is null and void under Article 1484 of the Civil Code, and, therefore, can not be.

If the question is determined by the law of donations *inter vivos*, the universal donee is one to whom *less than all the property* of the donor is given, because the donor is bound to reserve to himself enough of his property for his subsistence and cannot, therefore, give the whole.

To determine the question by the law of donations *mortis causa*, the conclusion is, there can be *no universal donee* under the law of Louisiana, although the lawgiver has declared otherwise, and imposed on him the obligation of paying the debts of the donor existing at the date of the donation.

Such a decision would not be in pursuance of the law, but against its express and plain provisions.

It seems, therefore, clear, that the question cannot be determined by the law of donations *mortis causa*, but must be decided by the law of donations *inter vivos*; and that the *universal donee is one to whom less than all the donor's property is given*.

In this case, Onil Bourgeat gave all his property to Constance Dumoulin, reserving only enough to himself for subsistence, and the donee is a universal one, in the sense of Article 1539 of the Civil Code.

The specification of each particular thing given in the act of donation, cannot have the effect of changing the character of the donation, and avoiding the obligation of paying the debts of the donor; for the reason that such an interpretation of the law, would provide an easy mode for its evasion.

The donee, Constance Dumoulin, has, however, pleaded, in this court, the prescription of one, three, and five years, to the plaintiff's action. The suit is on a promissory note, payable to the order of plaintiff, and the prescription of five years is applicable. The note became due on the 1st day of March, 1853, and the petition was filed on the 24th of February, 1858; but the record contains no citation, and the defendant did not appear and answer the petition, until the 18th of March, 1858, more than five years after the maturity of the note.

Prescription is not interrupted by the filing of a petition in the Clerk's office; but by service of citation or appearance, and answer of defendant. *Bonnet v. Ramsey*, 6 N. S. 130; *Matter of Mason*, 9 Rob. 105.

The plaintiff has the right to have the cause remanded, on the plea of prescription.

It is, therefore ordered, adjudged and decreed, that the judgment be reversed, and the cause remanded for further proceedings according to law; and that plaintiff pay the costs of this appeal.

MERRICK, C. J., dissenting. The plaintiff appears to me to have mistaken his remedy. The donation does not appear an universal donation, (which is allowed

FORBES
v.
MOORE.

in certain marriage contracts,) as is evident, to my mind, by a comparison with the analogous subject of donations *mortis causa*. Besides, if the obligation is intended to be imposed upon the donee to pay the debts of the donor, the contract ought to be made in the form of an universal donation, in order that he may know his liability.

Æris alieni, quod ex hæreditaria causa venit, non ejus qui donationis titulo possidet, sed totius juris successoris onus est. Si itaque nemini obligata prædia per donationem consecuta es; supervacuum geris sollicitudinem, ne vel hæredes dimatricis, vel ejus creditores te jure possint convenire. Code Lex. 15, lib. 8, t. 54.

Savigny says, (in reference to the Roman law,) if any one makes a donation by delivery of every individual thing constituting his entire estate, and there is nothing said in regard to his debts, no obligation is imposed upon the donee to pay them. But he adds, if the conveyance be made in the dishonest intention of injuring the creditors, they have against the donee the *Pauliana actio* in which it is of no consequence whether the donee was privy to the dishonest intention or not. Vol. 4, p. 139, Berlin ed.; Zachariæ, seconde partie, liv. 2d, sec. 315.

The donation in this case was of certain enumerated things. They are not declared to constitute, nor did they, in fact constitute, as we have already decided, the entire estate of the donor. The donee then took by particular title. Her title might, therefore, have become the basis of prescription, and was not affected by defects in her author's title. See *Black v. Pontalba*.

If the donation were in fraud of plaintiff's right, it is governed by Art. 1975 of the Civil Code, which is in these words:

"If the contract be purely gratuitous, it shall be presumed to be in fraud of creditors, if at the time of making it, the debtor had not, over and above the amount of his debts, more than twice the amount of the property passed by such gratuitous contract."

I think a judgment ought to be rendered in favor of the defendant, *Constance Dumoulin*, as in case of a nonsuit.

JOSEPH SCHWARTZ v. THIRTY-TWO FLATBOATS.

14	943
49	559

The qualifications of the members of the City Council cannot be inquired into in a suit to enforce a contract made by the Mayor, under a resolution of that body authorizing it.

A sale made at auction by the Comptroller, and afterwards clothed with the formalities of an authentic act, cannot be annulled on the ground, that the adjudication was made by a person who was not regularly licensed as an auctioneer.

Wharfage dues charged by a corporation, are not, properly speaking, a *tax*, like that which is levied for the support of government.

A PPEAL from the District Court of the Parish of Jefferson, *Burthe, J.*
A. W. Jourdan and C. Roselius, for plaintiff and appellee. *R. K. Cutler*, for defendants and appellants.

LAND, J. This is a proceeding *in rem*, instituted by plaintiff as lessee of certain revenues of the city of Jefferson, for the recovery of wharfage charges or taxes due by the owners of the boats, provisionally seized in this suit.

The opinion of the District Judge is elaborate, and his conclusions upon the merits correct.

SWARTZ
v.
FLATBOATS.

He did not err in rejecting the testimony offered on behalf of defendants. The testimony offered was immaterial.

For the reasons given by the District Judge, it is ordered, adjudged and decreed, that the judgment be affirmed, with costs, subject to a credit of ninety dollars remitted in the court below.

OPINION OF THE DISTRICT JUDGE.

At a sale made by the Comptroller of the City of Jefferson, under the directions of the Mayor and Aldermen of Jefferson City, *Joseph Schwartz* became the purchaser of the privilege of collecting for his own use and benefit, the revenues of the port of said town during eight years. The adjudication was ratified by the council, and the Mayor authorized to sign a transfer of the rights of the corporation; the lessee agreeing to collect the wharf and levee dues according to the tariff of port charges adopted at the sitting of May 4th, 1858.

The present suit is brought by the lessee to recover the wharfage due by thirty-two flatboats, under said tariff of charges. A number of similar suits having been brought either against the owners, or against the property itself where the owners were unknown, the different cases have, by agreement, been consolidated.

The defendants, after excepting to the demand of plaintiff on the ground that the suit is not properly brought, because the City of Jefferson is the only party which can stand in judgment in a case of this nature, plead the following means of defence:

1st. The contract is null, because it is a contract between *T. F. Laizer*, Mayor, and *Schwartz*, and that the Mayor cannot bind the corporation. In order to be binding upon the corporation, the contract should have been made in the name of said corporation.

2d. All the proceedings of the council in this matter are null and void, because some of the members of said council were not legally in office, and were incapable of doing any act obligatory on the City of Jefferson.

3d. The council of Jefferson City is a judicial person, having no other powers than those specially granted by its charter, and no power has been given to lease the port revenues; they, therefore, could not make such contract.

4th. *Schwartz* used fraudulent means to have the tariff of port charges changed; and the said *Schwartz*, a committee of the council, and some of the defendants, had made an agreement before the adoption of the tariff, by which certain levee charges should be fixed at a certain sum, when, in fact, the tariff has been fixed at a much higher rate.

5th. The sale was made at auction by the Comptroller, who had no right to make such sale. The sale, therefore, is null.

6th. The ordinance fixing the tariff is unconstitutional, inasmuch as it is not equal and uniform.

7th. The council had no right to sell the future revenues, and the sale is made for a much smaller price than the council could have collected itself.

8th. The lessee has not complied with the obligations of the contract, by neglecting to place check posts, repair wharves, &c. The contract is, therefore, null and void.

9th. The ordinances ordering the sale, fixing the tariff, authorizing the Mayor to sign the contract, are null and void, because the council was by law prohibited

from transacting any business in the month of May, until they had provided for the payment of the interest of the funded debt.

Such is the defence, and we will examine these different pleas *seriatim* :

I. The contract purports to be between *F. J. Laizer*, Mayor of the city of Jefferson, and *Joseph Schwartz* ; after reciting the quality in which *J. F. Laizer* appears, the act states that the contract is made in conformity with an adjudication and sale made by order of the council, and there is annexed to the contract a resolution of that body authorizing the Mayor to sign the act. It is clear, then, that the act is that of the council, represented by its Mayor, and not that of the Mayor alone.

II. The question raised in the second ground of defence was decided incidentally, and after mature deliberation, the court has not changed its opinion, and thinks that the qualifications of the members of the council cannot be inquired into in these proceedings.

III. It is true that the City of Jefferson is a judicial person, and has no other powers than those specially granted by its charter or by necessary implication. The question now presented to the court is this : Does the charter of the City of Jefferson give to the corporation the right to lease the revenues of the port? We find by section first of the charter, " that the corporation has the power to sue and be sued, plead and be impleaded, defend and be defended, in any court whatever ; to hold, possess, enjoy and retain, all and every kind of property whatever, provided the same be for municipal purposes, and the same to sell, alien, lease, farm and dispose of.

Sec. 12th of the charter gives to the corporation power to lay and collect taxes *in such a manner*, and for such amounts as they may deem expedient on all steamboats, ships, flatboats, rafts and crafts of every description, landing at the levee of said corporation.

These two sections of the charter are too clear to admit of any doubt upon the question of power to lease the revenues of the port. But, says the defence, the council can only sell transfer or lease for municipal purposes. For what other than municipal purposes could the contract have been entered into? The farming of markets, wharves, port dues, &c., are clearly acts of administration, and may be made injudiciously. But is nevertheless a right which corporations enjoy and which they can exercise.

IV. The question raised on the fourth ground of defence has also been decided incidentally. We are, indeed, at a loss to know how a binding agreement could have been made between *Schwartz*, the committee of the council, and some of the defendants, about the rates of wharfage, before the passing of the ordinance fixing the tariff, and before the adjudication by the Comptroller to *Schwartz*.

V. The charter provides that " all contracts for public works, or for materials and supplies, ordered by the council, shall be offered by the Comptroller at public auction, and given to the lowest bidder. The Comptroller shall, in addition to the duties herein enumerated, perform such others as the council may prescribe."

Admitting, for the sake of argument, that the Comptroller can only act as an auctioneer for the sale of contracts for public works and supplies, it does not follow that an adjudication made by him to the highest bidder, and ratified by the council, is null and void, as well as the contract signed after the adjudication. The law which forbids the sales at auction by other persons than auctioneers, imposes a fine upon those who exercise the trade or business of auctioneer without

SWARTS
v.
PLATBOATS.

a license, but it does not annul the sales thus made and afterwards clothed with all the formalities of authentic acts. But cannot the sale of property at auction by the Comptroller be considered as one of those duties which the council may prescribe.

VI. The ordinance fixing the tariff of wharfage and levee charges, is said to be unconstitutional, because it imposes a tax which is neither equal nor uniform.

It has been decided more than once, that such charges were not, properly speaking, a tax, like that which is levied for the support of government. It is a compensation paid by those whose vessels, crafts and rafts, find a landing and accommodations for their vessels and merchandise. We cannot consider such contributions, compensation or tax, to be unequal, because one vessel having a cargo worth thousands of dollars pays the same wharfage as that which is worth but as many hundreds. Can it be reasonably argued, that a scale of proportions should be made of the value of vessels, cargoes, &c., landing at the levee, in order to establish an equal proportion of wharfage for each vessel and cargo? The fluctuations of the market would require a constant change in the tariff, according to the respective value of the vessels and cargoes. The same reasoning applies to rafts.

VII. If the contract is onerous to the corporation, what right does it give to the defendants to interfere? As long as the council of Jefferson City does not complain, we may well suppose that there is no just cause of complaint, for the members of said council are the true representatives of the interests of the people of Jefferson City.

VIII. If the lessee has failed to place check posts, and to repair the wharves, as required by the contract, the council has the right, under said contract, to annul the lease without applying to a court of justice, and without indemnifying the contractor. But how can the defendants expect to be heard, when they complain of the non-execution of a contract to which they are no party. They have mistaken their remedy; and the council of Jefferson City is the source from which they must seek redress.

IX. The Act of 1856, providing for the payment of the interest of the funded debt of Jefferson City, makes it the duty of the council annually, in the month of May, specially to appropriate and set apart from the revenues of said city a certain sum for the payment of the interest of their funded debt, and it is not lawful for the council to proceed to other business until such appropriation is made.

The appropriation was made on the 26th of May, 1858. No particular day of May being fixed by the law for such appropriation, the council could, without violating the law, wait until the last day of May to make it. Art. 2052 of Civil Code says, expressly, "where a time is given or limited, the obligor has, until sunset of the last day, limited for its performance, to comply with his obligation."

Moreover this law, which has no sanction, instructs the council when they are to provide for the payment of their debt, but does not annul their other acts in case they should neglect to comply with its provisions. We cannot believe that the Legislature intended that no act of administration should be done in May, before the appropriation for the payment of the debt. And perhaps it would be necessary for the council to act previously, for the purpose of finding the means of paying said debt.

Upon the whole, we think that no well founded ground of defence has been opposed to plaintiff's claim.

It is, therefore, ordered, adjudged and decreed, that there be judgment in favor

of plaintiff, against the thirty-two flatboats provisionally seized in this case, for the sum of five hundred and sixty dollars, with interest from judicial demand, and costs of suit; this judgment to be satisfied by privilege on said flatboats and on the proceeds of the sale of the same.

SWANK
V.
FLATBOATS

CITY OF NEW ORLEANS v. S. LAMBERT.

14	247
46	814
14	247
114	1061
14	247
118	1087

An ordinance of the City Council, ordering a blacksmith's shop to be closed as a nuisance, is authorized by law, and may be carried into effect by an injunction restraining the owner from continuing it.

APPEAL from the Third District Court of New Orleans, *Duvignaud, J.*
J. J. Michel, for plaintiff and appellant. *C. Roselius*, for Defendant.

LAND, J. The petition alleges that the defendant is the proprietor of a certain blacksmith shop, situate in the Fourth District of the city of New Orleans, and that said shop is subject to the police regulations of the city, and liable to be closed and stopped in its operations whenever it becomes a nuisance, or dangerous to public health or safety.

The petition further alleges that the shop renders living in the neighborhood inconvenient and unpleasant, on account of the noise, the odor and smoke thereof, and that the same is a nuisance and carried on in violation of the city ordinances.

The defendant obtained a rule on the plaintiff to show cause why the injunction issued in this case should not be dissolved, on the grounds that the ordinance referred to in the petition is a mere nullity, and that the petition does not set forth any case for an injunction.

The rule was made absolute, the injunction dissolved, and the plaintiff ordered to pay the costs of suit.

It does not appear from anything in the record, that the ordinance referred to in plaintiff's petition is a mere nullity, nor has the defendant's counsel favored the court with an argument on that point.

The facts set forth in the petition authorized the issuing of an injunction, and if true, are sufficient to perpetuate it.

Article 665 of the Civil Code provides, that if the works or materials for any manufactory or other operation, cause an inconvenience to those in the same, or in the neighboring houses, by diffusing smoke or nauseous smell, and there be no servitude established by which they are regulated, their sufferance must be determined by the rules of the police, or the customs of the place.

It is, therefore, ordered, adjudged and decreed, that the judgment be reversed, the injunction reinstated, and the cause remanded to the lower court for further proceedings according to law, and that the defendant pay the costs of this appeal.

B. HAYNES, Liquidator, v. DAVID PIPES.

A judicial sale to enforce a mortgage for the security of a stock loan by a bank, does not release the mortgage for the security of the subscription of stock.

APPEAL from the District Court of the Parish of East Feliciana, *Ratliff, J. J. McVea*, for plaintiff. *F. Hardesty* and *J. O. Fuqua*, for defendant and appellant.

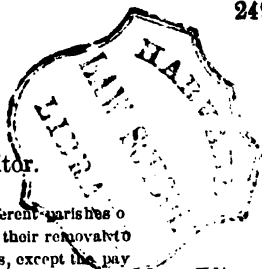
BUCHANAN, J. The plaintiff seeks to enforce the stock mortgage of the Clinton and Port Hudson Railroad Company against a third possessor of the mortgaged property. The defendant plead, that he purchased the land mortgaged at a sale made by order of the United States District Court sitting in bankruptcy, and that the Commissioners of the Clinton and Port Hudson Railroad Company made themselves party to the proceedings in bankruptcy, and promised to give defendant a release, if he would buy the property for a certain sum, which he did.

It is needless to inquire how far the Commissioners were competent to make a verbal agreement to release a debtor of this insolvent corporation; or how far a sale in bankruptcy operated to extinguish this mortgage, for it appears from the evidence that this agreement related to a different debt due the company, and by a different debtor, from the debt which is the object of the present proceeding.

It is in proof, that after the sale made in the bankruptcy of *John M. Smith*, this property was again seized and sold, (in August, 1844,) to satisfy the stock loan, to *Charles M. Smith*, which had never been assumed by *John M. Smith*. Now, in the case of *Haynes v. Harbour*, we have just decided, (in conformity to the decision in *Meeker v. The Clinton and Port Hudson Railroad Company*, 2d An. 971.) that a judicial sale to enforce the mortgage for the security of stock loans, did not release the mortgage for the security of the subscription of stock. Besides, in the sale of 3d August, 1844, this property was adjudicated by the Sheriff to the defendant, subject to the mortgage which it is the object of the present proceeding to enforce.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

MERRICK, C. J., having been of counsel in these cases, took no part in this decision.



E. T. PARKER, Sheriff, v. E. W. ROBERTSON, Auditor.

The Act of 1857 having provided that "all the criminal expenses incurred in the different parishes of this State, by arrests, confinement, and prosecution of persons accused of crime, their removal to prison, the pay of witnesses, and all other expenses attending criminal prosecutions, except the pay of jurors, shall be paid by the State, upon the certificate of the Clerk and the presiding Judge of the several courts of this State," the duties of the Auditor relative to accounts for such expenses thus certified, are ministerial and imperative, and he must issue his warrant on the Treasurer therefor. It would be otherwise, if the certificate of the Clerk and Judge should show upon its face that it was not drawn in accordance with the law, as, for instance, if it purported to be for fees in civil suits.

14	246
112	472

The 15th section of the Act of 1855, which gives the Sheriffs \$100 per annum for their fees in criminal cases, did not intend this sum as their sole compensation. There are many services rendered by Sheriffs, which are not provided for in the fee bill.

The party convicted in a criminal case must be condemned to pay the costs, and after a return of *nulla bona*, or after the Clerk and Judge are satisfied by sufficient evidence that the convict has no property, then the State becomes responsible for the costs.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*
Randell Hunt, for plaintiff. *E. W. Moise*, Attorney General, for defendant and appellant.

COLE, J. On the 15th of December, 1858, an account of *E. T. Parker*, Sheriff of the parish of Orleans "for fees incurred in the prosecution of criminals from the 1st of April to the 30th of June inclusive," was presented to the Auditor of the State of Louisiana, to be audited, which was refused.

The bill included not only fees, but also the expenses incurred during the specified period for cab-hire, refreshment to jurors, the pay of witnesses, candles, lamps, &c., with the exception of the pay of officers.

Plaintiff then applied for a *mandamus* to direct the Auditor to draw a warrant upon the Treasurer of the State, in his favor, for the amount of the bill, and to deliver the warrant to him.

The order issued, commanding the Auditor to show cause why the writ should not be granted.

Upon the trial of the rule, it was made absolute. The Auditor appealed.

The bill of plaintiff is claimed under the Act of 19th March, 1857, entitled "An Act relative to the payment of expenses incident to the prosecution of criminals." Sess. Acts, 1857, p. 187.

Sec. 1. Be it enacted, &c., "That all the criminal expenses incurred in the different parishes of this State, by arrests, confinement, and prosecution of persons accused of crime, their removal to prison, the pay of witnesses, and all other expenses attending criminal prosecutions, except the pay of jurors, shall be paid by the State upon the certificate of the Clerk and the presiding Judge of the several courts of this State."

The bill of plaintiff was certified, as required by the preceding section.

The duties of the Auditor would appear to prevent him from impugning the certificate, when it is upon its face within the particular jurisdiction confided to the Judge and Clerk by the section aforesaid of the Act of 1857.

Sections 5 and 12 of the Act of 1855 "to regulate the office of Auditor of Public Accounts," read as follows :

Sec. 5. Be it enacted, &c., "That it shall also be his duty, first, to audit, adjust, and settle all claims against the State, payable out of the treasury, except

PARKER
v.
ROBERTSON.

such claims as may be expressly required by law to be audited and settled by some other officer or person."

Sec. 12. "That in all cases of accounts audited and allowed against the State and in all cases of grants, salaries and expenses allowed by law, the Auditor shall draw a warrant upon the Treasurer for the amount due, in the following form," &c. Sess. Acts. 1855, p. 125, §§ 5 and 12.

The Act of 1857, already recited, provides that the criminal expenses shall be paid "upon the certificate of the Clerk and the presiding Judge of the several courts of the State."

The Act of 1857 leaves it to the wisdom of the Judge and Clerk to interpret the Act of 1857, and to decide what are the expenses intended by it. The duties of the Auditor relative to accounts thus certified are ministerial and imperative. He has no supervisory control over the Judge and Clerk, and is not an appellate or superior tribunal vested with the power of deciding that these officers have been in error in their interpretation of the law.

The Legislature have manifested their confidence by clothing them with the power of certifying these accounts. They are also able to certify knowingly, because the services are rendered in causes that have been tried before them.

It is true, that as the certificate is, according to *Mr. Crittenden*, "the evidence of the exercise of a special and limited jurisdiction, it must show upon its face a case within that jurisdiction."

If, for example, the certificate of the Judge and Clerk should show upon its face, that it was for fees in civil suits, the Auditor might refuse to authorize its payment, because there is no law empowering the Judge and Clerk to certify them in order to have them paid by the State.

But when the law orders that the expenses in criminal matters shall be paid upon the certificate of the Judge and Clerk, it leaves to them the interpretation of the nature of the expenses, and the Auditor is obliged to follow their interpretation and to view as expenses whatever they have so considered, which have been caused in criminal matters before them.

If they abuse their trust, or err in their interpretation, it is easy for the Legislature to deprive them of the power of certifying.

Our construction of the powers of the Auditor appears to have been that of several of the Attorneys General of the United States in analogous cases, and also that of several of the Justices of the Supreme Court of the United States.

The fourth section of the Act of Congress of 8th May, 1792, (1 Statutes at large, 277,) has this provision in relation to the Marshal's accounts: "The same having been examined and certified by the court or one of the Judges of it, in which the service shall have been rendered, shall be passed in the usual manner at, and the amount thereof paid out of the Treasury of the United States to the Marshal," &c.

Mr. Justice Story was of opinion "that the certificate of the Judge upon the examination of the Marshal's accounts was conclusive, and that the items of the charges are not re-examinable in any manner, by the officers of the Treasury Department." He further says, "Some years since, the same question was brought before the Judges of the Supreme Court of the United States for their consideration, upon the instance of some one of the Judges. It was then fully considered by all of us; and it was the unequivocal opinion of the Judges, (and my impression is, that there was an entire unanimity of opinion), that the certificate of the

PARKER
v.
ROBINSON.

Judge upon the accounts of the Marshals was conclusive and could not be re-examined at the Treasury Department, but must be passed as of course. I have never, at any time, heard a doubt expressed by any Judge, that this was the true and only legitimate construction of the statute; and I have no objection to its being communicated to the Treasury Department." Rep. of Com. H. R., No. 132, 2d sess. Cong. p. 8.

See also, upon the same and analogous questions, the opinions of Attorneys General U. S., Reverdy Johnson, H. S. Legaré and J. J. Crittenden. *Hommerich v. Hunter, State Treasurer*, ante p. 225.

Upon the hypothesis, however, that the certificate of the Clerk and Judge is not conclusive, and that the Auditor was entitled to go behind the certificate and to re-examine the Sheriff's account, he was still bound to issue the warrant demanded, because all the items in the account are for the expenses of criminal prosecutions in the parish of Orleans, which the Legislature in the Act of 1857 declares shall be paid by the State.

The correctness of the fees is not disputed, but the liability of the State for their payment is denied. The expenses in the bill, except the fees of the Sheriff are admitted to be a legal charge against the State. The Attorney General in his brief says, that the expenses of cab hire, lights, &c., are admitted, and that the inquiry is "narrowed" down to this: did the State, in the Act of 1857, assume the payment of Sheriff's fees in criminal cases? It is denied that fees are included in the word "expenses" in the Act of 1857, already quoted. In justification of this denial, reference is made to the Acts of 1805, 1807 and 1808 of the Legislative Council of the Territory of Orleans, and to those of 1813, 1817, 1842 and 1848 of the Legislature of the State.

Even admitting that during this period Sheriffs were not paid by the State their fees in criminal prosecutions, or received in their stead a small compensation fixed by law, not for any particular official acts, but for the whole of their services, still, this would not defeat the demand of plaintiff.

A reference to ancient statutes to illuminate a modern law is not so satisfactory when there is a manifest variation between them, and when the intention of the Legislature to depart from the former jurisprudence has been clearly exhibited, as we shall proceed to show has been done, in their legislation upon the payment of criminal expenses.

In 1852, an Act to change and regulate the expenses of criminal prosecutions throughout the State was passed, which is as follows:

Sec. 1. "That all the expenses hereafter incurred in the different parishes by the attendance of physicians, and for maintenance and clothing of individuals condemned for the commission of any crime, and of such as are accused of any crime or misdemeanor cognizable by the District Courts of this State, shall be paid by the respective parishes in which the offence or offences charged may have been committed."

Sec. 2. "That the fees, salaries and expenses provided by this bill to be paid by the local authorities, shall be fixed and regulated by the said authorities; and until the same be done by the said authorities, the fees, salaries and expenses shall remain as now fixed by law and be paid by the local authorities."

Sec. 3. "That all laws, or parts of laws, upon the subjects treated of in this Act, be and the same are hereby repealed." Sess. Acts, 1852, p. 180.

The point to be noticed in this statute is that "expenses" in the first section are made in the second section to include "fees."

PARKER
v.
ROBERTSON.

It is not so clear that Sheriffs would be entitled to be paid, under this law, their fees in criminal prosecutions, but it was so interpreted by the city authorities, and Sheriff *Marigny* was paid under it for sundry prosecutions.

In 1855, under the title of "expenses of criminal prosecution," the Legislature enacted the following statutes :

Sec. 68. Be it further enacted, &c., "That all the expenses incurred in the different parishes by the arrest, confinement and prosecution of persons accused of crime, their removal to prison, the pay of witnesses, jurors, &c., and all expenses whatever attending criminal prosecutions, shall be paid by the respective parishes in which the offence charged may have been committed."

Sec. 69. "That the fees, salaries and expenses to be paid by the local authorities, shall be fixed and regulated by them ; and until the same be done, they shall remain as now fixed by law."

Sec. 73 repeals all other laws contrary to the provisions of this Act. Sess. Acts, 1855, p. 161.

"Fees" in the 69th section are included in this statute in "expenses" in the 68th section, and these sections clearly provide for their payment ; for not only are mentioned the pay of witnesses and jurors, but also the expenses for the arrest and prosecution of persons accused of crime.

Even if the ancient legislation made a distinction between fees and expenses, and expenses did not comprehend fees, yet this statute embraces fees in the word "expenses" and repeals all laws contrary to the provisions of this Act.

In 1857, an Act was passed "relative to the payment of expenses incident to the prosecution of criminals," which is as follows :

Section 1. Be it enacted, &c., "That all the criminal expenses incurred in the different parishes of this State, by arrests, confinement and prosecution of persons accused of crime, their removal to prison, the pay of witnesses, and all other expenses attending criminal prosecutions, except the pay of jurors, shall be paid by the State upon the certificate of the Clerk and the presiding Judge of the several courts of this State." Sess. Acts, 1857, p. 187.

This Act is almost identical with that of 1855, except that it excludes from the expenses to be paid by the State the pay of Jurors, makes the State, instead of the parishes, responsible for the criminal expenses, and ordains that the expenses shall be paid upon the certificate of the Clerk and the presiding Judge of the several courts of the State.

The Act of 1855, in the use of the word "expenses" included therein "fees," and if there were any doubt of the intention of the Legislature in the use of the word "expenses" in the Act of 1857, it would be reasonable to interpret "expenses" therein to include fees, because it is almost a reenactment of the Act of 1855. If the Act of 1857 were not to be so understood, then the word "expenses" would be defined as used, according to the Attorney General, by the ancient jurisprudence, and be considered as not embracing "fees." But the ancient legislation upon the subject was repealed by the Act of 1855. It seems more rational, then, to define expenses as used by the Act of 1855, particularly as the Act of 1857 does not contain any repealing clause. The Act of 1857 must be considered to be a substitute for that of 1855, and to have used the word "expenses" in the same sense as it was understood in the latter Act.

The statute of 1857, however, appears to be clear and comprehensive.

It provides that all the criminal expenses shall be paid by the State, except the pay of jurors, and explains the nature of the expenses, namely all those in-

PARKER
v.
ROBINSON.

curring by arrests, confinement and prosecution of persons accused of crime, their removal to prison and the pay of witnesses. In order, however, to remove all doubt, it adds, that all other expenses attending criminal prosecutions, except the pay of jurors, shall be paid by the State.

Fees of Sheriffs are certainly a part of the expenses attending the arrest, confinement, removal to prison and prosecution of persons accused of crime.

If such were not the intention of the Legislature, they could have excepted from the expenses the fees of Sheriffs, as they excluded the pay of jurors.

It is admitted that under the Act of 1857, *John M. Bell*, Sheriff of the parish of Orleans, was paid out of the State Treasury fees and costs of criminal prosecutions in the parish of Orleans, for a part of the year 1857.

It is, however, argued, that the 15th section of the Act of 1855 "gives the Sheriff a salary of one hundred dollars per annum, for his services in matters of a criminal nature pending in courts, and that this was intended to compensate him in full for his services in all cases where the accused was acquitted, and in all cases in which the person convicted was unable to pay the costs."

Sec. 15 is as follows: "Every Sheriff in this State shall be entitled to one hundred dollars per annum, and each and every Clerk of the several District Courts to fifty dollars per annum, as a compensation for their services in matters of a criminal nature pending in their respective courts." *Sess. Acts, 1855, p. 168.*

This statute does not declare that Sheriffs shall not be entitled to more than one hundred dollars for their fees in matters of a criminal nature; and this same Act, section 12, provides that Sheriffs shall be entitled to demand from the parish one dollar for whipping any person sentenced to that punishment, and twenty-five dollars for executing any person condemned to capital punishment, to be paid by the parish.

Besides, the Legislature have put their interpretation upon section 15, by declaring in the Act of 1857 that the fees of Sheriffs shall be paid by the State.

The Act of 1857 is subsequent to that of 1855, and if there be any portion of the latter Act upon the same subject-matter, which is opposed to the former, it must be considered to have been repealed.

But it is unnecessary in the case at bar to view them as adverse in their provisions, for there are many services in criminal matters performed by Sheriffs, which are not provided for in the fee bill.

They are obliged to be with juries when they retire to take their meals, to watch over them when the court takes a recess, to keep an eye over prisoners not upon bail when in court, and they render many other services not detailed in the fee bill.

A hundred dollars appears to be a moderate compensation for services performed by Sheriffs in criminal matters, for which fees are not provided in the fee bill.

It is also objected, that the Act of 1855 provides that the party convicted shall pay the costs of prosecution, and the question is asked, does the Act of 1857 repeal this provision of that Act. It does not, but according to our construction of these two Acts, the party convicted must be condemned to pay the costs, and after a return of *nulla bona*, or after the Clerk and Judge are satisfied by sufficient evidence that the person convicted has no property, then the State becomes responsible for the costs. See opinion of H. D. Gilpin, Attorney General U. S., July 20th, 1840.

Judgment affirmed, with costs.

PARKER
v.
ROMBERSON.

MERRICK, C. J., concurring. I do not attach much importance to the fact, that the fees of officers in criminal prosecutions, were not paid by the State from 1814 to 1857, for the reason that the State is a sovereignty, and such payments could only be made by some special legislation. Salaries were paid to Sheriffs instead of detailed fees.

In 1852, a new system was inaugurated. The "expenses" in criminal proceedings were thrown upon the parishes and city, by the first section of the Act of 1852, and the second section of the same Act defined what was meant by "expenses," in saying, "that the *fees, salaries and expenses* provided by this bill, to be paid by the local authorities, shall be fixed and regulated by said authorities; and until the same be done by said authorities, *the fees, salaries and expenses*, shall remain as now fixed by law, and be paid by the local authorities."

There, then, was new legislation and a declaration by the sovereign, that *fees, salaries and expenses*, were to be paid by the local authorities.

To aid the parishes in meeting the new burden thus imposed, the Legislature, the following year, granted the parishes and the city of New Orleans, all fines and forfeitures collected in the same respectively. Acts 1853, p. 295.

In 1854, a law was passed declaring the moneys collected for fines and forfeited bonds in the parish of Orleans, a special fund out of which "*all costs and expenses* accruing in criminal prosecutions, in the First District Court of New Orleans," should be paid. Acts 1854, p. 58.

In 1855, as is well known, the Legislature undertook to reduce to one body the previous legislation on many subjects, and in pursuance of this object, the Act of 14th of March, 1855, relative to *criminal proceedings* was passed, which uses the word "expenses" in the same comprehensive sense as the first section of the Act of 1852. The sixty-eighth section, p. 161, is in these words: "That *all the expenses* incurred in the different parishes by *arrest, confinement and prosecution* of persons accused of crime, *their removal to prison*, the pay of witnesses, jurors, &c., and *all expenses whatever* attending criminal prosecutions, shall be paid by the respective parishes, in which the offence charged may have been committed."

Here again the word "expense" is used in its usual sense, and is expressly declared by the lawgiver to comprehend costs and fees.

And in the following section, he reiterates the same definition as contained in the second section of the Act of 1852, and confers on the local authorities the same powers. See Acts 1855, 161, secs. 68, 69.

Up to this point, the case presents no difficulty. But in 1855, in an Act, to define and regulate costs and fees generally, the Legislature, notwithstanding it had conferred upon the local authorities the power to regulate fees, &c., and bound them to pay the fees and costs of criminal prosecutions, gave, it would seem, to the Clerk and Sheriffs, (at least whenever it was to their advantage,) a cumulative mode of obtaining compensation, (which in some parishes would doubtless more than equal their fees,) by awarding the Sheriff one hundred dollars, and the Clerk fifty dollars. Acts of 1855, p. 168.

But whatever may have been the object of the Legislature in reviving the former provisions of law, at the same time it compelled the local authorities to pay the fees and costs of prosecution, and gave them power to regulate the same, it cannot annihilate the plain provisions of the special Act relative to criminal proceedings.

The last named Act professed to treat directly of the subject matter in hand, and it compelled the local authorities to pay, under the term "expenses," the She-

PARKER
v.
ROBERTSON

riff's fees, viz, "all expenses incurred by arrest, confinement, and prosecution of persons accused of crime, their removal to prison, the pay of witnesses, jurors, &c., and all expenses whatever attending criminal prosecutions, and is thus a special Act on the subject. See *St. Martin v. The City*, ante p. 113.

Under these laws, the Sheriffs of New Orleans were paid their fees in criminal cases, from 1852 to the year 1857, and it was never pretended or supposed that the cumulative compensation of the Act of 14th of March, 1855, could deprive the Sheriff of the compensation explicitly given him by the Act to regulate criminal proceedings. Indeed, what compensation would \$100 be to the Sheriff of the parish of Orleans for his fees in the criminal prosecutions?

It is well known that the people of some of the parishes complained of the burden imposed upon them by this legislation. In 1857, therefore, the Legislature, using a term which it had so repeatedly defined, took upon itself, by the same terms, and by nearly the same words, the burden which it had previously imposed upon the local authorities. Its language is :

"That *all* expenses incurred in the different parishes in this State *by arrests, confinement and prosecution* of persons accused of crime, their removal to prison, the pay of witnesses, and *all other expenses* attending criminal prosecutions, except the pay of jurors, shall be paid by the State, upon the certificate of the Clerk and the presiding Judge of the several courts of this State."

And whilst the State relieved the local authorities in this manner, it attempted, by a subsequent section, (which has been declared unconstitutional,) to withdraw from them the fines and forfeitures which had been granted to meet the burden.

It appears to me, therefore, that the fees of the Sheriff in criminal prosecutions form a part of the subject-matter confided to the Clerk and Judge to audit.

And I concur with my colleagues, that on any matter confided to them, their action is conclusive upon the Auditor of Public Accounts, and when they have once directed the fees of the Sheriff in criminal prosecutions to be paid, the duty of the Auditor is only ministerial, and he must draw a warrant for the same.

LAND, J., dissenting. The account in dispute is for the sum of \$2801 60, is stated to be for "*fees incurred in the prosecutions of criminals*, from the 1st day of April to the 30th of June, 1858, inclusive," and is certified by the Judge and the Clerk of the First District Court of New Orleans to be correct.

That the Legislature has the right to declare what expenses, fees and salaries, in criminal prosecutions, shall be paid by the State, and to fix the amount thereof, and to prescribe *the mode of payment*, is not disputed. This right has at all times been exercised by the State, and from an examination and comparison of the *laws now in force*, upon the subject of Sheriff's fees in criminal cases, with the *former laws* upon the same subject-matter, they are found to be uniform, consistent and identical.

The Act approved March 28th, 1813. to "*establish explicit fee bills*," provides that the several Sheriffs throughout the State shall be entitled to demand and receive certain fees for their services in civil and criminal cases, and the 14th section thereof provides, "that the Sheriff of the First District shall be allowed for *his services in criminal prosecutions and all ex-officio services not otherwise provided for*, a sum not to exceed two hundred dollars; and all other Sheriffs for like services, a sum not to exceed forty dollars, which allowance shall annually be paid by the District Judge, and shall be paid out of the public treasury on the warrant of the Judge."

PARKER
v.
ROBERTSON.

The Act of 1855 "*to regulate and define costs and fees generally,*" approved March 14th, *which is the law now in force*, provides that the Sheriffs throughout the State shall be entitled to demand for their services in civil and criminal cases certain fees, *and no more*, and the 15th section thereof provides, "that every Sheriff in this State shall be entitled to one hundred dollars per annum, and each and every Clerk of the several District Courts to fifty dollars per annum, as a compensation for their services in matters of a criminal nature pending in the respective courts."

This provision in the Act of 1855, granting to Sheriffs a fixed compensation or salary for their services in criminal cases pending in the courts, has been the settled policy of the State, so far as I can learn from the statutes, since the year 1813.

This policy was not changed by the Act of 1852, which imposed upon the parishes respectively, the obligation of paying all expenses in criminal prosecutions, nor by the Act of 1855, which continued that obligation in force, until the passage of the Act of 1857, by which the payment of these expenses was resumed by the State.

It is admitted that at the date of the passage of the Act of 1852, the State did not pay to Sheriffs, fees for their services in criminal cases pending in court, and as the Act of 1852 expressly declares that the fees, salaries and expenses in criminal prosecutions *shall remain as then (now) fixed by law, until changed by the local authorities, it necessarily follows*, that the parishes were not bound to pay any greater or other fees, salaries or expenses than the State had paid prior to the passage of *that Act*, and that whether the parishes paid the salaries formerly paid by the State, or paid specific fees in place thereof, *was a matter left by the Act to the discretion* of the local authorities. The Act of 1855 contained the same provision, that the fees, salaries and expenses *shall remain as then fixed by law, until changed by the local authorities*. It is also admitted that at the date of the passage of *this Act* the State did not pay to Sheriffs, fees for their services in criminal cases pending in court.

It appears from these various Acts, and the admissions in the record, that the public policy of the State to allow Sheriffs, a fixed compensation or salary for their services in criminal cases pending in the courts, instead of specific fees, has remained unchanged from the year 1813 to 1857, and the question presented to this court is, whether the Act of 1857 *has changed that policy, or repealed the laws establishing it*.

The Act of 1852, page 188, is as follows :

Section 1. That all the expenses hereafter incurred in the different parishes, by the attendance of physicians and for maintenance and clothing of individuals condemned for the commission of any crime, and of such as are accused of any crime or misdemeanor cognizable by the District Courts of this State, shall be paid by the respective parishes in which the offence or offences charged may have been committed.

Section 2. That the fees, salaries and expenses provided by this bill, to be paid by the local authorities, shall be fixed and regulated by the said authorities ; and until the same be done by the said authorities, *the fees, salaries and expenses shall remain as now fixed by law, and be paid by the local authorities*.

The Act of 1855 is in these words :

Section 69. All the expenses incurred in the different parishes, by the arrest, confinement and prosecution of persons accused of crime, their removal to prison,

the pay of witnesses, jurors, &c., and all expenses whatever attending criminal prosecutions, shall be paid by the respective parishes in which the offence charged may have been committed.

PARKER
v.
ROBERTSON.

Section 70. The fees, salaries and expenses to be paid by the local authorities, as above provided, shall be fixed and regulated by them, except for the maintenance of prisoners; and until the same be done, *they shall remain as now fixed by law.*

The Act of 1857 is as follows:

Section 1. That all the criminal expenses incurred in the different parishes of this State, by arrests, confinement and prosecution of persons accused of crime, their removal to prison, the pay of witnesses and all other expenses attending criminal prosecutions, except the pay of jurors, shall be paid by the State, upon the certificate of the Clerk and the presiding Judge of the several courts of this State.

It is evident that the only intention of the Acts of 1852 and 1855, was to impose upon the parishes the payment of all expenses in criminal prosecutions; and it is equally evident that the only intention of the Act of 1857 was to resume the payment thereof on the part of the State.

The language of the Acts imposing upon the parishes the payment of all expenses in criminal matters, is *more general and comprehensive* than the language of the Act of 1857, resuming the payment thereof.

It has already been shown, that it was only the intention of the Legislature, by the use of the general terms, *fees, salaries and expenses, in the Acts of 1852 and 1855*, to impose upon the parishes the payment of such fees, salaries and expenses *as were then established by law*, and which *the State itself was bound to pay*—for those Acts declare, that the fees, salaries and expenses thus imposed, *shall remain as then fixed by law*, until changed by the local authorities. It has also been shown by the statutes, that the State at the respective dates of the Acts of 1852 and 1855 was only bound to pay Sheriffs for their services in criminal cases pending in the courts, *the salaries provided by law, and not specific fees.*

It is also shown by an admission in the record, that no liability on the part of the State to pay Sheriff's fees in criminal cases was acknowledged at the treasury from the year 1814 to 1857.

The Act of 1855, "to define and regulate fees and costs generally," is the law now in force, and which determines the fees which Sheriffs are entitled to demand and receive in civil and criminal cases. The only fees allowed by this Act, which Sheriffs are entitled to demand and receive in criminal cases *from the State*, in addition to the salary of one hundred dollars granted by the 15th section, are the fees for keeping and maintaining prisoners in jail, and for transporting prisoners to the penitentiary, or from one parish to another.

The Act of 1857 does not expressly repeal the last mentioned Act of 1855, or any part thereof, nor does it contain any provision inconsistent with or repugnant thereto.

The fees claimed by plaintiff are the fees to which Sheriffs are entitled in *civil cases*. There is no law providing that Sheriffs shall be entitled to demand *like fees* from the State in *criminal cases*.

The Act of 1855, establishing explicit fee bills, is *similar to the former Acts* on the same subject-matter, and the interpretation given to those Acts, and acquiesced in from 1814 to 1857, was, *that Sheriffs were not entitled to demand of the State fees in criminal cases.* This interpretation of the former laws, identical with the

PARKER
v.
ROBERTSON.

present, must have been known to the Legislature when the Act of 1857 was passed ; and *the failure of the lawgiver* to declare specially in the Act of 1857, that Sheriffs should be entitled to demand for their services in matters of a criminal nature pending in the respective courts, *other and greater fees* than allowed by the Act of 1855, is conclusive to my mind that such was not his intention.

In my opinion, the Act of 1855, "to define and regulate costs and fees generally," *is in full force*, and is decisive against plaintiff's right to demand the payment of fees from the State *in matters of a criminal nature*, and that as the fees claimed by him are not allowed *by that Act*, that he is not entitled to demand and receive them from the State.

Debts against the State can only be created by express and unequivocal legislation, and not by implication or the interpretation of general and indefinite words in a statute, such as are used in the Act of 1857.

Article 94 of the Constitution provides, that no money shall be drawn from the treasury but in pursuance of a specific appropriation made by law, and this provision presupposes the existence of a debt specially created and acknowledged to be due from the State, anterior to the appropriation itself.

The appropriation of one hundred thousand dollars made to pay the expenses in criminal prosecutions under the Act of 1857 was nearly exhausted at the date of the Treasurer's report to the Legislature, and was wholly insufficient to pay the *acknowledged claims for expenses in criminal matters*, together with claims of the character of the one in dispute ; and the assumption that the appropriation was made to pay the fees claimed by plaintiff, as part of the expenses in criminal prosecutions, for which the State is liable, is entirely unsupported.

The fact that a part of the fees claimed by Sheriff *Bell* and his successor the plaintiff, was paid at the treasury under the Act of 1857, cannot affect the question as to the *meaning of the Act itself*. This suit shows that these payments are considered at the treasury to have been made in error.

The argument that the compensation of *one hundred dollars*, allowed to Sheriffs for services in criminal prosecutions, is *insufficient, unjust or impolitic*, can with more propriety be considered by the Legislature than this court.

The office of Sheriff is no where vacant. The State compels no citizen to hold the office. It is filled throughout the State by able and efficient incumbents who voluntarily assume the burden of service in criminal prosecutions for the inadequate compensation provided by law, in consideration of the fees to which they are entitled in civil proceedings, and, therefore, have no legal right to complain.

In my opinion, the judgment of the lower court is erroneous, and should be reversed.

VOORHIES, J., absent.

WILLIAM BROWN et al. v. STEPHEN ROBERTS.

The surety on a tutor's bond cannot require that payments made by the latter to his ward, shall be imputed to the amount that may be due upon the bond, on a breach of its conditions. The doctrine of imputation of payments does not apply to such a case.

Where the tutor makes a surrender of his property, and the parties in whose favor the bond was executed, consent to, and vote for its sale on terms of credit, such sale is a granting of time, which will have the effect of discharging the liability of the surety.

A PPEAL from the District Court of the Parish of East Baton Rouge, *Beale, J. A. M. Dunn*, for plaintiffs. *T. G. Morgan*, for defendant and appellant.

MERRICK, C. J. The present action has been brought upon a tutor's bond, signed by the defendant in 1833, as surety for *Moses Brown*, dative tutor to the plaintiffs, then minor children of *William Brown*, deceased.

The bond was given for \$1,168. In 1848, the plaintiffs brought suit against *Moses Brown* for a settlement of the tutorship accounts, and recovered judgment in the sum of \$4,785 70. Shortly afterwards, *Moses Brown* made a surrender of his property to his creditors. At the meeting of creditors, the plaintiffs, *William Brown*, *Octavius Brown*, since deceased, and the plaintiff *George Klinepeter*, representing his wife, voted for the sale of the movables for cash, the slaves one-fourth cash, and for the residue, a credit of one year, and the land on a credit of one and two years.

The heirs of *William Brown* received, on the tableau of distribution of *Moses Brown's* syndic, the sum of fifteen hundred dollars.

Judgment having been rendered against the defendant for the amount of the tutor's bond, \$1,168, and legal interest from 19th of February, 1853, he has appealed, and made the following points in this court :

1st. That he has the right to impute the payment made by the syndic to the satisfaction of the bond on which the appellant was surety ; and,

2dly. That the appellant was discharged from his obligation as surety, by the acts of plaintiff in according time to *Brown*, the principal obligor.

I. The doctrine of imputation of payments has no application to a tutor's bond in a case like the present. The tutor's bond is collateral to the administration of the tutor during the entire tutorship. So long as the tutor does his duty and makes payment where payment is required, no cause of action arises upon the bond. It would, therefore, be absurd to impute payments to an obligation depending upon a condition which had not happened.

The collateral obligation upon the bond takes effect only where the tutor neglects or refuses to do his duty, or make payment, and it covers the refusal to pay the last dollar to his wards become majors, as well as the first, and where the bond is given for the tutorship of several, to the last minor who arrives at the age of majority as well as the first. All payments made by the tutor or his representatives to all or any of his wards, are but a performance of his obligation of tutor. A refusal to pay any final balance, to all or any of his wards, gives rise to an action upon the bond, for such refusal becomes a breach of a condition of the bond.

Where a tutor, being appointed to several minor heirs, gives but one bond, that bond is as much forfeited by a refusal to pay over to the last minor, arriving at the age of majority, as it would be if the refusal had been made to each heir.

BROWN
v.
ROBERTS.

For the breach of a single condition gives rise to an action of indemnity upon the bond, to the extent of the loss, whether that loss be sustained by one or all of the minors. But the surety on the bond can only be held responsible to the extent of the sum specified in it, and if the loss be sustained by several of the heirs, they must adjust between themselves the portions to which they are entitled.

As between the surety and the minors, he cannot contest the right of any one to recover upon the bond to the extent of the indemnity due him. But when the whole bond has once been exhausted, whether by suits *seriatim* upon the same by the minors, as they arrive at the age of majority, or otherwise, the surety is discharged.

II. The second ground made by the appellant, presents some difficulty, as there are contradictory decisions on the very point in controversy. The plaintiffs' counsel relies upon the case of *Leger v. Arcenauz*, 5 Rob. 514, decided at Opelousas in 1843, and the defendant, upon the cases of *Lobdell v. Nephler*, 4 La. 294; *McGuire v. Wooldridge et al.*, 6 Rob. 50; and *Peacocke v. Chapman*, 8 An. 87.

The Article of the Code relied upon by defendant, is the opposite of Article 2039 of the Napoleon Code, and declares that the prolongation of the term granted to the principal debtor, without the consent of the surety, operates a discharge of the latter. C. C. 3032.

The plaintiffs' counsel relies upon the reasoning of the court in the case of *Leger v. Arcenauz*, to the effect, that by the surrender, the claim is no longer upon the debtor, but upon the net proceeds of the sale of the property ceded. And that the sale of the property for cash might have been injurious to the surety &c.

This reasoning is not entirely satisfactory. By the surrender, it is true, that all proceedings against the insolvent are stayed. But the rights of the creditors attach upon the effects surrendered, and the term of payment is really prolonged, whenever, on the vote of the creditor, the effects of the debtor are sold on time. For on payment of the principal debt by the surety and subrogation, he could not obtain reimbursement until the credit sales had fallen due. The term then is really prolonged. If the surrender be looked upon simply as a mode of execution, the result would be the same. In the case of *Peacocke v. Chapman*, 8 An. 87, the giving of time consisted in consenting to a sale of property seized upon execution upon a twelve month's credit. It was urged in that case, without effect, that the twelve month's sale upon an execution, (being one of the modes of collecting a debt,) did not operate even a novation of the original debt, and could not, therefore, be considered as affecting the contract or prolonging its term.

Suppose, immediately after having procured the sale of the property of the insolvent on time, the plaintiffs had instituted suit upon the bond against the surety, could he not, the surety, say to them, "you seek to bind me under more onerous conditions than my principal, for though you hold a legal mortgage upon the land and slaves to secure this debt, you have virtually deferred its payment for one and two years, and now you demand of me the amount in cash," thus violating Articles 3006, 3030 and 3032? It seems to us, there would be much force in the reply, and, on the whole, we think, the case of *Lobdell v. Nephler* the best sustained by reason and authority. Still it cannot be disguised, that where a debt was only partly secured, as in this case the creditor would be placed in a dilemma; for if he sought to secure the entire debt by procuring favorable

terms of sale, he would lose the security, and if he should suffer the sale for cash, he might lose the portion of the debt not secured, by the sacrifice of the property.

Giving the defendant, however, the benefit of our conclusions on this branch of the case, it will only occasion a small reduction of the judgment. For, as the condition upon which the bond was to become exigible has happened, the indemnity due the remaining ward, must be paid in full, leaving to the plaintiffs to adjust their rights among themselves.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed; and we do now order, adjudge and decree, that the plaintiffs do have and recover judgment against the defendant for the sum of one thousand and eighty-three dollars and eighteen cents, with legal interest thereon, from the nineteenth day of February, 1853, until paid, and that the plaintiffs pay the costs of appeal, and the defendant those of the lower court.

W. B. SCOTT v. G. C. BOGART and S. TOBY.

A *cessio bonorum* in this State is not a peremptory bar to a suit upon a judgment rendered contradictorily with the ceding debtor in another State after the cession has been accepted here, even though the debt upon which the foreign judgment was obtained was put upon the debtor's bilan.

In those States where the common law prevails, when a commercial firm is sued, it is necessary that process should be served on each member of the firm, and effect will not be given in our courts to a judgment there rendered against one of the members who was not served with process and made no appearance in the suit.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*

J. Livingston, for plaintiffs and appellants. *Durant & Hornor and Hart & Martin*, for defendants.

MERRICK C. J. The majority of the court adopt the opinion prepared in this case by Mr. Justice Spofford before his resignation. It is as follows:

SPOFFORD, J. This suit is based exclusively upon a judgment purporting to have been rendered in the Court of Common Pleas for the city and county of New York on the 2d October, 1855.

Both defendants excepted to the suit, upon the alleged grounds that on or about the 17th Feb. 1855, they made a *cessio bonorum* to their creditors and obtained a final judgment of discharge in the Sixth District Court of New Orleans, where the present suit was brought; they further alleged that plaintiff's claim was put on their bilan, and that one of the plaintiff's being a resident of New Orleans had notice thereof.

The exceptions were sustained and the suit dismissed by the District Judge, who says he felt constrained to this course by the authority of the case of the *Northern Bank of Kentucky v. Squires*, 8 An. 318.

But there is a peculiar feature in this case which the District Judge appears to have overlooked.

The suit is upon a foreign judgment. The plaintiffs do not seek to recover upon the original cause of action, but upon the judgment in which it has been merged. This judgment was obtained long subsequent to the Louisiana cession

BROWN
v.
ROBERTS.

SCOTT
V.
BOGART.

and the alleged discharge there under. If this discharge was a bar to the original demand, they should have pleaded it in the New York court where that demand was litigated.

A Louisiana cession is not a peremptory bar to a suit upon a judgment rendered contradictorily with the ceding debtor, in another State, after the cession has been accepted here, even though the debt upon which the foreign judgment has been obtained was put upon the bilan.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed, the defendants' exceptions overruled, and the cause remanded to be proceeded in according to law, the costs of this appeal to be paid by the defendants and appellees.

BUCHANAN, J., dissenting. The opinion of the majority of the court appears to me to overrule the case of *Northern Bank of Kentucky v. Squires*, 8th An., in which case I concurred, and have seen no sufficient reason to doubt the correctness of the doctrine therein contained.

I am of opinion that the Judgment of the District Court should be affirmed.

SAME CASE—ON A RE-HEARING.

MERRICK, C. J. On a reëxamination of the record of the case before the Court of Common Pleas of New York, offered in evidence in this case, we cannot find that any process was served upon the defendant, *George C. Bogart*. *Toby* answered the suit, but only for himself. It seems to us, therefore, quite clear, that the New York judgment could not bind *Bogart*, particularly as the plaintiffs, under their New Orleans name, were parties to the insolvent proceedings, and were bound by the decree homologating the deliberation of the creditors discharging *Bogart* from liability. C. C. 2173; *Gurlie v. Flood*, 11 Rob. 166; 5 An. 501.

It is urged that we are bound to presume that the proceedings in the Court of Common Pleas were regularly conducted according to the maxim, *omnia presumuntur rite esse acta*.

We think it would be carrying the doctrine of presumptions too far when invoked to defeat a solemn judgment of our own courts with the proper parties before them in order to give effect to a foreign decree.

It is again urged that the service upon one partner must be held sufficient to bring both into court. But the common law prevails in New York, and it is necessary under the common law that process should be served upon each member of a commercial firm; moreover, the domicil of *Bogart, Williams & Co.* was New Orleans and not New York. *Walworth v. Henderson*, 9 An. 339.

In regard to the defendant, *Toby*, the case is different. He was a party to the suit in the Court of Common Pleas. He went into bankruptcy in February, 1855, after the suit was commenced against him in New York. The creditors voted a discharge, which was filed and homologated in April, and the decree was finally signed on the first day of May, 1855, discharging *Bogart* and *Toby* from all the debts placed on their bilan, which included the debt in controversy.

This judgment was doubtless binding upon the plaintiffs, for they were cited by their New Orleans name, *R. H. Thorne & Co.*, and were parties to it. At this time the New York suit was still pending, and this final judgment of a competent court might have been pleaded in bar of that suit. The courts of New

SCOTT
v.
BOGART.

York were bound, under the Constitution and laws of the United States, to give it its effect. It was a defence which would have been as availing as the plea of payment or set-off. But this defence was not pleaded, and the cause in New York was continued until October, 1855, when it was tried and a judgment rendered against *Toby* and *Bogart*.

As to *Toby*, who was a party, the original cause of action was annihilated and merged in the judgment. In the place of the debt, *Toby* became bound by a judgment which, by the Constitution and laws of the United States, was as obligatory upon him in every other State of this Union as in the State of New York. Const. U. S. Art. 4, sec. 1; Act of Congress 26th May, 1790; *Mills v. Duryee*, 7 Cranch, 481, (2 condensed 578,) *Hampton v. McConnell*, 3 Wheaton, 234, (4 condensed R. 243,) 7 An. 334.

The question is then presented in the conflict between the two decrees upon the same subject-matter, one discharging the debtor and the other decreeing him to pay the same debt, which shall prevail? It seems to us, that the one last rendered must have effect, for it was in the power of the defendant in the last suit to have pleaded the former one in bar, and not having done so, he must be presumed to have waived his plea of *res judicata*. By the judgment, which absorbs the defence he might have made, he becomes indebted to his creditor by a new title.

Our judgment must be set aside as to *G. C. Bogart* and the judgment of the lower court affirmed in regard to him.

It is, therefore, ordered, that so much of the decree heretofore rendered by us as reverses and avoids the judgment of the lower court as to the said *George C. Bogart*, be set aside, and that the judgment of the lower court, sustaining his exceptions, be affirmed, and that the judgment of this court as to the other defendant, *Simeon Toby, jr.*, overruling his exceptions and remanding this cause for further proceedings remain undisturbed, and it is further ordered, that the plaintiffs and *Simeon Toby* each pay one-half of the costs of the appeal.

BUCHANAN, J., dissenting. I dissent from so much of the decree on re-hearing as condemns the defendant, *Toby*, for reasons given in my dissenting opinion upon the first decision of this appeal.

IN THE MATTER OF THE NEW ORLEANS DRAINING COMPANY—L. SURGI
v. C. ROSELIOUS, Receiver.

Where a rule was taken on the opposite party to have the expense of making a "plan" taxed as costs, and the defendant did not except to the form of proceeding, but answered to the merits, and testimony was taken without objection, it was the duty of the Judge to decide upon the merits of the controversy; and that which ought to have been pleaded as an exception in the court below cannot be assigned as error on the appeal. Although the amount allowed was a large one, there being no witness who estimated the value of the work at less than the amount allowed by the Judge, he could not have fixed upon a smaller amount, without acting arbitrarily and disregarding the testimony.

APPEAL from the Third District Court of New Orleans, *Duvignaud, J.*
C. Redmond, for plaintiff in rule. *C. Roselius*, in *pro. per.*, appellant.

MERRICK, C. J. The appellant, as receiver of the above named company, assigns two grounds of reversal, as error in the judgment of the court below:

SURGI
v.
ROSELIOUS.

I. "That the proceeding by rule, under the pretext of taxing costs, is radically wrong—the plan, for the making of which the appellee claims compensation, was not made in the course of judicial proceeding, or by order of court, and that whatever claim the applicant may have, it constitutes no part of the costs of court, and cannot be taxed as such."

The defendant in the rule did not except to the form of the proceeding, but answered to the merits. Testimony was taken without objection, and the case submitted to the Judge *a quo*. It was then his duty to decide upon the merits of the controversy, and that which ought to have been pleaded as an exception cannot now be successfully assigned as error. *Buchert v. Ricker*, 11 An. 491.

II. "That the amount awarded by the judgment of the District Court is unreasonable, and not warranted by the evidence."

The sum allowed for a "plan," \$1600, is certainly a large sum for this sort of work. But there is no witness who estimates the value of the plan at less than the sum allowed by the Judge. He could not have taken any smaller sum as the basis of his judgment, without acting arbitrarily, and disregarding the testimony.

Judgment affirmed.

PETER MARCY et al. v. SUN INSURANCE COMPANY OF NEW YORK—RICHARD
SALTER v. same, and HYDE & MACKIE v. CRESCENT MUTUAL INSURANCE
COMPANY.

Where the insurance is against river risks, and it is shown that the loss was from a peril of the river, and a possible cause is specified, it being also shown that the vessel was sea-worthy, the plaintiff (the insured) has done all in his power and has made out his case.

The liability of the insurer, except so far as limited by the policy, must be judged of by the nature of the property insured, the risks to which it was subjected, and the natural accidents to which it is liable

Where the vessel is sea-worthy, and there is no suggestion and proof of fraud, the plaintiff is not bound to establish the identical cause of the loss, but may show a possible cause.

APPEAL from the Sixth District Court of New Orleans, *Cotton, J.*

T. Gilmore, P. E. Bonford and C. Roselius, for plaintiffs. *M. M. Cohen, Randall Hunt and J. A. Maybin*, for defendants.

COLE, J. Plaintiffs claim the amount of insurance of a certain dock, known as the "Old Dry Dock."

On the 19th of March, 1855, the dock being employed in its usual and legitimate business in the Mississippi river, opposite the city of New Orleans, was sunk for the purpose of taking in a ship for repairs. The workmen, not being able to raise her as usual, caused the ship to be withdrawn, and efforts to be made to raise her.

These attempts to save the dock were unsuccessful; she sunk and became a total loss.

This cause was heretofore before us, and was remanded for a new trial, on account of an exception to the charge of the District Judge. It is reported in 11 An. p. 749.

The case was submitted to the jury upon the same evidence as at the first trial,

and they having been instructed in conformity with the principles decided by this court, rendered a verdict in favor of plaintiff for the amount claimed. Defendant has appealed from the judgment thereupon.

MARCY
v.
SUN INS. CO.

The principal difficulty in this case is as to the cause of the loss of the dock.

It is insisted that the cause of the loss must be shown, otherwise that the insurer cannot be held liable.

This proposition does not appear to be correct, when carried to the extent contended for by the defendant.

The insurance is against river risks; when, then, it is shown that the loss was not caused by a land, but by a marine peril, that the vessel was sea-worthy, and a possible cause of the loss is specified, the plaintiff has then done all in his power.

The perils are not only above, but also below the water.

When the loss takes place without apparently being produced by the violence of the winds and waves, or some external cause, all that the insured can do is to establish the vessel to have been sea-worthy.

The liability of the insurer, except so far as limited by the policy, must be judged of by the nature of the property insured, the risks to which it is subjected, and the natural accidents to which it is liable.

A dock moored to the wharf is not exposed to the same dangers as a steamer making distant voyages: the former is not so much in danger of collision, of snags and many other perils that might be enumerated; and the plaintiff must be supposed to have insured against the river risks to which she would be most liable; the insurers must also be considered to have had them in their view when they signed the policy.

It is true that the burden of proof is upon the plaintiff to make out his case; but the proper rule of evidence is, that when a party insures against perils, all of which cannot be seen or known, that the loss shall fall upon the insured, when it proceeds from a cause not known or that might have existed, but which is not satisfactorily proved, on the presumption that the vessel was not seaworthy. But if this presumption be rebutted and it be shown that the vessel was staunch, strong and in a seaworthy condition, and there is no suggestion and proof of fraud, then the plaintiff is not bound to prove the identical cause of the loss, but may show a possible cause. For as the defendant undertook to insure against perils below the water as well as above, it was then well known to the contracting parties that a loss might occur which could not be explained, and all that the insured could do would be to prove the vessel was seaworthy. If this were not so, the insurer would be paid for insurance against perils above and below the water, whilst he would only in certain cases be liable for losses from accidents above the water. If such had been the intention of the insurer, it ought so to have been explained in the policy.

Such appears to have been the opinion of this court in the case of *Snethen v. Memphis Insurance Co.*, 3d An. p. 474.

In that case the action was upon a policy on merchandize loaded on a barge in tow of a steamer.

The barge was suddenly discovered to be leaking badly and sinking, on the second day after the departure from St. Louis, on the way to New Orleans.

No specific cause could be given for the accident, as that the barge struck a snag or sand-bar, or incurred any other evident casualty. One of the witnesses conceded, however, that an external peril might occur, and sufficient to cause the sinking of a boat, without being observed at the moment.

MARCY
v.
SUN INS. CO.

The court gave judgment for plaintiff, on the ground that the testimony established the barge to have been seaworthy at the commencement of the voyage, that accidents proceeding from perils of the river, might occur to produce a leak and eventually a loss, without being at the moment perceived, and that some such peril must have been the operating cause of the loss of the barge.

In *Dupeyre v. Western Marine and Fire Insurance Co.*, 2 R. 458, the court said, "when a vessel is lost in consequence of some of the perils insured against, the presumption is in favor of her seaworthiness, and it is incumbent upon the underwriters to show that this warranty has not been complied with; but when, as in the present case, a loss occurs which cannot be ascribed to stress of weather or to any accident which might by possibility have produced it, the fair and natural presumption is, that the vessel was defective and not seaworthy, and the burden of proving that, in fact, she was seaworthy, is then thrown on the insured." 1 Philips on Insurance, 308, 324.

In the case at bar the evidence establishes the dock to have been seaworthy, and the weight of the vessel taken in not to have exceeded the capacity of the dock.

A possible cause for the loss is also shown.

The manner of sinking a dock is to open the valves, and when the desired quantity of water is obtained, the valves are closed; the water is then pumped out and the dock rises with the ship. The docks have sinking and discharging valves.

One of the witnesses thinks that if one of the valves had been open her twelve pumps could not have relieved her.

The greatest risk of the dock was the sinking and raising.

There are parcels of drift-wood running round in the Mississippi river, and driven by changeable currents. Sometimes when the valves are open for the purpose of sinking a dock, the chips of wood get into the valves and choke them so that they cannot be shut down, and the consequence is that the water continues to rush in. One of the witnesses testifies that he knows of no other cause of the sinking of the dock than this.

Defendant contends, however, that this is an ordinary every day risk, and that he cannot be considered to have insured against ordinary but only extraordinary perils.

It may be said of almost every risk, that it is an ordinary one, but at the same time, a vessel meets with accidents from them only occasionally.

The entrance of a small quantity of chips into the valves might be deemed an ordinary peril, but the flowing in of a sufficient number to prevent the valves being closed and to cause the dock to sink, must be considered an extraordinary peril. If not, docks would constitute stock of very little value, for it would be an ordinary every day risk, that the valves would become choked up, and that the docks would sink.

When the nature of the dock is contemplated, it was just as much an extraordinary peril that she should be sunk by chips entering the valves, as that a steamer should be sunk by striking a snag. There are snags in many places in the Mississippi river and boats may be sunk by them, but they are often escaped or passed over in safety; so the valves of docks are liable to be filled with chips so as to render it impossible to close them, but to effect this, the current must be in a direction towards the valves, and the chips must be of a certain size and number.

The case of *Millaudon v. New Orleans Insurance Co.*, 4th An. p. 16, is not antagonistical to the opinion of the court in this case.

The court there decided that the insurers will not be responsible where the sugar and molasses are covered by an ordinary fire policy, and the loss is occasioned by an explosion of the steam-boilers used in the manufacture of the sugar. The court remarked, that so far as relates to the insurance, they were unable to distinguish a loss occasioned by the explosion of the boiler, from that caused by the breaking or derangement of any other part of the machinery.

In the case at bar, the possible cause of the loss is not a derangement of the machinery of the dock, but the action of external causes in a violent and unusual manner upon the valves of the dock, by which they were prevented from closing and the dock was sunk.

This cause was tried before two juries, who, after having weighed the testimony, and the latter under instructions directed by this court, have decided in favor of plaintiff. The evidence is of such a nature that we would not feel justified in interfering with their verdict.

Judgment affirmed, with costs.

MERRICK, C. J., concurring. This case having been remanded for a new trial, the District Judge charged the jury in conformity with the views expressed by the court on the former appeal. 11 An. 748.

The jury found a second time for the plaintiff, and from an examination of the testimony I am unable to say that it is unsustained by the proof. I, therefore, concur in this decree.

VOORHIES, J., absent.

JAMES J. WEEMS v. PETER R. VENTRESS.

Where it is stipulated, in an act of sale, that the note given for the price, shall remain deposited with the parish Recorder, until a certificate of non-mortgage is furnished, its possession by the plaintiff, is *prima facie* evidence, that it was delivered to him by the depository after a certificate furnished. If the plaintiff came into possession of the note improperly, the defendant's remedy would have been by injunction, not by an appeal from the order of seizure and sale.

Where a note bears interest from maturity, the interest begins to run from the day of payment specified, without allowing for days of grace.

Parties against whom executory process is issued for an amount which exceeds in some particular the sum shown to be due by the documents filed, ought to address themselves to the Judge who issued the order, to have the error corrected, instead of making such error the pretext for an appeal involving vexatious delays.

A PPEAL from the District Court of the Parish of Iberville, *Beale, J.*
S. Matheus, for plaintiff and appellant. *Barnard & Pope*, for defendant.

BUCHANAN, J. This is an appeal from an order of seizure and sale upon a note given for the price of a sale, protested for non-payment.

The defendant assigns for error on the face of the proceedings :

1st. That the act of sale stipulates that the note on which this order has issued, shall remain deposited with the parish Recorder until a certificate of non-mortgage is furnished.

The plaintiff annexes the note to his petition for seizure and sale. His posses-

WEEKS
v.
VENTRONE.

sion of the note is *prima facie* evidence that it has been delivered to him by the depositary, (the parish Recorder,) after a certificate furnished. If the plaintiff has come into possession of this note improperly, this would be the ground of an injunction, not of an appeal from the order of seizure and sale.

2d. That the order of seizure and sale allows interest from the 15th of April, 1858; while interest should only have been allowed from the 17th, the date of protest.

The act of sale declares the price to be payable, a portion in cash and the balance in six equal and annual instalments, for which the vendee has executed his six promissory notes, "with interest from and after maturity, at the rate of eight per cent. per annum till paid, and said notes are all dated this day, and payable respectively on the fifteenth of April of the years 1858," &c. By contract, therefore, as well as by law, (Acts 1855, p. 352,) the interest ran upon this note from the day of its maturity, the 15th of April, 1858.

The case of *Cumming v. Archinard*, 1 An. 280, relied on by defendant, was decided under the old legislation of Louisiana, according to which interest only ran, in the absence of a contrary stipulation, from the day of protest of a note. See also the case of *Andrews v. Rhodes*, 10 Rob. 52.

3d. That the order of seizure and sale improperly allowed four dollars costs of protest, for which the record furnishes no warrant.

Since this assignment of errors, the record has been completed upon the application, regularly made, of the appellee; and an amended copy of the protest, with the notarial fees (\$4) endorsed, has been certified to us by the Clerk of the District Court.

Upon this point, it is not out of place to observe, although unnecessary for its decision, that there are some very sensible suggestions in the dissenting opinion of Judge Preston, in the case of *Nichols v. Grice*, 6 An. 446, (quoted by appellant,) to the effect that parties against whom executory process is issued for an amount which exceeds in some particular the sum shown to be due by the documents filed, ought to address themselves to the Judge who issued the order, to have the error corrected, instead of making such error the pretext for an appeal, involving vexatious delays, and it may be great pecuniary loss to a creditor in pursuit of a just debt. In fine, this is a case where the maxim applies, *de minimis non curat lex*.

We decline to allow damages for a frivolous appeal, as asked by the counsel of appellee, for the reason that the record, as it stood when the assignment of errors was filed, did not exhibit the notarial fees of protest and notices.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

COLE, J., concurring. If the nature of days of grace be considered, it is clear that when a note bears interest from maturity, the holder is entitled to interest upon the days of grace.

The elementary writers upon bills of exchange and promissory notes state, that days of grace were probably originally introduced by the usage of merchants, in the first place, to enable the acceptor of a bill, the more easily to make payments of his acceptances as they became due, which, as the payments were all to be made in gold and silver, might sometimes, from the occasional scarcity of the precious metals, become a matter of no small difficulty and embarrassment; and in the next place, to point out to the holder, what time he might reasonably grant to the acceptor for such payment, without being guilty of *laches*, or endan-

gering his right of recourse, upon the ultimate non-payment of the bill by the acceptor, against the other parties thereto.

WHEAT
v.
VENTRONE.

The usage, which was at first probably discretionary and voluntary on the part of the holder, became afterwards a right, and was also applied to promissory notes. Story on Notes, sec. 215 and note.

The origin of days of grace was then not to diminish the obligations of the debtor, and to enable him to have the use of money, without interest, for a certain time after the bill or note became due, but it was to facilitate him in procuring the means to liquidate it by the granting of a certain time, which varies in different commercial countries. Story on Notes, § 217.

The note is really due, when the days of grace commence, for they cannot begin until it has matured upon its face. When, then, as in the case at bar, the notes bear interest after maturity, the interest runs from the time they mature upon their face, and not from the time they are made to mature by the days of grace.

The money is understood to be loaned for the length of time accorded by the days of grace beyond the time specified in the note, and it is not to be supposed that the debtor is to have the use of the money for this additional time for nothing. The days of grace were not accorded to diminish the force and effect of the original contract, to lessen the rights of the creditor, or to enable the debtor to have the money for this additional time, without paying interest.

In *Ogden v. Saunders*, 12 Wheat., pp. 213, 312, Mr. Chief Justice Marshall, discussing this subject as applicable to promissory notes, says :

"The usage of banks, by which days of grace are allowed on notes, payable and negotiable in bank, is of the same character. Days of grace, from their very term, originate partly in convenience and partly in the indulgence of the creditor.

"By the terms of the note, the debtor has, to the last hour of the day on which it becomes payable, to comply with it; and it would often be inconvenient to take any steps after the close of day.

"It is often convenient to postpone subsequent proceedings till the next day.

"Usage has extended this time of grace, generally, to three days, and in some banks to four. This usage is made a part of the contract, not by the interference of the Legislature, but by the act of the parties.

"The case cited from 9 Wheat. 581, is a note discounted in bank. In all such cases, the bank receives, and the maker of the note pays, interest for the days of grace.

"This would be illegal and usurious, if the money was not lent for these additional days.

"The extent of the loan, therefore, is regulated by the act of the parties."

In a case quoted by Kid, in his work on bills of exchange and promissory notes, p. 125, the reporter said :

"It was also observed, that it had been uniformly the custom of the Bank of England, the bankers, and the principal merchants in the city, to make allowance for the three days in discounting these notes; and that if they were not to be allowed, that practice must be illegal, and they must all have incurred the penalties of usury."

In the banks of New Orleans, it is customary in discounting notes, to charge interest for the days of grace.

The reason why interest is due upon the days of grace is, that although by

WEEKS
v.
VENTRONE.

commercial law the bill or note may not be demandable for a certain time after its apparent maturity upon the face thereof, yet that it did really become due at the time designated in the obligation, but by a tacit contract between the parties, the money is considered to be lent for the additional number of days accorded as days of grace in the country where the bill or note is made and payable.

Art. 2206 of the Civil Code declares: "The days of grace are no obstacle to the compensation."

This Article evidently considers the debt to be in fact due, when it becomes so upon its face, otherwise compensation could not take place, for it can only exist between two debts equally liquidated and demandable. C. C. 2205.

Article 2206 clearly makes the distinction between the debt demandable upon its face, as matured, but not demandable according to commercial law, and it considers that the right of a party to plead compensation ought not to be defeated, because, although the note appears to be due and demandable upon its face, it is really not so, on account of the extension of time granted for the benefit of the debtor.

When the note matures upon its face, it is in reality due; but by the tacit contract between the parties, an extension of time is granted. But although this is understood at the time of the execution of the obligation, yet the note becomes due at the time specified in it; and by the tacit contract, the consideration of the obligation, is loaned for the additional time of the days of grace, so that it, in fact, becomes demandable at the time of expiration of the second or tacit contract. As then, it is due when the second contract tacitly begins, this is the reason why compensation can be plead as provided by Article 2206.

Article 1931 of the Civil Code declares, that in contracts, stipulating a conventional interest, it is due without any demand, from the time stipulated for its commencement until the principal is paid.

In *Keith, curator, &c., v. City of New Orleans*, this court said, "The obligation of defendant bore interest upon its face, from date." It was not necessary, therefore, for a protest in order to make it carry interest.

If, in the case at bar, no interest were allowed for the days of grace, defendant would then have the use of property, bearing fruits and revenues, without paying their equivalent, which is represented by interest.

I concur in the decree.

MERRICK, C. J., dissenting. I cannot think that the promissory note payable to order, matured, so as to bear interest, before the expiration of the last day of grace. Acts 1855, p. 47, sec. 6, and p. 352; Story on Promissory Notes, sec. 215, and note 1; Chitty on Bills, ed. 1849, p. 521; *McDonald v. Lee's Administrator*.

And as I see no reason to overrule the case of *Cumming v. Archinard et al.*, 1 An. 280, I am unable to concur in the decree in this case.

BENJAMIN WADE, Sen. v. C. W. NEWTON & Co.

Where defendant, in his answer in the cause, which was sworn to, responded substantially to the interrogatories propounded in plaintiff's petition—*Held*: to be sufficient.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
Emerson & Huntington, for plaintiff. *Whitaker & Fellows*, for defendants and appellants.

BUCHANAN, J. The plaintiff sued the three partners of a commercial firm, which has dissolved, for the balance shown by an account-current, which was made part of his petition. The petition concludes by a prayer, "that the defendants may be cited to answer hereto, and ordered also to answer the annexed interrogatories on oath, within the legal delay, and that in due course of law they may be condemned," &c.

Annexed to the petition is the following interrogatory: "Are you not indebted to plaintiff, as set forth in the above petition and account annexed, in the sum of \$9,245 20? And is not said amount now due and owing?"

No order of court was made for the answering of this interrogatory; but a copy of the petition and a citation were served upon *C. W. Newton & Co.*, "by leaving the same in the hands of *Wade, Jr.*, a member of said firm."

C. W. Newton, one of the defendants, filed his separate answer to the petition, containing a distinct and circumstantial denial of the indebtedness alleged in the petition and account-current annexed thereto; which answer was signed and sworn to by the said defendant *Newton*.

The plaintiff and appellee objects that the answer of *Newton*, although it negatives the interrogatory, is not what is required by Article 349 of the Code of Practice, inasmuch as it was not offered as an answer to the interrogatory, but as an answer to the petition. We consider this answer sufficiently formal. It responds, not only substantially, but categorically, to the interrogatory propounded. That interrogatory is itself a portion of the petition, and refers to the allegations of the petition. It probes the conscience of the defendant, as to the truth of those allegations.

Two witnesses were offered by plaintiff on the trial; one of them being one of the defendants, and a son-in-law of plaintiff; the other, a person who had been book-keeper of the firm of *C. W. Newton & Co.*, which had been dissolved, and was insolvent. The testimony of these witnesses does not, in our opinion, invalidate the sworn answer of the defendant.

Plaintiff relies upon a rendition of the account-current to himself, in the name of the firm; but it is clear, from the evidence, that *Newton* was not privy to such rendition of account. It appears that the credit of \$10,000 upon that account, for two items of \$5,000 each, paid *Henderson & Peale* and *John Watt & Co.*, was first given, upon the books of the concern, to *Benjamin Wade, Jr.*, who was one of the partners. The entry was afterwards changed, and the name of *Benjamin Wade, Sen.*, (the present plaintiff,) was substituted for that of his son.

Both *Huntington* and *Cooling* (the witnesses of plaintiff) prove, that this change of entry on the books was made without the privacy or knowledge of *Newton*, and that the account was also rendered without his knowledge.

WADE
v.
NEWTON.

The plaintiff has attempted to prove, by the witness *Cooling*, an acknowledgment on the part of *Newton*, that this \$10,000, amount of two notes, (or drafts as they are called in this testimony,) was a loan from plaintiff to the firm. But *Cooling's* testimony on this head is very vague, and the theory that the said notes were a loan to the firm, is inconsistent with other facts proved by this witness, as well as with other evidence. On the whole, the plaintiff has utterly failed to discredit the sworn answer of the defendant, *Newton*.

The articles of copartnership of *C. W. Newton & Co.* are given in evidence by defendant, from which it appears that *Benjamin Wade, Jr.*, was to furnish, as his contribution to the capital of the partnership, the sum of thirteen thousand dollars cash, or its equivalent. This contract of copartnership is by notarial act, and dated the seventh day of April, 1857, it being stipulated that the partnership shall be considered as having commenced on the first day of the same month. The two documents held by the plaintiff and spoken of by his witnesses, are promissory notes, one signed by *B. Wade, Jr.*, dated 7th April, 1857, payable to the order of *C. W. Newton & Co.*, eighty-five days after date, for the sum of five thousand dollars, value received, and endorsed *C. W. Newton & Co.* and *Henderson & Peale*; the other signed *C. W. Newton & Co.*, dated 1st of April, 1857, payable to the order of *B. Wade, Esq.*, on the first day of January, 1858, for the sum of five thousand dollars, with interest at six per cent. per annum from date, value received, and not endorsed.

Both these notes are proved to be entirely written and signed by *Benjamin Wade, Jr.*, and the evidence leaves no doubt in our minds that they constituted a portion of the capital furnished by said *Wade* to the partnership stock of the firm of *C. W. Newton & Co.* One of them appears to have been negotiated to a party named *Henderson & Peale*, and to have been guaranteed by the plaintiff and taken up by him; the other to have been negotiated to plaintiff directly. There can be no doubt that the plaintiff cashed these notes for the honor of his son, although the latter used the name of the firm of *C. W. Newton & Co.* in signing one note, and endorsing the other. Their joint amount is \$10,000, which added to \$3,000 for which *Benjamin Wade, Jr.*, was credited, cash, on the books of the concern, makes precisely the sum which he was bound to contribute to the capital of the partnership.

The plaintiff cannot, in justice to his son's partner, *Newton*, or to the creditors of the insolvent concern in which his son was a partner, be allowed to reclaim, in this form, the amount which he may have advanced to his son, to set him up in a business which has proved unsuccessful.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed; and that there be judgment against plaintiff and in favor of the defendant and appellant, *C. W. Newton*, with costs in both courts.

MERRICK, C. J., dissenting. I do not think the answer to the petition sworn to by defendant, an answer to the interrogatories on facts and articles. In my opinion the case ought to be remanded, to enable defendant to put in more formal answers.

B. B. LOCKHART, Administrator, v. J. J. WALL, Administrator.

There is no law which renders an administrator personally liable for a debt of his intestate, on his mere neglect to comply with an *ex parte* order of the Clerk to file his account.

APPEAL from the District Court of the Parish of Livingston, *Wilson, J. W. E. Walker*, for plaintiff. *C. J. Bradley*, for defendant and appellant.

MERRICK, C. J. In 1855, the defendant, as administrator of *Samuel Patterson*, deceased, having \$521 38 to distribute to the creditors, filed a tableau of distribution.

The privileged claims, including the \$1000 allowed by law to the widow and minor children amounted to over \$1200.

The mortgages exceeded \$4000, and ordinary claims were \$1419 69. The plaintiff was classed as a mortgage creditor by tacit mortgage for \$300. This tableau of distribution was homologated by the Clerk June 7th, 1856.

On the 12th day of June, 1857, the defendant filed a second account and tableau of distribution, wherein he showed (after certain payments) a balance of \$824 63, which he prays might be applied to the payment of the privileged debts. The widow filed an opposition claiming to be paid, by preference to all other debts, the sum of one thousand dollars. The opposition was sustained by the District Court. From this decree the administrator, in the month of May, 1858, took an appeal returnable to the present term of this court.

In July the plaintiff filed his petition and obtained an *ex parte* order from the Clerk upon the defendant to file an account of his administration within ten days after notice, allowing an additional day for each ten miles his residence may be from the court-house. The plaintiff had, two or three days previously, also caused a notice of the order of the Clerk homologating the account of 1855 to be served upon the defendant. This notice did not purport to be a copy of the order itself, but was a notice apparently composed by the Clerk addressed to the defendant. The Sheriff, in his return, after stating the manner in which he served the notice, certified further, "That the said *Wall* did not inform me at the time of service whether he had sufficient funds on hand to pay the claim referred to in said notice or not, but stated he did not think said claim ought to be paid in preference to the rest of said claims due by the estate."

After the delay fixed by the Clerk in his *ex parte* order had expired, the plaintiff instituted the present action to make the defendant personally liable for failing to file the account, and for failing to inform the Sheriff whether he had funds to pay the debt.

The judgment of the lower court was in favor of the plaintiff for \$300 and five per cent. interest from 3d September, 1855, but refused him an execution until he had previously filed a bond with the Clerk, conditioned that the defendant should not be damaged by any judgment which this court might render in the matter of the succession of *Patterson* already referred to.

Defendant appeals.

We are not aware of any law which renders an administrator personally liable for the debt, on his mere neglect to comply with the *ex parte* order of the Clerk

LOCKHART
v.
WALL.

to file his account, and as the law has not denounced the penalty claimed, we cannot maintain this ground as the basis of the action.

So far as it concerns the notice of the Clerk's order homologating the account, it may be observed, that the plaintiff was as fully advised of the condition of the estate as the defendant, and it is quite evident that this notice was not served for the purpose of ascertaining the condition of the funds in the hands of the administrator. If this had been the object, it could have been much better attained on a simple motion. Phil. Rev. Stat., p. 2, sec. 3. It seems to us it could have no serviceable object but to entrap the defendant by any incautious reply he might make to the Sheriff charged with serving the notice. And on such a reply, it seems he has been condemned to pay this debt, when from both accounts rendered by him, which are unopposed by the plaintiff, it appears that the funds in the hands of the administrator are insufficient to pay the privileges, and that the plaintiff has no claim in virtue of any decree to any part of the same.

We must, therefore, look into the proceedings, and see if the defendant has become personally bound for this debt. We suppose this proceeding to be commenced under Articles 1053, 1054, 1055, 1056 and 1057 of the Code of Practice. An examination of these Articles shows, that the judgment there spoken of is one regular in form against the administrator, condemning him at least to pay the debt in the due course of administration. Now, the order of the Clerk homologating the account is not a judgment in the sense of those Articles. The only proper subject of the order was the sum of \$521 38 $\frac{1}{2}$, which the administrator was ordered to distribute in effect to the privileged creditors. See *Hickman v. Flenniken*, 12 An. 268. There was no decree against the administrator to pay over any other sum of money to the plaintiff or any one else; for the Clerk was without judicial power to do more than homologate the account. As, therefore, the defendant held no judgment ordering the administrator to pay him any sum of money, the notification of the Clerk's order homologating the account was an idle ceremony which could not produce the serious results ascribed to it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed, and that there be judgment on the present demand in favor of the defendant as in case of non-suit, the plaintiff paying the costs of both courts.

VOORHIES, J., absent.

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MRS. AGLAÉ BRINGIER, Administratrix, v. MARTIN GORDON, Administrator.

The evidence of a single witness to establish acknowledgements of indebtedness on the part of a deceased person, is held to be the weakest species of evidence known to the law, and will be received with disfavor. Such evidence held in this case to be insufficient to defeat the plea of prescription.

An action for the recovery of money loaned is prescribed by three years.

APPEAL from the District Court of the Parish of Ascension, *Duffel, J. J. H. Ilsley*, for plaintiff and appellant. *Durant & Hornor*, for defendant.

LAND, J. This suit is instituted by plaintiff, as administratrix of the succession of *M. D. Bringier*, and in her own individual right, to recover from

the succession of *H. B. Trist* the sum of one hundred and twelve thousand four hundred and ten dollars and twenty-one cents, with interest, at the rate of eight per cent. per annum, from the 15th day of May, 1849.

The suit is founded on a notarial act of *indebtedment* in the sum of twenty thousand dollars, and on numerous promissory notes given for principal amounts, and the interest thereon, forming, as it were, three classes of securities.

First. The notarial acknowledgement mentioned.

Secondly. Promissory notes given for principal amounts.

Thirdly. *Coupons* or interest notes upon the whole amount of indebtedness, including the twenty thousand dollars acknowledged in the act.

The defendant pleaded a general denial, and the prescription of three, five and ten years.

It is sufficient to say, that all the promissory notes were prescribed by the lapse of five years, prior to the commencement of this suit, in July, 1857, and that plaintiff seeks to avoid the effect of this plea by proving an interruption of prescription as to some of the notes, and a renunciation as to others in June, 1850, by a specific acknowledgment, and afterwards, in 1854, by a general acknowledgment of *H. B. Trist*.

The evidence offered consists of the verbal admissions or acknowledgments of the deceased, to a single witness, made at a particular time and place, when the deceased and witness were alone.

The impossibility of contradicting a witness, under such circumstances, and his entire immunity from temporal punishment for false swearing, have induced the courts to receive such testimony with disfavor, and to declare it the weakest species of evidence known to the law. *Succession of Segond*, 7 R. 112; 10 L. 355; 2 R. 299; 6 A. 763.

The rule is general, and so well founded in reason and justice, that the high character of a particular witness cannot be permitted to form an exception to its general application.

To prevent frauds and perjuries, the Legislature, in 1858, passed an Act forbidding absolutely the introduction in evidence of the verbal acknowledgments of persons deceased, in cases of this kind. *Acts of 1858*, p. 148.

Independently of this statute, we have no hesitation in deciding, upon the authority of the previous decisions of this court, that the testimony on which plaintiff relies is insufficient to avoid the plea of prescription filed in this case.

The prescription of ten, and not five years, under Article 3508 of the Civil Code, is applicable to the debt of twenty thousand dollars acknowledged in the notarial act.

This debt became due in March, 1847, and was acknowledged by *H. B. Trist* in a subsequent act, in 1848, to be still due and owing, and was not therefore prescribed at the date of service of citation, in this case, in August, 1857.

This debt by agreement in writing bore interest at the rate of nine per cent. per annum. But as the interest was separated from the principal, and separate notes given therefor, up to the 1st of May, 1849, and these notes have been prescribed, interest can only be allowed from the 15th of May, 1849, at the rate of eight per cent. per annum, as claimed in the petition.

In addition to the notarial acknowledgment and promissory notes, the plaintiff also sues on a receipt for the sum of six hundred dollars, dated 8th of February, 1844, signed by *H. B. Trist*.

BRINGER
v.
GORDON

This receipt is only the evidence of an advance, or loan of money, and the action for its recovery is prescribed by the lapse of three years. C. C. 3503. Its consideration was proved by parol.

The judgment of the lower court was in favor of the plaintiff, for the sum of twenty thousand dollars, acknowledged in the notarial act, with interest at the rate of eight per cent. per annum from the 15th of May, 1849, and for the sum of six hundred dollars, with five per cent. interest from the 17th of April, 1852, and rejected all the other claims of plaintiff, on the plea of prescription. This judgment is correct, except so far as it condemns defendant to pay the six hundred dollars mentioned in the receipt, and interest thereon.

It is, therefore, ordered, adjudged and decreed, that, so far as the judgment of the lower court condemns the defendant to pay the sum of six hundred dollars, mentioned in the receipt, and interest thereon, it be reversed, and that said claim be rejected, and that said judgment be, in all other respects, affirmed, with costs in both courts.

MERRICK, C. J., concurring. Considering the large amount in controversy, I concur, although I think the testimony of a single witness may be sufficient to show the interruption of prescription, where it occurred previous to the recent statute.

VOORHIES, J., absent.

W. A. UNDERWOOD v. F. LACAPÈRE—L. RUSH, P. C. BOURGEOIS and
J. R. WHITE, Warrantors.

In a sale of a slave mother and her infant child, where it appeared by the evidence that the child was only sold with the mother on account of its tender age, and added nothing to the value of the mother—*Held*: That the vendor was not liable in warranty for the value of the child, which his vendee had been compelled to pay as warrantor in a subsequent sale of both mother and child.

Costs follow the judgment, and an exception to the rule cannot be made in the case of a warrantor called in to defend the title of his vendee, and who is decreed not to be liable for the return of any part of the price he had received.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
C. Dufour and Beatty & Bush, for Mrs. Bourgeois, appellant. Johnson & Denis, for White, appellee.

BUCHANAN, J. The main question presented by this appeal is, whether *Mrs. Bourgeois* is entitled to any money judgment against her warrantor, *White*, on account of her slave boy, *William*, her vendee having been evicted, and having obtained judgment against her for his estimated value at the time she sold him.

When *White* sold the boy to *Mrs. Bourgeois* he was an infant but six weeks old, and was sold together with his mother *Peggy* for the sum of eight hundred dollars. But the evidence shows that the child was of no appreciable value at that age, and, instead of enhancing, really diminished the then value of the mother. The inference is, that no part of the eight hundred dollars was paid by *Bourgeois* for the child, but he was acquired for nothing, being inseparable from his mother, who was sold for eight hundred dollars. Between four and five years afterwards, *Bourgeois* sold the boy, *William*, and his mother, *Peggy*,

for one thousand dollars. At this time, the boy is estimated to have been worth two hundred and fifty dollars, and the mother seven hundred and fifty.

UNDERWOOD
v.
LACAPÈRE.

Lacapère, Bourgeois' vendee, upon being evicted of the boy, was, therefore, entitled to recover of *Bourgeois*, in warranty, two hundred and fifty dollars, the price which he paid.

But *Bourgeois* having paid nothing for the boy to *White*, the author of his title, can recover nothing as his price.

It is true, the vendor whose vendee is evicted, is bound, not only for the restitution of the price, the fruits, &c., recovered by the real owner, and the costs of suit, but also for the damages when the vendee has suffered, if any, besides the price that he has paid. C. C. 2482. But here no damages are proven. *Bourgeois* has only had to refund the two hundred and fifty dollars which she received for a boy who cost her nothing. We adhere to the rule established in the case of *Burrows v. Peirce*, 6th An. 298, that the loss of profits by reason of an accidental increase in value of the property sold, after the sale, is not recoverable by the evicted vendee, in the recourse upon his warrantor. And the fact, that the vendee of a slave has afterwards sold him for a higher price than he gave, does not, upon eviction, authorize him to recover the difference from his vendor, as damages.

The District Judge, therefore, properly ruled that no claim had been established against *White*, either for a price, or for damages.

Judgment affirmed with costs.

SAME CASE—ON A RE-HEARING.

BUCHANAN, J. The institution of two separate petitory actions, at different periods of time, one for the slave woman, *Peggy*, and one for her child,—the mother and child having previously passed, by several distinct conveyances, for one price in each conveyance, without a separate estimation of the relative value of each,—has produced a complication in the facts, which gives some color to the complaints made by the warrantor, *Mrs. Bourgeois*, in her petition for re-hearing.

We have, therefore, accorded the re-hearing, and have carefully reconsidered the case in all its bearings. It results from our researches, that *Mrs. Bourgeois* having purchased the woman, *Peggy*, and her infant child from *White*, for eight hundred dollars, and having, some years thereafter, resold the same woman and child to *Lacapère*, for one thousand dollars, was sued in warranty for the woman alone, and cited her vendor, *White*, in warranty in the same suit. *Mrs. Bourgeois* was condemned, as warrantor, to pay *Lacapère* seven hundred dollars, but neglected to have judgment entered up, upon her call in warranty.

Perhaps she was unable to do so, *White* being only in court, in that suit, as an absentee, by a curator *ad hoc* appointed by the court to represent him. Whatever may have been the reason, the fact is that there was no judgment upon that call in warranty. Subsequently, *Mrs. Bourgeois* was cited a second time in warranty of *Lacapère's* title; but this time, to the child of *Peggy* alone, which had not been sued for in the first suit. She cited her vendor, *White*, to warrant her also in this suit. *White* was served personally with citation and joined issue. Judgment was rendered against *Mrs. Bourgeois* in this suit, for two

UNDERWOOD
v.
LACAPÈRE.

hundred and fifty dollars, the estimated relative value of the child at the time of the sale from *Mrs. Bourgeois* to *Lacapère*, and there was judgment in favor of *White* upon the call in warranty of *Mrs. Bourgeois*, the court being of opinion, under the evidence, that the child possessed no appreciable value at the time of the conveyance by *White* to *Mrs. Bourgeois*. This judgment was affirmed by our decree already pronounced herein. And we are unable to perceive that we have wronged *Mrs. Bourgeois* by that decree.

In this suit, nothing was in controversy but the child, although it is true that child constituted one of several objects which had passed by the same conveyance. But it appears from the evidence, that the child added nothing to the value of the other article sold, the mother, at that time. It was necessarily included in the conveyance, however, because the humane provision of our law is imperative, that the slave mother cannot be sold separately from her offspring of tender age.

But it seems from the statements of the petition for re-hearing, that *Mrs. Bourgeois* settled her claim against *White* in the first suit out of court, and received from him for the woman *Peggy* the same amount, seven hundred dollars, which she had been condemned to pay to *Lacapère*. Nothing of this appears in the record; but we take the statement of counsel to be correct. If so, it is possible that *Mrs. Bourgeois* will have a remedy for further indemnity against *White*. For it is now decided, contradictorily with *White*, that the whole of the price paid by *Bourgeois* to *White* (\$800) was for the woman *Peggy* alone. And it may be argued, that in the first suit, *Mrs. Bourgeois* could not have recovered more than \$700 from *White*, because she had only been condemned to pay \$700. But that now, having been condemned to pay an additional sum of more than \$100, she has an additional claim for the balance of the price by her paid. We throw out these observations without expressing a decided opinion. But we are clear that we cannot give *Mrs. Bourgeois* relief at this time, and with the proofs before us.

Upon the question of costs, we perceive no more reason to change our previous judgment. Costs follow the judgment and are to be paid by the party cast. C. P. 549; *Bolton v. Harrod*, 10 M. R., 115.

Let our former judgment remain undisturbed.

VOORHIES, J., absent.

STATE v. JAMES REONNALS.

Where a gun was taken by the accused in another State, its sale in this State might be proof, not of a larceny here, but that the original taking was felonious. Its sale here would not be in violation of any law of this State; and a party cannot be tried here for a crime committed in another State. On an indictment for embezzlement, the jury cannot find the accused guilty of a breach of trust. Where the jury have written their verdict upon the indictment, but it is recorded differently, the verdict as written by them shows what was their meaning and intention.

APPEAL from the District Court of the Parish of East Feliciana, *Haralson*, J., presiding. *N. F. Kernan*, for the State. *D. B. Sandford*, for defendant. *COLE, J.* The accused having been found guilty of breach of trust, was sen-

tenced to imprisonment at hard labor in the penitentiary for one year, and has appealed.

In relation to the bill of exceptions, motion for arrest of judgment and other defences it is sufficient for our present decision to say, that if the gun were taken by appellant in the State of Mississippi, the sale of it in Louisiana might be proof, not that he committed larceny in the latter State, but that the object of his taking it in the former was to steal it.

The mere sale of the gun in Louisiana would not be in violation of any law of this State.

If any crime against the rights of property were committed, it must be supposed to have been perfected in Mississippi; it cannot be conceded that the gun was taken without the permission of the owner in Mississippi, and that the intention to steal it was only conceived and perfected when it was sold in Louisiana.

If the gun had been loaned to the accused in Mississippi and he had returned it, and afterwards took it in presence of the owner, without his consent, but without any objection on his part, defendant would then have apparently committed a trespass and not larceny.

The subsequent sale of the gun in Louisiana would, however, tend to show that the intention in taking it was to steal it, and, in absence of other proof, it would be more proper to suppose that the intention to steal was perfected at the time the gun was taken, than after the accused had passed into another State. It is to be supposed that when he left the borders of Mississippi with the gun, that the intention of stealing it had been already formed and perfected. If so, the accused cannot be tried in this State for a crime committed in Mississippi.

The indictment charges him with having embezzled a gun, and the jury found him guilty of a breach of trust. The verdict is not responsive to the charge.

It is true that the verdict was recorded differently, being as follows :

"We, the jury, find the accused guilty in manner and form, as he stands charged in the indictment," but the indorsement upon the indictment is as follows : "We, the jury, find the accused guilty of breach of trust, and recommend him to the mercy of the court."

This shows what was the intention of the jury, and the verdict ought not, under such circumstances, to be sustained. This case is not covered by section 83 of the Act relative to criminal proceedings. Phillips' Dig. p. 175.

It is, therefore, ordered, adjudged and decreed, that the verdict of the jury be set aside and the judgment of the court thereupon be avoided and reversed, and that a new trial be granted to appellant, and that this case be remanded for further proceedings according to law.

VOORHIES. J., absent.

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ANN CAHILL, Wife of CONWAY, v. CATHARINE CONNELLY, Administratrix and Tutrix.

Two lots adjoining each other were sold at public auction according to a figurative plan exhibited at the time, and referred to in the acts of sale which were executed, pursuant to the adjudication; this plan represented an alleyway running across the rear of both lots—*Held*: That although the sale conveyed the soil of the alley, which was requisite to make out the depth given to the lots in the title, a right of way was established in the alley as a servitude.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
Budd & Lambert and *E. Bermudez*, for plaintiff. *M. M. Cohen*, for defendant and appellant.

BUCHANAN, J. This is a dispute about the right to use an alley in the rear of the two houses owned by plaintiff and defendant respectively, and which front on Julia street, at the corner of Philippa, in the city of New Orleans. The alley is three feet wide, and runs across the two lots of plaintiff and defendant. It has a gate opening upon Philippa street. Both the lots, with the buildings thereupon, belonged to the estate of *Mrs. Bannister*, and were sold at a probate sale of her effects, according to a plan which was exhibited at the public auction, and referred to, as annexed, in the acts of sale executed by a Notary Public, in conformity to the adjudications. That plan is in evidence, and a number of surveyors, examined in relation to it, have not been found to agree in regard to its indications; some being of opinion that the alley was intended to be figured as a common alley, while others were of a contrary opinion.

The plaintiff is the owner of the lot which is furthest removed from Philippa street, and is, of course, at the bottom of the alley. The defendant is bounded laterally by Philippa street, and is, of course, at the entrance of the alley. The latter has closed up the alley on a prolongation of the line which, upon the plan, divides the two lots; which line, we have observed, stops, upon the plan, at the alley, and does not cross it.

It appears to us that, as was remarked by one of the witnesses, the depth given to the two lots in the titles, is conclusive of the question before us. That depth is the same in both cases, namely, sixty-five feet seven inches. But that depth cannot be had, without including, for both lots, the middle of the alley, which is three feet. Both titles, then, conveyed the soil of the alley; and the reference in the titles to the figurative plan of *Dunbar*, which depicted the said space of three feet, as a passage of communication from lot number two (plaintiff's lot) to Philippa street, constitutes a title to a servitude or right of way to Philippa street, in favor of lot number two.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

VOORHIES, J., absent.

CHARLES H. DAVIS, Husband, v. TENNESSEE ROBERTSON, Wife.

There may be cases in which the husband ought not to be allowed interest on debts of the wife paid by him, as where the payment has been fraudulently deferred by him for the purpose of injuring her; but where the debt has been paid in good faith, the interest, as an incident of the debt, is chargeable to the person who owes the same.

By giving the husband the administration of her paraphernal property, the wife relieves herself of her portion of the marriage charges.

In the absence of proof of the wife's separate administration of her paraphernal estate, it will be presumed to have been under the management of the husband.

A PPEAL from the District Court of the Parish of East Baton Rouge, *Wilson, J.*, presiding. *A. M. Dunn*, for plaintiff. *T. G. Morgan* and *S. Mathews*, for defendant.

MERRICK, C. J. This case was brought to liquidate the sums due the community by the separate estate of the defendant. The community was dissolved by a suit for a separation of bed and board instituted by the plaintiff against the defendant, and was renounced by her by an act in due form.

Since the institution of the present suit, she has departed this life, and her heirs have been made parties. The cases of *Robertson v. Davis*, 9 Ann. 268, and *Kelly v. Robertson*, 10 An. 303, were connected with this litigation.

In the lower court, the case was referred to an auditor, to state an account between the parties. Both parties filed oppositions to the account, which was amended, and a judgment was rendered in favor of the plaintiff for the sum of \$25,372 09, and five per cent. interest thereon, from the 15th day of May, 1858, until paid. The present defendants appeal.

Eight items of the auditor's account, amounting to the sum of \$14,466 41, and the sum of \$3,398, allowed by the District Judge, in addition to the auditor's account, (a total of \$17,864 41,) are contested before this court.

I. The first three items opposed, are the amounts of interest paid on the separate debts of the wife. Her heirs contend, that as the husband had the benefit of the estates of the wife, which were under his administration, it was his duty, as an usufructuary, to keep down the interest; that he ought not to be permitted to enjoy her estates, and allow interest to accumulate upon her debts.

Possibly, there may be cases in which the court will refuse to allow the husband interest, where it was evident that payments are fraudulently deferred for the purpose of injuring the rights of the wife. But where debts are paid in good faith, the interest must be considered as but an incident of the principal obligation which it follows, and chargeable to the person owing the debt.

If the property of the wife was under the administration of the husband during the community, so was also his own property, and she had the right to one-half of the community on its liquidation, had she chosen to accept it. By giving the husband the administration of her paraphernal property, she relieved herself from her portion of the marriage charges. C. C. 2366, 2409.

II. The account paid the Picayune for subscription to that paper, and \$42 96, were admitted before the auditor, and cannot be contested in this court.

III. It is next objected, that the District Judge erred in allowing \$1,705 for ameliorations made upon the defendant's plantation, during the existence of the community. There is some conflict of testimony on this branch of the case.

DAVIS
v.
ROBERTSON.

Taking the doctrine of this court, as settled in 4 Rob. 278, 6 Rob. 508, and 6 An. 634, as the rule governing the case, it will not enable us to say that the District Judge erred in his estimate.

IV. There is no ground to suppose that the decree in the suit of *Tennessee Robertson* against the plaintiff, 9 An. 268, awarding her the administration of her paraphernal property, can have the effect of the thing adjudged, so as to deprive the plaintiff of the horses and mules, belonging to the community. For although she alleges that she owned thirty mules, &c., at the same time, and in the same petition she averred, that there were twenty horses and mules belonging to the community. The latter were not transferred to her separate estate by the decree. And the same must be said of the new wagon, carriage, and household furniture. She had enjoined the defendant from disposing of the community, and these very effects are mentioned in the inventory, caused to be taken by her, as as property of the community.

V. Defendants are charged with 1,100 bushels of corn and 50 acres of plant cane taken possession of when the deceased resumed the administration of her paraphernal property.

It is contended that her heirs ought not to be charged with this amount, because plaintiff must have received an equal amount when he commenced to administer the plantation, and that the one ought to compensate the other.

This view seems equitable, and, as we shall give the plaintiff the benefit of one-half of the crop of 1849, and the proof is uncertain as to the corn and plant cane that year, we shall deduct but one-half of these two items. The consent of the wife to use the corn and plant cane does not deprive her of the right to require compensation.

VI. The plaintiff was married to the deceased in July, 1849. The proof is, that the crop upon her plantation was then half made. The plantation was under the charge of the defendant, *W. J. Sharpe*, as overseer.

The deceased, in her suit for separation of property, filed in 1852, and sworn to in order to obtain an injunction, alleged that the crops upon the plaintiff's cotton plantation in West Feliciana and her separate plantation, for the years 1849, 1850 and 1851, belonged to the community. Subsequently, however, she amended her petition, and alleged that the crop of 1849, on her plantation, did not belong to the community. The District Judge allowed the plaintiff one-half of the crop of 1849.

There would be no difficulty on this branch of the case, but the testimony of the plaintiff in another case is produced, in which he says the management of the property was given him in January, 1850. But in another place he says, he frequently transacted business for the plantation in 1849, and it is shown that he had five or six of his own negroes engaged in taking off the crop, and it is not shown that the deceased exercised any control over the place after her marriage, until her suit for separation, and such appears to have been the opinion of this court in the suit for the separation of property. 9 An. 269.

As the property was not shown to be administered by the wife, separate and alone, it must be considered as under the management of the husband. C. C. 2362, 2375, 2376.

Had the crop been held separate, the deceased would have been bound for her proportion of the marriage charges. The debts contracted during this period were community, and we cannot say that the Judge erred in holding one-half of the crop of 1849, as community; but certain expenses incurred in making the crop,

must be deducted. The amount should be \$2,806 40. For example, one-half of the overseer's wages should be deducted, as the plaintiff has credit for the same in another form.

DAVIS
v.
ROBINSON.

VII. The auditor allowed \$7,456 77, being eight per cent. to compensate plaintiff for hires, advantages and damages. This sum is sought to be justified, on the ground that plaintiff is entitled to be paid the hire of the mules belonging to the community, and to indemnify him for the damages sustained by the injunction, which prevented him from disposing of the effects of the community and paying the debts.

He alleges, in argument, that more than \$5,000 interest has accrued on two of these debts, while he has been kept from making the assets of the community available. The injunction continued from the 15th day of January, 1852, to April 3d, 1854. The assets of the community amounted to \$15,876 40. But a portion consisted of the claim due by the separate estate of the deceased to the community, and we do not suppose the injunction deprived the plaintiff of available means of more than \$12,000, including the horses and mules. We think \$2,119 99 will cover the special damages.

We cannot concur in the estimate made by witnesses for the hire of the mules.

The community was dissolved on the 27th day of November, 1856, and from this date, the sums due by the deceased to the community, exclusive of \$2119 99 allowed as damages, should bear interest at five per cent., instead of the large sum allowed by the judgment of the lower court. The answers of the deceased to interrogatories of *Kelly, Frazier & Co.*, ought to have been excluded.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed; and we do now order, adjudge and decree, that the plaintiff do recover and have judgment against said *William J. Sharpe, Mrs. Leodocia R. Sharpe*, widow of *O. P. Davis, Mrs. Elizabeth J. Sharpe*, wife of *Samuel Matthews*, and *Ernestine R. Davis*, a minor, represented by *Richard A. Stewart*, her under-tutor, each for their virile share of the sum of seventeen thousand nine hundred and ninety-three dollars and eighty-one cents, with legal interest on the sum of \$15,873 72, from the 27th day of November, 1856, until paid. And it is further ordered, that the plaintiff pay the costs of this appeal, and the defendants the costs of the lower court.

VOORHIES, J., absent.

U. H. DUDLEY v. T. W. TILTON.

A proprietor has no right to alter the elevation of the banquette before his house in the city of New Orleans, without having first obtained the consent of the municipal authorities.

The violation of a right to the use of property is sufficient to maintain an action without proving damages.

A PPEAL from the Third District Court of New Orleans, *Duvignaud, J.*
Benjamin, Bradford & Finney, for plaintiff. *E. H. Durell*, for defendant and appellant.

COLE, J. The petition of plaintiff, a resident of the city of New Orleans, represents that he is owner of a lot of ground situate in the square bounded by Canal, Rampart, Common and Philippa (now Dryades) streets; that in the year

14	283
45	432
14	283
51	533
14	283
104	88
14	283
108	344
107	265
14	283
109	1074
14	283
111	69
14	283
113	858
113	871
14	283
118	1005

DUDLEY
v.
TILSON.

1836 he erected on said lot a three story brick dwelling-house, which he has since occupied with his family as his domicile, and that in front of the house he laid down a banquette or sidewalk, in pursuance of the city ordinances, according to the grade adopted by the city and to the lines given by the city surveyor, and upon a level with the sidewalk in front of the adjoining houses.

He further shows that defendant having become the owner of the adjoining lot, which forms the corner of Canal and Philippa (now Dryades) streets, is about to elevate the banquette or sidewalk in front of his house, and to lay down a banquette ten inches or thereabouts above the level of the sidewalk of petitioner, and is now at work in making the elevation; that the sidewalk so raised immediately adjoining that of petitioner, will be a serious impediment as well as constant annoyance in the path of petitioner on his way to and from his dwelling-house, as also a public obstruction and nuisance; that the sidewalks in front of petitioner's house cannot be raised to a corresponding level with the projected sidewalk of defendant without much cost and serious damage to the dwelling of petitioner, which was built upon an elevation corresponding to the existing level of the sidewalk and street in front; that the defendant has no legal authorization to raise the level of his sidewalk, and in so doing he is acting in violation of the rights of petitioner as well as of the public.

He prayed for an injunction to restrain the defendant from raising the level of his sidewalk during the pendency of this suit, and after due proceedings that it be made perpetual and for damages.

There was judgment perpetuating the injunction and ordering the defendant to take up the sidewalk, and to erect it agreeably to the level and grade to be given by the City Surveyor.

Upon the trial the plaintiff did not attempt to prove that the action of defendant in the premises had or could cause him any injury, or that it was either a public or private nuisance, and the only questions in the case are, whether defendant has the right to change the level of his sidewalk without permission from the proper authority, and if he has not, whether plaintiff, as a citizen of New Orleans, has the right of action to inhibit him from doing it.

The following ordinance was approved the 6th of October, 1815, and is to be found on page 13 of a "General Digest of the Ordinances and Resolutions of the Corporation of New Orleans," published in 1831:

"Whenever any banquette, counter-banquette, or foot-way is to be repaired or made anew, no person shall make any alteration in the order established for the lineation or leveling of the said foot-way or banquette and counter-banquette, unless specially authorized by the Mayor and City Council; and under the obligation that the owner or tenant of the house in question, shall, if necessary, apply to the City Surveyor, to receive from him the lineation and leveling to be observed in the execution of said work."

In Leovy's compilation of "The laws and General Ordinances of the city of New Orleans," an ordinance is found which describes and fixes the duties of the Surveyor of the city, and makes it his duty to furnish the Common Council with all the plans, estimates and other information appertaining to his department, which the Council may require, and "to give the lineations of all the streets of the city, as well as the lineations and grades of the sidewalks, wharves, levees, bridges and streets, in accordance with the ordinances of the Common Council."

It is admitted by defendant, that "such is now, and such has ever been the duty of the City Surveyor; and at no time has he had the power to establish, in

accordance with his own discretion and good judgment, the grade of either street or banquetta."

It appears to us to be immaterial whether or not the Act of 1815 is repealed by the ordinance of May 21, 1857, which repeals all ordinances or resolutions passed prior to the consolidation of the city, in 1852, of a general nature, and not contained in Leovy's compilation of the laws and general ordinances of the city of New Orleans.

It is clear that the levels of the banquettes of the parties to this suit were fixed prior to the repeal of the law of 1815, if it has been repealed; and it cannot be admitted that a private citizen has the power to alter the elevation of the banquetta before his house, without being authorized by the public authorities.

If a private citizen can do this in the absence of any prohibitive ordinance, it must be by an inherent right in the citizen to do whatever is not forbidden.

When, however, one places himself within the limits of a municipal corporation, he cannot exercise what might be deemed an indefeasible prerogative beyond the bounds of government and population, if the possession and use of such right might destroy that of citizens to the use of public things. C. C. 479.

Article 444 of the Civil Code declares, that public things are those, the property of which is vested in a whole nation, and the use of which is allowed to all the members of the nation.

"Things which are for the common use of a city or other place, as streets and public squares, are likewise public things." C. C. 445.

"Things which belong in common to the inhabitants of cities and other places, are of two kinds: Common property, to the use of which all the inhabitants of a city or other place, and even strangers, are entitled in common, such as the streets, the public walks, the quays, &c." C. C. 449.

As the streets are common property, every citizen may be considered in a certain sense as a proprietor thereof, and no particular citizen has the right to interfere with the level and elevation of the streets without the permission of the majority of the inhabitants through their representative, the municipal corporation.

If one citizen has the right to elevate his sidewalk five inches, another may raise his ten or twenty inches, or another may depress his a certain number of inches; in fact, there would be no limit to the changes that might be made in the level of the banquettes. Every proprietor might have his at a different elevation from that of any other, so that it would be impossible to traverse the streets with convenience, pleasure or safety.

We conclude, therefore, that defendant has not the power to alter the level of his sidewalk without permission from the municipal authorities of the city of New Orleans.

The only question that remains is, whether plaintiff, as a citizen of New Orleans, has the right of action to inhibit defendant from changing the level of his sidewalk, on the ground that it is a violation of his rights.

When the rights of property are interfered with, the proprietor is not bound to prove damage in order to maintain his action against a trespasser. Each of the inhabitants of a city has as much right to the use of a street as a proprietor has to that of his private estate.

Each citizen has then the right of action to prevent a proprietor from changing the sidewalk before his house, because it is a violation of his right of property in the use of the sidewalk that a private citizen should have the authority to alter the level of the sidewalk without permission from the municipal government.

DUDLEY
v.
TILTON.

In *Allard et al. v. Lobau*, 2 M. N. S. p. 319, Judge Porter, being the organ of the court, in speaking of public things and the use thereof, said: "The use thus granted to each individual, of the things just mentioned, by the public, who are the owners, appears to us to confer the right of enjoyment in as full and complete a degree as that which would be derived from the concession of a private proprietor, on soil that belonged to him. If there is any difference we are unable to perceive it, and in either case we conceive, that if the party on whom this privilege is conferred, or to whom this use is accorded, be obstructed in the exercise of it, he is well found in considering it as a private injury; for it prevents him from enjoying a personal right."

In this case the court also held, that an Act of the Legislature punishing criminally the violations of the rights of the public to certain common property, did not take away the right of action of a private individual in a civil proceeding.

It is not necessary that plaintiff should have suffered actual damage, it is sufficient to maintain his action that defendant proposes to violate his rights.

The 296th Article of the Code of Practice provides, that "injunction or prohibition is a mandate obtained from a court, by a plaintiff, prohibiting one from doing an act which, he contends, may be injurious to him, or impair a right which he claims."

Art. 298 of the Code of Practice also declares, that the injunction must be granted "when the defendant is in the act of building or constructing some work, tending to obstruct a place of which the public has the use."

When a person without authority is changing, or proposes to change, the level of the sidewalk in front of his house and make it higher than that of his neighbors, he may be said to obstruct a place of which the public has the use.

In *Akin et al. v. Bedford et al.*, 5 N. S. p. 501, Judge Porter, delivering the opinion of the court, said, that "a party may always claim the aid of the laws of his country to prevent a wrong, which, if inflicted, he could claim damages for. These laws would be lamentably defective if they could not prevent injuries as well as punish them."

It is clear that a violation of a right to the use of property is sufficient to maintain an action without proving damages, for if a citizen can interfere with the established order of a street in one way, he could in another, and the citizens are not obliged to wait until damage is done, but they can resist at once the assumption and usurpation of the right by a private individual to interfere with the order of property, the use of which belongs to the public in general.

If they could not do this, then individuals might make such alterations as would materially impede the commerce of the city and injure the trade of merchants. They could so change the levels of the sidewalks as to prevent persons from passing without great inconvenience, and they could thus injure the trade of a merchant very essentially before the action could be brought.

Even if a party should prove that his alteration was not a public injury, this would not justify him, for he assumes to effect that good by the usurpation of a right; and the citizens are interested to thwart the illegal assumption of authority which may produce so much evil if allowed in general.

In *McDonogh v. Calloway et al.*, 7 Rob. p. 445, the court held, that an injunction "is as effective in enforcing a right as in preventing a wrong or injury."

In *Herbert v. Benson*, 2 A. p. 771, the court held, "that public places within the limits of a corporation cannot be appropriated to private use, and that individual corporators, as well as the officers of the corporation, have the right to

prevent such appropriation, and to sue for the demolition and removal of buildings erected on them by individuals."

In *Bruning v. New Orleans Canal*, 12 An. p. 543, this court said, "we are not disposed to say, because the decision of this cause does not require it, whether the initiative in the abatement of the nuisance of an obstruction of the public highway is exclusively reserved to the City Council, or whether proceedings might not be commenced for that purpose by individual citizens who were aggrieved by the nuisance. But we assert, without hesitation, the right of any citizen so aggrieved to an action in damages against the offending party." *Durant v. Riddell*, 12 An. 746.

According to the first and third laws of the 22d title of the 3d Partida, any individual may forbid the erection of a house or other edifice in public places. *Vide Mayor, etc., of New Orleans v. Gravier*.

It is ordered, adjudged and decreed, that the judgment of the lower court be affirmed, with costs.

VOORHIES, J. absent.

DUDLEY
v.
TILTON.

14 287
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SOWLE & WARD v. C. W. POLLARD & Co.—G. W. HELME, Defendant
in rule.

The Art. C. P. (as amended) which requires a delay of ten days before an execution shall issue, in the first district, is in the interest of the defendant and for the purpose of protecting his right to a suspensive appeal. C. P. 624; Acts 1843, p. 40. This right he may at any time waive, and a valid execution may issue immediately. C. P. 567. If he suffers the delay for a suspensive appeal to expire, the premature issuance of an execution does not even give him the right to enjoin. The appellees allowed interest in this case during the delay occasioned by the appeal.

APPEAL from the Third District Court of New Orleans, *Duvignaud, J.*
F. Perrin, for plaintiffs. *H. H. Taylor*, for defendant in rule and appellant.

MERRICK, C. J. The controversy in this case grows out of a rule relative to the distribution of certain funds made upon sundry executions.

The plaintiffs and appellees held one of the executions issued on the first day of December, 1857, upon a judgment signed November 20th, 1857.

The appellant *G. W. Helme*, held two judgments, one signed the 20th and the other the 27th of November, 1857. On these he issued his executions, the one December 3d, 1857, and the other December 10th, 1857.

The funds in the hands of the Sheriff being sufficient to pay the two judgments rendered November 20th, 1857, the controversy is really between the plaintiffs and *G. W. Helme*, the appellant.

On the question whether the execution issued and levied on the 10th day of December, is not superior to that issued on plaintiffs' judgment and levied on the 1st day of December, 1857, two days before the delay for taking a suspensive appeal had expired, the appellant contends that one creditor cannot claim the benefit of a priority of seizure, unless he complies with the rules of practice relative to the issuing and execution of the writ, and that a party who violates the law, by issuing an execution before the delay has expired, ought not to derive any advantage from this attempt to obtain a preference over the other creditors; privileges from seizures being *stricti juris*.

SOWLE
v.
POLLARD.

To this the plaintiffs and appellees reply, that the objection ought not to be listened to, as coming from the appellant; because he stood by and saw the property sold under this execution with others, and being a third party he cannot now question the regularity of the proceeding and take advantage of the inadvertence of the Clerk and the plaintiffs.

The Article of the Code of Practice, as amended, which requires a delay of ten days before an execution shall issue in the first district, is in the interest of the defendant, and for the purpose of protecting his right to a suspensive appeal. C. P. 624; Acts 1843, p. 40.

This right the defendant may at any time waive, and a valid execution may issue immediately. C. P. 567.

For this delay does not in any manner affect the public order, and as the defendant may voluntarily satisfy the judgment by payment, so also, it would seem, he may ratify an execution issued prematurely, by giving up property for seizure upon it, or voluntarily standing by and seeing the same sold under it. See *Conner v. Copeland*, 3 An. 452, 9 An. 309.

The premature issuing of execution is a mere irregularity, which the defendant may have corrected within the delay for, or after he has taken his suspensive appeal; but if he suffer the delay to expire, it does not then even give him a right to an injunction. *Dayton v. The Commercial Bank of Natchez*, 6 Rob. 20; *Morgan v. Whiteside, curator*, 14 L. R. 280. See also 1 Rob., 497; *Legget v. Potter*, 9 An., 309; *Hatch v. English*, 12 Rob. 136.

The execution was not, therefore, void, because issued before the delay had expired, but it became valid by the expiration of the delay, there being no attempt on the part of the defendant to correct the irregularity.

As the first execution of *G. W. Helme* is ordered to be paid in full, it is a matter of indifference to him whether it is ordered to be paid first or second in rank, and the question does not arise whether one creditor can gain an advantage by his premature seizure, over another creditor who has issued his execution and made his seizure upon a judgment bearing the same date, at the earliest day allowed by law for the same.

For in this case the plaintiffs' execution, if it had been delayed two days longer, would then have been seven days in advance of *G. W. Helme's* second execution. It must, therefore, be held to have acquired its validity at least concurrently with *G. W. Helme's* first execution and seizure, and to take precedence of the execution and seizure made seven days afterwards. The court did not, therefore, err in giving the first two executions preference over the second.

The appellees have prayed an amendment of the judgment in this case, so as to award them interest on their judgment pending the appeal.

As the delay has been occasioned by the appellant, the appellees seem entitled to the correction, and we will order the distribution as of this date, as between the appellant and appellees.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be so amended as to award to *Sowle & Ward* the sum of thirteen hundred and forty-two dollars out of the sum to be distributed, instead of \$1210 21, and that the amount awarded *G. W. Helme* upon his execution in his cause, No. 11,941, be reduced from \$1416 17 to \$1284 37, and that the judgment so amended be affirmed; the appellant paying the costs of the appeal.

VOORHIES, J., absent.

MASTER AND WARDENS OF THE PORT OF NEW ORLEANS v. SHIP MARTHA
J. WARD et als.

The 8th section of the Constitution of the United States, which declares that Congress shall have power to regulate commerce, does not prevent the exercise of such power by the States, as far as is necessary for the police regulations of their domestic commerce, in regard to which Congress has not deemed it expedient to make any regulations.

The Act of the Legislature of 1855, relative to the Board of Master and Wardens, which provides for the payment of services actually rendered or the tender of such services, is not a violation of the clause of the Constitution of the United States which gives to Congress the power of regulating commerce.

The fees allowed to the Master and Wardens are in no sense imposts or duties on imports or exports.

A PPEAL from the Third Justice's Court of New Orleans.

C. Roselius and *M. Hahn*, for plaintiffs. *Gauthier & McPheeters* for defendants and appellants.

COLE, J. The Master and Wardens of the port of New Orleans instituted this action to recover ten dollars for fees of survey, and five dollars for entrance fee.

There was judgment for plaintiffs, and defendant has appealed.

The duties of the Master and Wardens are detailed in the Acts of 1855, p. 489, and in those of 1857, p. 88. By the former, they are obliged, if called upon by the captain of any ship or vessel arriving from sea, to inspect the manner in which the hatches of such ship or vessel were secured previous to the opening thereof for the purpose of discharge, and to be present at the opening of the same. They are also surveyors of damaged goods brought into the port of New Orleans in any ship or vessel, and, with the assistance of one or more skillful carpenters, surveyors of any damaged vessel, and any vessel deemed unfit to proceed to sea. It is their duty, also, to order and direct the sale of damaged goods by public auction.

For these services fees are designated.

By the Act of 1857, a certain supervisory control over pilots, and other duties relative to the pilots, are vested in the Master and Wardens, for which no fees are provided. This control and these duties are contained in sections 4, 5, 13, 15, 16, 17 and 20 of the Act of 1857.

The constitutionality of the Act of 1855 is the only question in the case.

It is contended that it is opposed to the 8th and 10th sections of Article 1st of the Constitution of the United States, which declare that "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," and that "no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," &c.

The creation of a Board of Port Wardens has never been deemed an usurpation of the power of Congress to regulate commerce, within the intendment of the Constitution of the United States.

The statutes organizing and establishing a Board of Port Wardens are of the same class as those relative to inspection, quarantine and pilotage laws, or those for the regulation of the internal commerce of a State. 9 Wheaton, p. 1, *Gib-*

PORT WARDENS
v.
SHP M. J. WARD. *bons v. Ogden*; 11 Peters, p. 102, *City of New York v. Geo. Milne*; 2 Peters, p. 245, *Wilson et al. v. Black Bird Creek M. Company*; 18 Howard, p. 421, *Pennsylvania Bridge Company*.

The 8th section of the Constitution of the United States declares, that Congress shall have power to regulate commerce, but it does not say, it shall have the exclusive power; and in the event it does not think it expedient to exercise this power, there is no prohibition against the exercise of it by the States, as far as is necessary for the police regulations of their domestic commerce.

In *Wilson v. The Black Bird Creek Marsh Company*, the question arose in the Supreme Court of the United States, whether the State of Delaware had the right to stop a navigable creek, through which the tide ebbed and flowed.

The counsel for the plaintiffs in error argued that the right insisted upon came in conflict with the power of the United States "to regulate commerce with foreign nations and among the several States."

Marshall, C. J., delivering the opinion of the court, said: "If Congress had passed any Act which bore upon the case; any Act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks, into which the tide flows, and which abound throughout the lower country of the Middle and Southern States; we should feel not much difficulty in saying that a State law coming in conflict with such Act would be void. But Congress has passed no such Act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question." 2 Peters, p. 252.

In *Cooley v. Board of Wardens of port of Philadelphia*, in which a question arose, whether the laws for the regulation of pilots and pilotage enacted by the State of Pennsylvania were in conflict with the power of Congress over commerce and the laying of duties on imports and exports, Curtis, J., delivering the opinion of the court, said: "The power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States, in every part; and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation. Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert, concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, a plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain.

"We are of opinion that this State law was enacted by virtue of a power residing in the State to legislate, that it is not in conflict with any law of Congress; that it does not interfere with any system which Congress has established by making regulations."

Daniel, J., concurred in the decree, but upon different reasons. His opinion was "that the power of enacting pilot laws, although in some degree connected with commercial intercourse, does not come essentially and regularly within that power of commercial regulation vested by the Constitution in Congress. The

PORT WARDENS:
2.
SIMP. M. J. WARD.

power delegated to Congress by the Constitution relates properly to the terms on which commercial engagements may be prosecuted; the character of the articles which they may embrace; the permission or terms according to which they may be introduced; and do not necessarily nor even naturally extend to the means of precaution and safety adopted within the waters or limits of the States, by the authority of the latter, for the preservation of vessels and cargoes, and the lives of navigators or passengers. These last subjects are essentially local; they must depend upon local necessities which call them into existence, must differ according to the degrees of that necessity. They have no connection with contract, or traffic, or with the permission to trade in any subject, or upon any conditions. They belong to the same conservative power which undertakes to guide the track of the vessel over 'the rocks or shallows of a coast or river; which directs her mooring or her position in port, for the safety of life and property, whether in reference to herself or to other vessels, their cargoes and crews; which, for security against pestilence, subjects vessels to quarantine, and may order the total destruction of the cargoes they contain. This is a power which is deemed indispensable to the safety and existence of every community. It may well be made a question, therefore, whether it could, under any circumstances, be surrendered; but certainly, it is one which cannot be supposed to have been given by mere implication, and as incidental to another, to the exercise of which it is not indispensable." 12 Howard, 319, 326, *Cooley v. Board of Wardens of the port of Philadelphia*.

In *Gibbons v. Ogden*, Marshall, C. J., delivering the opinion of the court, and speaking of inspection laws, said:

"They form a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to a general government; all of which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.

"Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an Act of Congress passed in pursuance of the Constitution, the court will enter upon the inquiry, whether the laws of New York have, in their application to this case, come into collision with an Act of Congress. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several States,' or in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress. 9 Howard, 203, 210, *Gibbons v. Ogden*.

The preceding quotations are applicable to the case at bar. The laws relative to the Master and Wardens of the Port of Orleans, cannot, in the sense of the Constitution of the United States, be said to regulate commerce, although they are upon a subject incidental to it, and are incidentally necessary for the carrying on of commerce.

Quarantine laws and Pilotage laws are embraced in the definition of regulating commerce, and affect it as much as the laws relative to Master and Wardens. If the former can be passed by the States, the latter can also.

The Constitution of the United States declares, that "Congress shall have:

PORT WARDENS power to establish uniform laws on the subject of bankruptcies throughout the
SEN. M. J. WARD. United States." Constitution United States, Art. 1, § 8. This court, however
 has declared : " That the insolvent or bankrupt laws of a State, if not suspended
 by the enactment of a uniform bankrupt law by Congress, are constitutional and
 valid as to all posterior contracts entered into between citizens of the State where
 such laws exist." *Northern Bank of Kentucky v. Squires*, 8 An. 339 ; Story on
 the Constitution, § 1066, 1109.

The power given to Congress to establish bankrupt laws is just as plenary as
 that to regulate commerce ; if, then, in the absence of national legislation the
 States can pass laws relatives to bankruptcy, they can also pass those laws rela-
 tive to commerce, which do not attempt to interfere with the peculiar sphere of
 Congress, but only endeavor to give force to the laws of Congress relative to
 commerce, such as those now under consideration relative to Master and War-
 dens.

In the absence of national legislation for the protection of commerce, there is
 an inherent right in the States to protect themselves.

Commerce is of vital importance to the States, and unless there are pilots to
 conduct the shipping to safe harbors, officers vested with the duties of Master
 and Wardens, and other persons authorized to perform the official acts necessary
 for the operations of commerce, the merchant will seek other ports for the dispo-
 sal of his merchandize.

It is the interest of every State to attract as much commerce as possible ; each
 State will, therefore, essay to create such police statutes relative to commerce, as
 will be of the greatest convenience to it.

The duties performed by the Master and Wardens, do not clash with the powers
 of Congress to regulate commerce. If Congress desired, it might perhaps be
 within its exclusive dominion, to appoint officers to execute the duties now in-
 incumbent upon plaintiffs.

Congress has not deemed it proper to use the power, being no doubt of opinion
 that as the regulation of the operations of commerce, so far as relates to the case
 at bar, are ministerial and the conveniences of commerce may require them to be
 different in the several states, that it would be wiser to abstain from legislating
 thereupon, and allow each State to enact its own laws. The States have, there-
 fore, the right to do what is essential for the protection of the shipping entering
 their ports, and of the merchandise conveyed in such vessels.

As the creation of a Board of Master and Wardens is not in conflict with the
 Article of the Constitution relative to the power of Congress to regulate com-
 merce, neither is it opposed to that part of the Constitution which prohibits the
 States from laying any impost or duty on imports or exports.

The Act of 1855, relative to the Board of Master and Wardens, merely pro-
 vides for the payment of services actually rendered, or the tender of such services.
 The fees accorded, cannot be regarded as imposts or duties on imports or exports ;
 it is a contradiction of terms so to view them.

The remarks of the Supreme Court of the United States relative to the Pilot
 laws, are applicable to the present case. In *Cooley v. Board of Wardens of port*
of Philadelphia, in speaking of the law of Pennsylvania which appropriated the
 half-pilotage fees for the purpose of forming a charitable fund for distressed or
 decayed pilots, they say : " The provision of the Constitution as to imposts and
 duties was intended to operate upon subjects actually existing and well under-
 stood when the Constitution was formed. Imposts and duties on imports, ex-

ports and tonnage were then known to the commerce of the civilized world to be as distinct from fees and charges for pilotage, and from the penalties by which commercial States enforced their pilot-laws, as they were from charges for wharfage or towage, or any other local port-charges for services rendered to vessels or cargo; and to declare that such pilot-fees or penalties are embraced within the words imposts or duties on imports, exports or tonnage, would be to confound things essentially different, and which must have been known to be actually different by those who used this language." 12 Howard, 314, *Cooley v. Board of Wardens*.

PORT WARDENS
V.
SHIP M. J. WARD.

"An impost, tax, or duty," says Judge Martin, "must be confined to the idea which they commonly present to the mind; exactions to fill the public coffers, for the payment of the debt, and the promotion of the general welfare of the country, not to a retribution, provided to defray the expenses of building bridges, erecting causeways, or removing obstruction in a water course, to be paid by such individuals only who enjoy the advantage resulting from such labor and expense." 11 M. p. 324.

In the case of *The Master and Wardens of the port of New Orleans v. Prats*, Judge Martin said: "The constitutionality of the Act of 1805, which first allowed fees to the Master and Wardens, (B. & C's. Dig. p. 465), has never been questioned, although they have been claimed for nearly forty years." 10 Rob. 460.

It is, however, contended, that even if it is not contrary to the Constitution of the United States, to allow fees to the Master and Wardens for services actually rendered, that the sixth section of the Act of March 15th, 1855, is unconstitutional.

This section is a reenactment of that of 1821, and provides: "That in addition to the fees allowed to the Master and Wardens, they shall be entitled to demand and receive for each vessel arriving in the port of New Orleans from sea, the sum of five dollars, whether they be called upon to perform any services or not, which sum they shall be entitled to demand of the captain, owner, or consignee of every such vessel, and in case of failure or refusal to pay the same, they shall have the right to proceed for the recovery of the same against the said vessel, before any Justice of the Peace, or other competent tribunal. Session Acts, 1855, p. 490, § 6.

Even if the Master and Wardens performed no direct services as a compensation for the fee of five dollars, still this section could not be considered as laying a duty or impost on imports or exports, or as a burden imposed upon commerce by taxing vessels coming from sea.

The Master and Wardens are obliged to be always ready to perform their official services for any vessel that may need them. They are appointed for the benefit of the shipping, and their compensation in such cases can be likened to half-pilotage.

Section 18 of the Act of 1857, relative to Pilots, p. 90, provides: "That if the master of any ship or vessel coming or going out of any of the mouths of the Mississippi river, shall refuse to receive on board and employ a pilot, the master or owner of such ship or vessel, shall pay to such Pilot, who shall have offered to go on board and take charge of the vessel, half-pilotage."

The Supreme Court of the United States in *Cooley v. Board of Wardens of port of Philadelphia*, in speaking of a provision of the law of Pennsylvania, relative to pilots, which allowed half-pilotage, when no direct services were rendered, say:

PORT WARDENS
 v.
 SHIP M. J. WARD.

"We think this particular regulation concerning half-pilotage fees, is an appropriate part of a general system of regulations of this subject. Testing it by the practice of commercial States and countries legislating on this subject, we find it has usually been deemed necessary to make similar provisions. Like other laws, they are framed to meet the most usual cases, *quæ frequentius accidunt*; they rest upon the propriety of securing lives and property exposed to the perils of a dangerous navigation, by taking on board a person peculiarly skilled to encounter or avoid them, upon the policy of discouraging the commanders of vessels from refusing to receive such persons on board at the proper times and places; and upon the expediency, and even intrinsic justice, of not suffering those who have incurred labor and expense and danger to place themselves in a position to render important service generally necessary to go unrewarded, because the master of a particular vessel either rashly refuses their proffered assistance, or, contrary to the general experience, does not need it. There are many cases in which an offer to perform, accompanied by present ability to perform, is deemed by law equivalent to performance. The laws of commercial States and countries have made an offer of pilotage service one of those cases, and we cannot pronounce a law which does this to be so far removed from the usual and fit scope of laws for the regulation of pilots and pilotage as to be deemed, for this cause, a covert attempt to legislate upon another subject under the appearance of legislating on this one."

If, then, half-pilotage fees are not contrary to the Constitution of the United States, it would seem that the sixth section of the Act of 1855 is not unconstitutional.

There is, however, another reason why this section is constitutional.

The Act of 1857, p. 88, in sections 4, 5, 13, 15, 16, 17 and 20 vest the Master and Wardens of the Port of New Orleans with various powers and obligations, for which no fees are allowed.

An examination of these sections will show, that they provide by the intervention and action of the Master and Wardens for the maintenance of order and discipline among the pilots, and for other things which tend to the advantage and safety of vessels coming from sea into the port of New Orleans.

If these duties were not performed by the Master and Wardens, it would be necessary to have them executed by other officers, who would necessarily be paid by a tax laid upon vessels coming from sea into the port of New Orleans. We say they would be thus paid, because these duties are for the benefit of such vessels, and, without the performance of such duties, they would be exposed to be lost, and of course it is just that they who receive the benefit should bear the expense.

Suppose that one of the pilots had been appointed by the Governor, by virtue of a statute, to execute the same duties as are detailed in these sections, and that the law had authorized the pilot to charge five dollars upon every vessel coming into the port as compensation for his duties, certainly no one could dispute the constitutionality of such a tax, without at the same time contesting the constitutionality of the pilot laws which provide for the compensation of pilots; because, if pilots be necessary, they must also be subjected to certain regulations and to the supervision of persons in authority, so that they may faithfully do their duty, and safely and skillfully guide vessels from the sea into the port of New Orleans.

The principle is the same whether these duties are to be performed by a pilot

or by the Master and Wardens. It is indeed wiser that they should be the province of the latter than of the former; for the Master and Wardens would not probably have such intimate relations with the pilots as one of their own number, and their impartiality would not be affected thereby.

The law has provided against the risk of partiality and interest, for the fourth section of the Act of 1855, (Sess. Acts, p. 490,) declares, "that neither the Master nor any of the Wardens aforesaid shall be concerned, directly or indirectly, in any pilot-boat, or with any branch-pilot, in respect to the business of his trust."

Although the services directed by these sections are not directly rendered by the Master and Wardens to the vessels coming from sea, yet they are rendered through the pilots, because the latter perform their official duties to the vessels with more fidelity and skill, under the supervisory care of the Master and Wardens, than would otherwise be the case. 2 An. 538, *First Municipality v. Pease*; 11 M. 324, *State v. Navigation Co.*; *Cooley v. Board of Wardens*, 12 Howard, p. 299.

As these services are performed indirectly, the plaintiffs are as much entitled to be paid for them as if they were done directly, and indeed, from the nature of the services, it is impossible they should be directly performed.

The payment of five dollars is, therefore, the compensation for services received by vessels, which services are necessary for their safety, and is not against the Constitution of the United States, in the absence of any law of Congress providing for the performance of the same services as those rendered by the Master and Wardens.

Judgment affirmed, with costs.

VOORHIES, J., absent.

SUCCESSION OF BAKER WOODRUFF.

The testator provided for the emancipation of a number of his slaves as follows: "As soon as possible after my decease, I wish all my negroes freed that I will name, and sent to Pennsylvania, and bread and meat found them for one year, all at the expense of my estate." *Held*: that it was the intention of the testator that the negroes should be freed in this State and then be removed to Pennsylvania, and that it was not competent for the court here to grant an order authorizing the executor to remove them and to pay the expenses of their transportation and maintenance, after the Act of March 6th, 1857, preventing their emancipation here.

A PPEAL from the District Court of the Parish of St. Bernard, *Foulhouze, J. Lea & Marr*, for executor, appellant. *J. E. Morse, J. Gilmore, P. E. Bonford and J. Vanmatre*, for appellees.

COLE, J. *Baker Woodruff* died in the month of May, 1857, leaving a last will and testament, which was dated on the 22d day of February, 1855. This will was admitted to probate on the first day of June, 1857.

In this will there is a testamentary disposition directing that a large number of his slaves should be freed.

It is in these words: "As soon as possible after my decease, I wish all my negroes freed that I will name;" (here follow the names of the negroes,) "and

SUCCESSOR OF
WOODRUFF.

sent to Pennsylvania, and bread and meat found them for one year, all at the expense of my estate."

The testamentary executor applied for an order of court authorizing him to remove the slaves to the State of Pennsylvania, to be there emancipated, and setting apart a sufficient sum to defray the expense of their transportation and their maintenance.

Notice of this application was given to the heirs present in the State and to the attorney of absent heirs.

Opposition was made to this application, on the ground that the dispositions of the last will of the deceased, relating to the manumission of the slaves and their removal to Pennsylvania, are contrary to the laws of the State of Louisiana, and to public policy, and are absolutely null and void.

The District Judge maintained the opposition and rejected the application of the executor.

From this judgment the executor has appealed.

It appears to us that the intention of the testator was, that the negroes should be freed in this State and then be removed to Pennsylvania.

In the absence of any provision of the will exhibiting an adverse intention, a testator must be presumed to have intended that the provisions of his will should be executed in accordance with the laws of the State where it is made, where he lives and has his property, rather than in accordance with the laws of a foreign State.

If the law prohibiting emancipation had not been passed, it would have been the duty of the executor under this will to have applied in this State for the emancipation of the slaves, and afterwards for a sufficient sum of money to be taken from the estate to buy for them food for their sustenance in Pennsylvania, where they were to be sent after their emancipation.

If the executor had demanded of the court permission to take the slaves to another State to be emancipated, whilst our laws would have allowed him to have freed them in this State, it is evident that the permission would have been refused, because the intention of the will was, they should be liberated in this State.

The statute approved March 6th, 1857, prevents their emancipation; the sending of them to Pennsylvania, which was to be the consequence of their freedom, cannot then be effected. Sess Acts 1857, p. 55.

The testator lived a sufficiently long time after the enactment of the law prohibiting emancipation to have adopted some other method of enfranchising his negroes, if his intentions, as manifested in the testament, had remained unchanged.

It is unnecessary to express any opinion upon the right of a testator under our present law to authorize his executor to remove his slaves to another State for the purpose of emancipating them.

Judgment affirmed, with costs.

MUNICIPALITY No. 2, for the use of JAMES PIGRAU, v. ARTHUR GUILLOTTE.

14	297
51	808
51	919

The power of the municipal corporation to make contracts for the pavement of streets at the expense partially of proprietors, is clear.

In the absence of proof of fraud, the acceptance by the corporation of work which it was authorized to contract for, is *prima facie* evidence against the defendant, so far as relates to its completion and the manner in which it was done.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
C. Hunt and C. T. Bemiss, for plaintiff and appellee. R. N. Ogden, for defendant and appellant.

COLE, J. This suit was instituted by *James Pigrau* to recover the amount of two bills for paving Felicity Road, in front of his property, with interest thereupon.

There was judgment for plaintiff, and defendant has appealed.

On the 22d of March, 1849, *Pigrau* entered into a contract with the city of Lafayette and the Second Municipality of New Orleans, for the paving of Felicity Road, from its end nearest the river to Appollo street.

The said corporations subrogated *Pigrau* to all the rights of the Mayor, Aldermen and Inhabitants of the city of Lafayette and of the Second Municipality of New Orleans, to collect from the proprietors of property on each side of Felicity Road, one-third from each proprietor of the cost of the paving, and empowered *Pigrau* to institute suits for the recovery of the portions of the said road-way pavement, which might be due by the front proprietors aforesaid.

The Second Municipality having ceased to exist, and being now represented by the Mayor and Aldermen of the city of New Orleans, by Act of the Legislature, approved 23d of February, 1852, this suit was accordingly revived under the style of the city of New Orleans, for the use of *James Pigrau v. Arthur Guillotte*.

The authority of municipal corporations to enter into contracts of this character, is clear. *O'Leary v. Sloo*, 7 An. 25.

Felicity Road, which *Pigrau* undertook to pave, was the boundary line between the city of Lafayette and the Second Municipality.

The property of the defendant was on the Second Municipality side.

It is established that the work was done, and accepted by the Second Municipality.

In the absence of proof of fraud, the acceptance by the corporation of work which it was authorized to contract for, is *prima facie* evidence against the defendant, so far as relates to its completion and the manner in which it was done.

A consideration of the evidence induces us to believe that the work was as well done, as the price charged therefor permitted.

Judgment affirmed, with costs.

Re-hearing refused.

VOORHIES, J., absent.

JOHN W. MURRELL v. R. H. DIXEY and H. C. DIXEY.

The common carrier owes indemnity to the shipper of goods for delay in the transportation, and legal interest upon the price of the goods during the period of the delay may be recovered, as the measure of such indemnity.

The shipper cannot recover, as damages, the premium paid by him for insurance upon the goods, while the vessel was lying in a port to which she was driven for repairs, by reason of her unseaworthiness. The carrier in such case becomes the insurer.

APPEAL from the Fourth District Court of New Orleans, *Price, J.*
Benjamin, Bradford & Finney, for plaintiff. *Durant & Hornor*, for defendants and appellants.

MERRICK, C. J. The defendants are sued as the captain and owners of the ship Plymouth. The plaintiff, having a contract with the French government, shipped on board of defendant's ship a quantity of naval lumber, consisting of masts, bowsprits, beams, deck plank, &c, from Mobile, Alabama, to Cherbourg, France. At the contract prices, the value of the lumber was \$26,674.

The ship left Mobile harbor on her voyage, on the 18th day of October, 1856, at six o'clock P. M. At 8 o'clock, the ship had six inches water in the hold. The pumps were used during the night. At 12 o'clock M. the next day, the leak having greatly increased, it was determined to alter the course of the vessel and make for the port of New Orleans, where she arrived on the 22d of the same month, still leaking badly. On her arrival the usual proceedings were had, which resulted in an order that the cargo should be unladen, and the ship was ordered into dock as unseaworthy.

The cargo was reshipped on board the Trenton, at the cost of defendants. The latter ship sailed from New Orleans on the 18th day of February, and delivered her cargo at Cherbourg, where it was received, without objection, on the part of the French government.

This suit has been brought to recover damages occasioned by the delay and transhipment of the cargo, and the controversy is confined in this court to three items of damage allowed by the Judge *a quo*.

They are as follows, viz :

Premium paid for harbor risk, whilst the vessel lay at this port, \$192 08.

Amount paid *Cazenave* for superintending cargo and forwarding same, \$200.

And interest at five per cent. on \$26,674, from 23d October, 1856, to 18th of February, 1857.

There has been some discussion of the question, whether the ship was seaworthy while she lay at the port of Mobile. The New Orleans witnesses are almost unanimous that the ship could not have been seaworthy at that time. The Mobile witnesses are equally positive that it was seaworthy.

The District Judge believed the New Orleans witnesses, and we cannot say that he erred.

The ship did not encounter any bad weather, and if she was not unseaworthy otherwise, she became so from her bad stowage.

It becomes necessary to consider the elements of damage controverted by the defendants and appellants.

I. As to the premium paid for the harbor risk. There is no reason to sup-

pose that defendants were aware of the unseaworthy condition of the ship, and they cannot be charged with bad faith.

On the arrival of the ship in the port of New Orleans, the plaintiff had the option of two modes of proceeding. 1st. To dissolve the contract of affreightment and resume possession of the cargo; or, secondly, to insist upon the contract and compel the defendant to deliver the cargo as he had agreed to do by his bill of lading.

The latter cause appears to have been adopted in this instance, as it is proved that the lumber was reladen on the Trenton without cost to plaintiff, under a contract made by the consignee (Captain Dixey) and agents of the Plymouth, and that the agent of the plaintiff made several demands upon the agent of the Plymouth, who complied with the same, but owing to high prices, not as soon as plaintiff's agent desired.

The consequence of this was, that the cargo whilst in the port of New Orleans, where it had arrived by reason of a deviation occasioned by the unseaworthiness of the vessel, was at the risk of *the defendants as insurers*. Angell on Car. secs. 175, 176, 177; Abbott, 340; Parson's Merc. Law, 348-351.

It does not, therefore, (in the absence of authorities) appear to us reasonable, that the defendants should be compelled to insure the cargo, and at the same time, be held responsible for such re-insurance (for in that light it ought to be viewed) as the plaintiff may be pleased to procure. Such damage, if it may be so called, being optional with plaintiff, whether he will incur it or not, seems too remote to be supposed that it entered into the consideration of the parties when the bill of lading was signed.

II. The preceding remarks apply with equal force to the \$200 paid *Cazenave* by plaintiff, as his agent. By holding defendants to their contract, the cargo was in their charge, and as they employed and paid for the necessary agents and laborers in accomplishing the transshipment, they cannot be compelled to pay for any others.

III. Defendants contend that interest cannot be sued for, separate from the principal, and that timber does not produce the fruit known as interest, nor is the premium paid for the use of timber ever known by that name.

It appears to us that the common carrier must be held responsible for unnecessary delay in the delivery of the merchandise intrusted to him for transportation. The fact that the merchandise has not deteriorated during the interval, is not a sufficient answer to the holder of the bill of lading, who may, in the meantime, have experienced great inconvenience and loss.

In the case of *Rathbone v. Neal*, 4 An. 567, this court held, that "the carrier undertakes to transport the goods not only in good safety, but *within a reasonable time*. She is bound to account for their value at the expiration of that time. It is as much a part of his contract, as to deliver them in good condition, and in commercial adventures time is one of the elements upon which they are undertaken and controls their result. Nor do we think that the plaintiffs have lost their rights to recover from the defendants, for the delay in the delivery of the goods in consequence of having received them, and disposed of a portion of them at private sale."

In the case before us, there is no other proof of special damage than that resulting from the fact, that the plaintiff was delayed nearly four months by the act of defendants, in receiving \$26,674 contracted to be paid him by the French government. The defendants, therefore, have occasioned the plaintiff damage,

MURKELL
v.
DEXTER.

equal to the amount of interest which he would have received on his money in that interval. This is not a remote damage, but one which may be supposed to have been contemplated by the parties. C. C. 1928, No. 1. The question of the increased charge for freight is reserved by the parties.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed; and we do now order, adjudge and decree, that the plaintiff recover and have judgment against the defendants *in solido*, for the sum of four hundred and thirty-three dollars and twenty-four cents, with a privilege upon the property attached, the plaintiff paying the cost of appeal, and the defendants those of the lower court.

VOORHIES, J., absent.

MARY ANN LOGAN, f. w. c., v. P. T. HICKMAN and H. M. ROBERTSON.

The general rule is, that the defendant must be sued at the place of his domicile or usual residence, and a suit for freedom has not been made by the lawgiver an exception to this rule. To obtain a sequestration, both an affidavit and bond are required, and the lawmaker has made no exception in favor of negroes held in slavery, who may sue for their freedom.

APPEAL from the Third District Court of New Orleans, *Duvigneaud, J. Semmes & Labatt*, for plaintiff and appellee. *A. N. Ogden & Stansbury*, for *Hickman*, appellant. *J. & E. Bermudez*, for *Robertson*.

LAND, J. The plaintiff sues the defendant for the recovery of her freedom, and caused herself to be sequestered on the affidavit of her attorney and *without giving bond*.

The defendant filed the following exception:

"Now comes *Peter T. Hickman*, the defendant, and excepts to this action brought against him and for cause shows: that this respondent is a citizen of the State of Louisiana, *having his domicile in the parish of Rapides*, and is not subject to the jurisdiction of this honorable court; wherefore respondent asks that this exception may be sustained, plaintiff's petition dismissed, and defendant hence dismissed."

On the trial of the exception, the residence of the defendant was admitted to be in the parish of Rapides, as alleged.

The exception was overruled, and the defendant took a rule to show cause why the writ of sequestration issued herein should not be set aside on the following grounds:

First.—That the sequestration is unauthorized by law.

Second.—That there is neither bond nor affidavit as required by law.

The rule was discharged and the defendant answered to the merits, reserving the benefit of the exception by him filed.

There was judgment for the plaintiff, and the defendant has appealed.

The District Judge erred in overruling the exception to the jurisdiction of the court. The general rule is, that the *defendant must be sued at the place of his domicile, or usual residence*, and a suit for freedom has not been made by the lawgiver an exception to this rule. C. P. 89, 162, 163, 164. It has already been decided by this court, that a negro held in slavery, who sues for his freedom, must

LOGAN
v.
HICKMAN.]

sue his master, or the person holding him in slavery, at the place of his domicil or usual residence.

This decision is not only founded on express legislation, but also in considerations of public policy, and cannot be departed from, by reason of the hardship which may result from the application of the rule in any particular case.

The District Judge also erred in discharging the rule to set aside the writ of sequestration. To obtain the conservatory process of sequestration, *both an affidavit and bond are required*, and the lawmaker has made no exception in favor of negroes held in slavery, who may sue for their freedom, and the courts have no authority to make any such exception. C. P. 276.

It is, therefore, ordered, adjudged and decreed, that the judgment be reversed; the verdict of the jury be set aside, and that this suit be dismissed, with costs in both courts, without prejudice to plaintiff's right of action at the domicil of defendant.

Re-hearing refused.

VOORHIES, J., absent.

HILLERY KEMP v. HEIRS OF DIANA CORNELIUS.

Whenever it becomes necessary to institute a separate and distinct action, from the one in which the judgment was rendered, the prescription of ten years under Art. 3508 of the Civil Code, is applicable to such action.

APPEAL from the District Court of the parish of East Feliciana, *Ratliff, J. Muse & Hardee*, for plaintiff and appellant. *J. & C. McVea*, for defendants.

LAND, J. The plaintiff, alleging himself to be a creditor of the estate of *Cady Raby*, for the sum of two hundred and fifty dollars and twenty-five cents, with five per cent. interest thereon, from the 5th of July, 1831, (as is shown by a judgment rendered October 26, 1831,) and that the heirs of *Cady Raby* and *Diana Cornelius*, are about to make a final partition of their estates, he prays that said partition be so amended as to set apart a sufficient amount of property, or the proceeds of the sale of said property, to pay said judgment.

To this demand, the heirs plead the prescription of five, ten, twenty and thirty years.

The action in this case is a personal one, and is prescribed by ten years. C. C. 3508.

Whenever it becomes necessary to institute a separate and distinct action from the one in which the judgment was rendered, the prescription of ten years is applicable under Article 3508 of the Civil Code. To avoid this prescription, the creditor must be in a condition to enforce the collection of his judgment, without the aid of an original suit.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed with costs in both courts.

MERRICK, C. J., being a creditor with another upon the tableau, declined taking part in this case.

VOORHIES, J., absent.

G. W. HULSE v. S. W. DORSEY.

A party who bid for land at a public land sale, is estopped from denying the validity of the sale on the ground that it was land liable to private entry, which he had unsuccessfully applied to the Register and Receiver of the Land Office to enter.

APPEAL from the District Court of the Parish of Tensas, *Farrar, J. A. Snyder*, for plaintiff and appellant. *J. P. Farrar*, for defendant.

BUCHANAN, J. Plaintiff, by petition filed in the District Court of Tensas Parish, on the 6th of June, 1857, demands that patents issued by the General Government to defendant on the 24th November, 1849, for lands adjudicated to the latter at a public sale by the Register and Receiver of the Land Office at Monroe on the 10th July, 1848, be decreed to enure to his (plaintiff's) benefit, and that he recover possession of the land, with damages at the rate of five dollars a year per acre, for its detention.

The ground alleged by the petition for this claim is, that after the land in question had been once offered at public sale, without being sold, and had thereby become liable to private entry, the plaintiff had applied to the Register and Receiver of the Land Office at Monroe, Louisiana, to enter said land, and had been by them refused. Whereupon, plaintiff had a second time applied to enter said lands, by locating upon them Internal Improvement Land scrip issued by the State of Louisiana, which application was also refused by the said Register and Receiver; that in violation of plaintiff's rights, the said Register and Receiver offered said lots afterwards at public auction, when the same were adjudicated to defendant, and patents afterwards issued to him for the same; that plaintiff having complied with all the requirements of law, is equitably entitled to said land.

The answer of defendant alleges that plaintiff was present at the public sale of the lands claimed, by an agent, and bid for the lands in opposition to defendant, to whom, as the last and highest bidder, the land was publicly adjudicated; that plaintiff then protested against said sale, and appealed to the proper authorities at Washington, who after examining thoroughly the matter, under the advice of the Attorney General of the United States, decided in favor of defendant. He therefore pleads, first, that plaintiff having bid for the land at the public sale at which it was adjudicated to defendant, is thereby estopped from denying the validity of the sale; second, that the decision of the authorities at Washington having been invoked by plaintiff in the premises, such decision is final and conclusive against him and has the force of the thing adjudged, and cannot now be disturbed, after an acquiescence of many years by plaintiff in the correctness and finality of such decision.

The facts alleged in the answer are established by sufficient evidence, written and oral, received without objection and constitute, in our opinion, a bar to this action. We would observe, in reference to the bid made by the agent of plaintiff at the public sale in Monroe, that the said agent declares he made that bid on his own account, and not on account of his principal, the plaintiff. But the fact of this witness being the agent of plaintiff to enter these lands, is admitted by plaintiff. The witness declares that he was plaintiff's agent for the purpose of locating Louisiana State land scrip upon these lands. Under these circumstances, if the

land had been adjudicated to the witness in his own name, we entertain no doubt that the plaintiff would have had a legal right to claim the benefit of the purchase. This bid must, therefore, be viewed as the bid of plaintiff. He cannot be allowed to disavow the acts of his agent for one purpose, while he adopts them for another.

HCLER
v.
DORSEY.

There is no proof of any application on the part of plaintiff to locate his land scrip, except through the witness in question. See the case of *McMasters v. Commissioners of the Atchafalaya Bank*, 1st An., p. 11.

Judgment affirmed with costs.

VOORHIES, J., absent.

CITY OF NEW ORLEANS v. L. BOUDRO.

Where an appeal is taken by the defendant in a suit, brought by the city to recover a tax or license less than \$300 under a city ordinance, it is the duty of the defendant to bring up with the record the ordinance alleged to be illegal or unconstitutional, otherwise the case presents nothing for the decision of the court and the appeal will be dismissed.

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APPPEAL from the Second District Court of New Orleans, *Morgan, J.*
W. O. Denègre, for plaintiff. *J. J. Lugenbühl*, for defendant and appellant.

MERRICK, C. J. This suit is brought to recover \$101 as a tax or license on the defendant as keeper of a restaurant.

The assignment of errors was not filed within the delay required by Art. 897 C P. and cannot be considered. See *Byrne v. Ridell*, 2 An., 11.

The defendant denies the existence of any ordinance which compels him to pay the license claimed, and further answering says, if there be one the same is illegal and unconstitutional and not adopted according to law, and that it does not apply to him.

No ordinance appears in the record in this case, neither is there any evidence certified. And as the record contains no bill of exceptions, there is nothing exhibited by the same within the appellate jurisdiction of this court.

The *existence* or *non existence* of an ordinance is a question of fact of which the District Court has (in a controversy involving less than \$300) the exclusive jurisdiction. So too it is a question of fact, whether a party resides within the limits embraced by an ordinance legal upon its face. See *Board of Health v. Pooley, Nicol & Co.*, 11 An. 743.; *Police Jury v. Villaviabo*, 12 An. 788.

It was the duty of the defendant to place on the record the ordinance which he alleges to be illegal or unconstitutional, in order that the court might decide the question of law arising upon the same. Not having done so, the case, as already observed, presents nothing for us to decide.

It is, therefore, ordered, adjudged and decreed, that the appeal in this case be dismissed at the costs of appellant.

VOORHIES, J., absent.

MRS. J. K. HAULY v. R. CROZIER et al.

In matters relating to the interests of minors much discretion must be exercised by the Judge of the Second District Court, but a judgment of nonsuit only, should be rendered in a case where the representative of minors has improperly dispensed with the production of the proof necessary to establish a claim against them.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*
Semmes & Labat and J. McConnell, for plaintiff and appellant. *Collens & Wooldridge*, for defendants.

MERRICK, C. J. This is an action for the partition of the succession of *James Hauly*, deceased. The facts set forth in plaintiff's petition are of a character somewhat extraordinary and induced the District Judge to render judgment in favor of the defendants, notwithstanding the plaintiff's right had been admitted in the deliberations of a family meeting, the answers of the defendants, and an agreement of counsel on file also signed by the tutors *ad hoc*.

It appears by the pleadings (if they are to be credited), that *James Hauly* and the plaintiff were married in Dublin, in Ireland, many years ago, the deceased then bearing the name of *Haulon*; that they had one child, who is now dead, issue of the marriage; that her husband abandoned her and left her in want; that she did not hear from him for seventeen years; that he then sent for her to come to this city; that he had after his arrival married another woman, *Joanna Griffen*, by whom he had three children, the minor defendants in this suit; that after the death of *Joanna Griffen*, he sent for petitioner, as above stated, and was married to her a second time in this city. She claims a partition of the estate with the children of *Joanna Griffen*.

The counsel for the defendants state in this court, that the reason why they did not put at issue the allegations of plaintiff's petition, was that the parties were satisfied that the plaintiff had abundant evidence to prove her marriage with *Hauly* in Ireland, and it would be useless to controvert it.

We think in a large city like this, much caution must be exercised by the Judge of the Second District Court in matters of this kind, and it is his duty to see that the estates of minors and orphans are not wasted and dilapidated. But in this instance, whatever may have been his suspicions, instead of rendering a final judgment against the plaintiff, he ought to have ordered a new trial and re-instated the case upon the docket. With the admissions and pleadings in this case, a final judgment could not be rendered against the plaintiff.

The appellants aver that they only desire an opportunity of exhibiting their testimony. To this they are clearly entitled.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that this case be remanded to the lower court for a new trial and further proceedings according to law; the defendants paying the costs of the appeal.

I. U. BALL v. FELIX GREAUD.

A waiver of protest by an endorser, is not a waiver of the notice of non-payment.
An accommodation endorser is entitled to notice, as any other endorser.

A PPEAL from the District Court of the Parish of Iberville, *Wilson, J.*, presiding. *Barrow & Pope*, for plaintiff and appellant. *Z. Labauve*, for defendant.

MERRICK, C. J. This suit is brought against the defendant as an endorser and surety upon a promissory note.

The note was made payable to the order of defendant and endorsed by him.

Before its maturity, he signed the following agreement upon the back of the note.

"I hereby waive protest on the within note, and hold myself bound for the payment of the same, as if legally protested.

(Signed)

F. GREAUD."

The defendant, in his answer, avers that he signed the note as surety.

It does not appear that any notice of non-payment was given the defendant and he invokes the decisions in the cases of *Wall v. Bry*, 1 An. 312, and *Breaux v. Leblanc*, 10 An. 97, to show that the plaintiff has failed to make out his case inasmuch as the waiver of protest is not a waiver of the notice of non-payment.

The plaintiff replies that those cases cannot control the present case, because the defendant alleges he signed the note as surety, and, therefore, is not entitled to strict notice, and, moreover, *Greaud*, before maturity, offered to give his own note to the plaintiff in the place of the note sued on, and thereby waived the protest and notice under the authority of *Sigerson v. Matthews*, 20 How. 498.

The note was made payable to the order of the defendant, and he was, therefore, a necessary party to the instrument, and must be considered an accommodation endorser, and entitled to notice as any other endorser. 10 An. 97; *Peets v. Wilson*, 19 La. 478; 9 La. 334.

The proof on which plaintiff relies, is a conversation between the defendant and the witness, in which the former, in speaking of what occurred before the maturity of the note at the time he had signed the agreement to waive the protest, said further, that he had no money then, but if he could get time, he would pay the note, and that he had offered plaintiff to give him a note payable in a year for the note sued on. Subsequently he told witness that he had seen a lawyer and should not be obliged to pay the note. Here the conditional offer of the defendant was not accepted as the plaintiff chose to rely upon the note. There was then no absolute promise to provide for the note at its maturity, which would bring the case within the doctrine of *Sigerson v. Matthews*.

The case of *Wall v. Bry*, has been acted upon since it was rendered, and the rules of commercial law ought not to be lightly disturbed.

The defendant is entitled to the benefit of the decision, and the judgment must be affirmed.

Judgment affirmed.

VOORHIES, J., absent.

G. W. HELME v. C. W. POLLARD & Co.—GRUMAN & Co., Garnishees.

The answers of garnishees, when categorical, are conclusive, unless disproved.

APPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
C. Roselius, for plaintiff. *W. D. Hennen*, for garnishees and appellants.

LAND, J. The plaintiff, the judgment creditor of the defendants, garnishees *Gruman & Co.*, under the Act of the 20th of March, 1839.

The answers of the garnishees to the interrogatories propounded, deny explicitly that they have in their possession or under their control any property, rights or credits belonging to the defendants. They answer, that they have in their possession certain promissory notes payable to the order of defendants, and endorsed by them in blank,—but that they are not the property of defendants.

The plaintiff, alleging that the answers were evasive and untrue, took a rule on garnishees to show cause why they should not be condemned to deliver up these notes or pay the amount of plaintiff's judgment.

The rule was made absolute, without any evidence contradicting or impeaching the truth of the answers of garnishees. The judgment is erroneous. The answers of the garnishees, when categorical, are conclusive, unless disproved.

It is, therefore, ordered, adjudged and decreed, that the judgment be reversed, and that there be judgment in favor of *Gruman & Co.*, the garnishees, with costs in both courts.

VOORHIES, J., absent.

ARCHIBALD BORRON v. W. W. MERTENS.

An affidavit for a continuance, is insufficient, when it does not disclose the name of any witness, by whom it is expected to prove any particular fact or facts, and does not state within what time the party expects to obtain the testimony of his witnesses.

APPEAL from the Third District Court of New Orleans, *Duvignaud, J.*
Budd & Lambert, for plaintiff. *Durant & Hornor*, for defendant and appellant.

LAND, J. This suit is for the recovery of five hundred and fifty dollars and twenty-four cents, for re-weighing and inspecting cotton. The answer was a general denial. On the trial, the defendant filed an affidavit for a continuance, which was refused. There was judgment for plaintiff, and defendant has appealed. It is urged in this court that the Judge below erred in refusing the continuance.

The affidavit was insufficient. It did not disclose the name of any witness, by whom the defendant expected to prove any particular fact or facts. It did not state within what time the defendant expected to obtain the testimony of his witnesses.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.

VOORHIES, J., absent.

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EXECUTORS AND HEIRS OF McMICHAEL v. GASTON T. RAOUL, Tutor.

Where a particular item of an account claimed by the defendant in a suit for the liquidation of a partnership is not fully sustained by the evidence, a judgment will be rendered in favor of plaintiff, as in case of nonsuit, upon that particular claim.

The natural tutor who supervises the interest of his minor child in the liquidation of a partnership of which the deceased mother of the minor was a partner, cannot claim for services rendered the partnership; he has only a claim against his ward in his account of tutorship.

A PPEAL from the District Court of the Parish of Livingston, *Beale, J.*
Jessee R. Jones, for plaintiff. *G. W. Watterston*, for defendant and appellant.

BUCHANAN, J. This is a suit for the settlement of a partnership. The defendant had judgment for a balance of fifteen hundred and ninety-six dollars and twenty-nine cents, bearing interest at eight per cent. from the last day of January, 1854. He appealed, and asks that this balance be increased by the amount of four items of his account rejected by the court.

1. "Amount of draft given to *George McMichael* by *Moore, Wittie & Co.* on *Messrs. T. C. Bates & Co.*, for railroad work performed by the copartnership, \$3213 25."

It is unnecessary to pass upon the bill of exceptions taken by defendant to the rejection of the deposition of *George F. Wittie*, offered to prove this item, inasmuch as the deposition comes up with the record, and if admitted, would not have availed as sufficient proof of the charge.

The witness does not specify either the number of the drafts, nor their amount, which his firm drew upon *Bates & Co.* in favor of *George McMichael*. His answers are as vague as the interrogatories, and his evidence, at best, is but secondary. If those drafts were paid by *Bates & Co.* to *George McMichael*, as charged in defendant's account, that fact could have been proved by the testimony of *Bates & Co.* and by the drafts themselves, which must be in *Bates & Co.*'s possession. Upon this item, we will amend the judgment of the lower court, by decreeing a nonsuit.

2. "Paid *T. G. Davidson*, for securing title to Carthage land, \$600."

This item was properly rejected. The evidence offered in support of it is obviously insufficient. It proves no payment of any sum whatever for the supposed services of *Mr. Davidson*. Neither does it prove to our satisfaction that he rendered any services in the premises, for which he would have been entitled to make a charge.

3. "Services rendered the copartnership since *George McMichael*'s death, (January 14th, 1854) \$500."

There is a bill of exceptions taken by defendant to the rejection of evidence to support this item. The District Judge did not err. The partnership between *George McMichael* and the wife of defendant was dissolved by the death of the latter; which, it is admitted in argument, took place in November, 1853, some months before that of *George McMichael*. The defendant, as natural tutor of his minor children, issue of his marriage with the deceased, (the sole capacity in which he is before us) was bound to supervise and manage for the said minors their interest in the liquidation of the partnership. For such services, he can

McMICHAEL
v.
RAOUL

claim nothing more than the compensation allowed by law to tutors : a claim to be made against his wards in his account of tutorship.

4. Sundry small items of freight and passage amounting to \$32 10.

The deposition of a witness, named *R. P. Guyard*, was offered in support of these charges by defendant, and rejected by the court. It is unnecessary to pass upon the bill of exception to the rejection of this deposition ; for we find (the deposition being annexed to the bill of exception,) that the testimony of this witness would have amounted to nothing, had it been admitted.

The plaintiffs and appellees, on their part, have answered the appeal, and complain of the allowance of two items of account by the judgment of the court below in favor of the defendant.

Those items are :

1st. \$2400, with interest, for price of the "Fay tract," with an adjoining fraction of land, and a stock of cattle, horses, &c., &c.

2d. \$1103 for hire of slaves.

The first of these items was due by the plaintiff's ancestor, *McMichael*, under the articles of copartnership. The second is justified by the evidence.

It is, therefore, adjudged and decreed, that the judgment of the District Court be amended ; that there be judgment in favor of plaintiffs, as in case of nonsuit, upon the claim of defendant for \$3213 25, drafts given to *George McMichael* by *Moore, Wittie & Co.*, upon *T. C. Bates & Co.* ; that, in other respects, the judgment be affirmed ; the plaintiffs to pay costs of appeal.

VOORHIES, J., absent.

14 308
46 634

R. POCHÉLU v. G. A. D. KEMPER.

Where a party has sued and obtained judgment against a company, as a corporation, he is estopped from afterwards denying its corporate capacity.

APPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
Benjamin, Bradford & Finney, for plaintiff. *Singleton & Clack*, and
M. M. Cohen, for appellants.

COLE, J. Plaintiff is the holder and owner of the following described note :

"New Orleans, April 12th, 1855.

\$1020. Sixty days after date, the New Orleans Bone Black Company promise to pay to the order of *D. C. Lowber*, agent, ten hundred and twenty dollars, value received.

R. G. LATTING,
President.

(Endorsed)

D. C. LOWBER."

Five hundred dollars were paid on this note on the 14th June, 1855.

On the 24th of January, 1856, plaintiff instituted suit and obtained judgment upon the balance due upon the note against the New Orleans Bone Black Company.

This suit was conducted as against a corporation.

POORHU
v.
KEMPEN.

On the 29th May, 1856, execution was issued on the judgment, and was returned "no property found."

Whereupon plaintiff instituted this suit, in which he avers that the New Orleans Bone Black Company was a manufacturing company, and composed of certain persons who are jointly and severally liable to him for the payment of the note and judgment aforesaid.

The District Court rendered judgment in favor of plaintiff. Defendants have appealed.

The former suit against the company, apparently as against a corporation, tends to show that plaintiff took and considered the note as an obligation of a corporation, and not of a commercial partnership.

We are of opinion, that the plaintiff is now estopped from denying the New Orleans Bone Black Company to be a corporation, because he sued it and obtained judgment against it as such. *East Pascagoula Hotel v. West*, 13 An.

It is, therefore, ordered, adjudged and decreed, that the judgment be avoided and reversed, and that there be judgment in favor of appellants against the claim of plaintiffs, and that appellee pay the costs of both courts.

Re-hearing refused.

LAURA SCOTT v. JOHN McDUGALL.

Where a promissory note has been transferred, by a verbal contract, without the indorsement of the payee, such verbal transfer cannot have the effect of an indorsement and give the paper a character of negotiability.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
Elmore & King, for plaintiff. *A. T. Steele*, for defendant and appellant.

MERRICK, C. J. The plaintiff, the widow of *R. L. Scott*, deceased, held a promissory note against *Daniel Mayes*, in Mississippi, payable to *R. L. Scott*, for \$800 and interest.

Mayes declined paying the note to plaintiff, because no letters of administration had been granted the plaintiff, a resident of Texas.

Her Attorney obtained in the courts of Mississippi letters *ad colligendum*, and thereupon *Mayes* transferred, (in payment of the note due to *Scott's* estate,) verbally and without indorsement, the note sued upon, which is in these words :

"March 1st, 1853.

\$1060. One year after date, I promise to pay to the order of *Daniel Mayes* one thousand and sixty dollars, for value received.

(Signed)

JOHN T. JETER.

(Endorsed)

JNO. McDUGALL."

"This note is made for purchase of land, as per deed given 20th of April, A. D. 1853."

(Signed)

J. D. MAYES."

"Received one hundred and sixty dollars and sixty cents on the within note."

(Signed)

J. D. MAYES."

SCOTT
v.
McDOUGALL.

The *J. D. Mayes* whose name appears above is the son of the payee of the note.

Judgment was rendered against *McDougall*, as surety on the note for the remainder due, and he appeals.

The defendant contends that the plaintiff has shown no title in herself and cannot recover.

Had the note been indorsed by the payee, it then would have been transferable by delivery, and under the authority of *Montgomery v. Myers*, 2 An. 276, the action probably could have been maintained in plaintiff's name.

But instead of a transfer by delivery under an indorsement in blank, plaintiff claims title in virtue of a special verbal contract in no manner resting upon the commercial law. It is evident that such verbal transfer cannot have the effect of an indorsement and give the paper a character of negotiability. See *Burton v. Chaney*, 3 An. 338; 2 L. R. 91, 92; 14 L. R. 423. At most, it can only have the effect of transferring the thing, the promissory note to the transferee. And this latter must transfer it in the same manner, for the paper having been taken out of the forms of commercial usage, becomes subject to the rules governing ordinary contracts.

The transfer in the present case was made to *Seal*, who held the letters *ad colligendum*. The transferrer expressly denied the right of the plaintiff to the note. *Seal* had no power except what was conferred upon him by the laws of Mississippi. And the power thus conferred ceased when he caused his letters *ad colligendum* to be dismissed.

It is not shown that any principal administration was ever granted upon *R. L. Scott's* estate, nor that the plaintiff was entitled to *Scott's* property in virtue of a will, although she claimed such right, which was disputed by *Mayes*.

The only shadow of title which plaintiff can have under the evidence, arises from the fact that *Seal*, after he found he could not collect the note from *Jeter*, forwarded the same to *W. A. Elmore, Esq.*, of this city, for collection for the plaintiff.

This does not appear to us to be sufficient. *Seal* himself ceased to have power over the paper when his letters *ad colligendum* were dismissed. The plaintiff acquired no rights under *Seal's* partial administration. The letters of the latter being dismissed, and there being no principal administration upon *Scott's* estate, *Seal* does not appear to have the interest of a bailee in the note, and could hardly maintain an action in his own name on the note. The plaintiff does not pretend to sue as his agent, nor does she set up any transfer from *Seal* as administrator, even if the auxiliary administration could confer on him the right to transfer the choses in action of the estate.

It is possible that plaintiff may have a claim to the note as legatee, or by some other title which does not appear in this record, and we shall render a judgment of nonsuit.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that there be judgment in favor of defendant as in case of nonsuit, with costs in both courts.

VOORHIES, J., absent.

HEIRS OF DELORD SARPY v. CITY OF NEW ORLEANS.

14 317
49 908

The warrantor is not liable for the fees of the attorney employed by the party evicted.

Attorney fees cannot be recovered as either costs of the suit or as damages, under Art. 2482 of the Civil Code.

The party evicted from real estate, cannot recover the difference between the costs of the improvements made by him, and the enhanced value of the soil.

APPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Janin & Griffon, for plaintiff. *J. J. Michel*, for defendant and appellant.

COLE, J. This suit is the sequel of that instituted by the same plaintiffs against the city, and reported in 11 An. 699.

In that case, the court decided the principles upon which the division line between the battures of faubourgs St. Mary and Delord is to be laid out. The plaintiffs, however, had claimed, in the first suit, but a part of the ground to which that division line entitled them. This suit is for the remainder.

As this case presented no new facts and no new question of law, so far as the right to the land is concerned, the city did not contest plaintiff's title.

The District Judge, in his judgment, succinctly and correctly states the questions presented in this case, in the following words :

"There being no dispute as to the title, the only questions to be determined, relates to the boundaries fixing the portion of said property no longer wanted for public purposes, the enhanced value of the property from the improvement, and the amount or cost of the improvements to be awarded to the evicted third person."

The plaintiff's claims for damages, fruits and revenues, were reserved.

John Sidell was one of the defendants sued by the plaintiffs, as being in possession of their property. He had purchased his part of the lots of the city of New Orleans, whom he called in warranty.

There was judgment for plaintiffs against *Sidell*, and in his favor against the city, his warrantor.

The city has appealed, and contests only the allowance of \$1,500 for attorney's fees in favor of *John Sidell*, and the allowance in the judgment of \$2,890 for the difference between the cost of the improvements and the enhanced value of the property.

I. The warrantor is not liable for the fees of the attorney employed by the party evicted. There is no reason why they should be allowed in favor of parties evicted against their warrantors, and not also in every other case. It is often as injurious to a creditor to be forced to sue upon an obligation, and to abide the tedious process of law, as it is for a vendee to be evicted from land or other property.

Art. 2482 of the Civil Code declares, that if the buyer be evicted, he has the right to claim against the seller—1st. The restitution of the price ; 2d. That of the fruits and revenues, when he is obliged to return them to the owner who evicts him ; 3d. All the costs occasioned, either by the suit in warranty on the part of the buyer, or by that brought by the original plaintiff ; 4th. In fine, the damages, when he has suffered any, besides the price that he has paid.

Costs in the third clause of this Article, refer to the taxed costs of suit, and not to the fees of attorneys.

SARPY
v.
NEW ORLEANS.

If fees of attorneys were comprehended in costs, then the warrantor would be liable to pay not only the attorney's fees of the vendee, but also those of the party suing for the land, for by the third clause he is obliged to pay the costs caused by the call in warranty of the buyer, and also those of the plaintiff who claims the property.

But as he is the warrantor of his vendee, and not of the plaintiff, the latter can of course only claim the costs of suit.

Damages in the fourth clause of this section, do not refer to the fees of attorneys employed by the warrantors.

If they did, the legislator would hardly have said: "In fine, the damages, when *he has suffered any*, besides the price he has paid," for in almost every case of eviction, the buyer is obliged to employ an attorney to call his vendor in warranty.

The Article is treating of the consequences of eviction, and "damages" evidently refer to the losses proceeding from being deprived of the property, and not to the money expended by him for fees of attorneys, in order that he might keep possession of the property. Attorney's fees are not a consequence of eviction, but an expenditure in order to prevent eviction. As the costs of suit are mentioned, it seems reasonable to suppose that the fees of attorneys would also have been enumerated, if such had been the intention of the legislator.

It is true, that in *Tear v. Williams*, 2 An. 870, fees of counsel were recovered against the warrantor, but it was decided otherwise in *Melançon's Heirs v. Robichaud's Heirs*, 19 La. 360, and we consider this decision more in accordance with the proper construction of the law. The liability of the warrantor in the case of *Melançon's Heirs*, was determined according to the provisions of the old Civil Code, inasmuch as the contract of sale, by the ancestor of the warrantor, was made under that Code; but Art. 54, p. 354 of the old Code is the same as Art. 2482 of the new Code.

II. The court erred in granting compensation for the difference "between the costs of the improvements and the enhanced value of the soil." C. C. 2482.

The old Code permitted such allowance. Art. 57 declares, that "if, at the time of the eviction, the thing sold has risen in value even without the buyer having contributed thereto, the seller is bound to pay him the amount of said augmentation of value above the price of the sale."

The old Code contained the same provisions for the relief of the evicted purchaser in Art. 54, as are embraced in Art. 2482 of the new Code; but the former also provided for further relief in a certain event, as explained in Art. 57. The omission of this last Article by the framers of the new Code, shows that their intention was not to allow such compensation.

If, however, the District Court intended to make the city pay for any part of the improvements, or for any part of their depreciation in value, the judgment was erroneous.

The judgment of the District Court decreed that *John Slidell* should recover from the plaintiff the sum of \$17,890, of which \$15,000 were for the present value of the improvements, and \$2,890 for one-half of the difference between their present value and their original costs; and also that *Slidell* should recover from the city of New Orleans \$17,750, the price paid by him for the lots, \$2,890 and \$1,500 for special damages for lawyer's fees. The plaintiff's have not appealed, or asked any amendment of the judgment.

The warrantor cannot be made to pay \$2,890, the other half of the difference

between the present value of the improvements and their original costs. *Young v. Lebeau*, 13 An.; *Young v. Courtney*, 13 An.; and *City v. Hale*, 14 An.

SARFY
v.
NEW ORLEANS.

It is, therefore, ordered, adjudged and decreed, that the judgment be amended as follows: that the part of the judgment which decrees that *John Slidell* shall recover from the city of New Orleans two thousand eight hundred and ninety dollars, difference "between the costs of the improvements and the enhanced value of the soil," and fifteen hundred dollars special damages for lawyer's fees, with interest thereupon, be avoided and reversed, and that the said claims be rejected; and that the judgment so amended be affirmed, and that the appellee, *John Slidell*, pay the costs of appeal.

BUCHANAN, J., recused himself.

VOORHIES, J., absent.

CHARLES McDERMOTT v. ELIJAH CANNON.

In cases where it is admissible to dispense with personal service of a notice, the notice ought in general to be served in the form required for citations and other analogous proceedings.

APPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
T. A. McDannold, for plaintiff. *Michel & Koontz*, for defendant and appellant.

MERRICK, C. J. This is a redhibitory action. The contract sought to be rescinded is the sale of a slave alleged to be affected with scrofula and addicted to running away.

Among other defences to the action, it is objected by defendant that the slave has never been tendered to him or offered to be returned. See 4 Rob. 381; 2 N. S. 471; 4 La. 198; 19 La. 283; 11 An. 215; 4 An. 562.

The proof on this branch of the case is, that *Messrs. Henderson & Peale*, the merchants of the plaintiff, addressed a note to the defendant, wherein they stated that they were requested to collect the value of the slave from defendant, and informed him that the negro was unsound and a runaway, and in jail in this city at defendant's expense, and requested defendant to call and settle the matter.

The note was delivered to a negro boy standing in front of the door (as is supposed) of defendant's house.

This is not sufficient proof of an offer to return the negro. If it be conceded that it was not necessary actually to produce the negro and demand a rescission of the sale, still we think the delivery of an important document to a negro boy standing in front of a house, cannot be considered as a service of the same upon the person having his domicile in the house. If personal service be dispensed with, (in cases where it is admissible to dispense with such service,) the notice ought in general to be served in the form required for citations and other analogous proceedings.

The judgment must, therefore, be reversed, and one of nonsuit entered.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that there be judgment in favor of the defendant as in case of nonsuit, with costs of both courts.

VOORHIES, J., absent.

JOHN H. RUDDOCK v. WESLEY MALLORY.

Where, during the pendency of charges against him, the Clerk of a court resigns his office, the appointment made of a Clerk *pro tempore* terminates with the resignation.

A vacancy in the office thus occurring, may be filled under Art. 79 of the Constitution, by the Judge presiding in term time where the vacancy occurs, in place of the Judge of the District in which the court is held.

APPEAL from the District Court of the Parish of St. Tammany, *Beale, J.* presiding. *A. Bowie* and *W. E. Walker*, for plaintiff. *Penn & Martin*, for defendant and appellant.

MERRICK, C. J. The facts of this case and points in controversy, are correctly stated by defendant's counsel as follows, viz :

"Certain charges having been made by *Marcus T. Carter*, District Attorney, and *Mr. Alfred Hennen*, a practicing attorney in the Eighth Judicial District, against *William B. Hosmer*, the Clerk elect in said district for the parish of St. Tammany, the Hon. *Julius E. Wilson*, Judge of the said district, on the 14th of July, 1858, granted an order suspending *Hosmer*, and appointed the defendant, *Wesley Mallory*, Clerk *pro tempore*.

"On the 10th of November following, *Hosmer* tendered his resignation as Clerk to the Hon. *Robert G. Beale*, Judge of the Sixth Judicial District, then presiding at said court, who accepted the same, and appointed *John H. Ruddock*, the plaintiff herein, *Mallory* refused to give up the possession and archives of the office upon the grounds :

"1. That he had been appointed by the Judge of the court, the Hon. *J. E. Wilson*, until certain charges made against *Hosmer* were heard and decided, which had not been done.

"2. That the resignation of *Hosmer* could not take effect until notified to the proper power to take cognizance thereof, i. e. the Hon. *J. E. Wilson*.

"3. That the appointment of *Ruddock* was illegal, and in violation of Art. 79 of the Constitution of the State.

"The Judge *quo*, however, granted a peremptory *mandamus*, on the application of the relator, commanding the defendant forthwith to deliver to him the possession of said office, together with all the books, papers, &c. And the defendant has appealed."

We are not aware of any law which prevents the Clerk from resigning during the pendency of charges against him. The Constitution gives the Judges of the inferior courts power to remove their Clerk for a breach of good behavior, and the Act of 1855, makes it the duty of the District Judge, on complaint made against the Clerk, to appoint a day for hearing the evidence. Phillips' Revised Stat. p. 88, sec. 31.

By resigning, the Clerk voluntarily brings about what a decree upon the complaint is intended to accomplish, viz, a vacancy in the office and the appointment of a new Clerk. "The breach of good behavior," whatever it may be, is not to be punished in this form of proceeding, further than by a removal from office. If it be a criminal offence, it must be punished in according to the forms of the criminal law.

At the time *Hosmer* sent in his resignation, the Judge of the Sixth Judicial District was holding court in the parish of St. Tammany, under the Act of 20th

RUDDOCK
v.
MALLORY.

of March, 1858, p. 220. He had power to transact all business at the term at which he presided as District Judge, as fully and validly as the Judge of the Eighth Judicial District could have done, and as a consequence he could receive the resignation of the Clerk, and if he saw fit so to do, he had power to appoint a new Clerk for the unexpired term. He was District Judge for the parish of St. Tammany for the term at which he presided. *State v. Judge of the Sixth District*, 5 An. 756; *State v. Ryan*, 10 An. 540.

But it is contended, that the Article 79 of the Constitution declares, that it is the Judge of the court where the vacancy exists, (that is, the Judge of the Eighth Judicial District,) who is to make the appointment.

The Article is as follows :

"Art. 79. Clerks of the inferior courts, in this State, shall be elected for the term of four years, and should a vacancy occur subsequent to an election, it shall be filled by the Judge of the court in which the vacancy exists, and the person so appointed shall hold his office until the next general election."

The Code of Practice requires a defendant to be sued before his own Judge. But the law is complied with, when he is cited to answer before any competent Judge holding court at the place of his domicile; and *pro hac vice*, such Judge is the Judge of the defendant. C. P., Art. 162. So, too, we think the Judge spoken of in Art. 79, is the Judge legally holding the court at the time the appointment is made, if it be made in term time, as was done in the case under consideration. This power would be necessary to prevent a failure of justice in case of the death, or resignation and absence of a Clerk, during the term held by a Judge of an adjoining district.

Art. 77 of the Constitution gives the Judges of the several inferior courts, power to remove the Clerks thereof for a breach of good behavior. In case of relationship, it might happen that the Judge of the district would be compelled to recuse himself. If no other Judge could fulfil his functions, the case could not be tried. If another Judge could be called in to decide the controversy, then the same Judge, in the event of a vacancy, might appoint his successor.

We are aware that a Judge from a neighboring district would feel some delicacy in making an appointment, but this feeling would doubtless prompt him to defer the appointment where possible, and in making it, to consult the wishes of the Judge of the district as far as compatible with the public interests.

The *pro tempore* appointment of the defendant, terminated with the resignation of Mr. Hosmer and the appointment of the plaintiff.

Judgment affirmed.

VOORHIES, J., absent.

C CUMMINGS AND HUSBAND v. J. H. ERWIN.

An appeal will be dismissed when all the parties interested in maintaining the judgment appealed from are not made parties.

A PPEAL from the Sixth District Court of the Parish of Iberville, *Beale, J. S. Mathews*, for plaintiffs and appellants. *D. N. Barrow*, for defendant.

BUCHANAN, J. The defendant, sued as a third possessor of property subject to the general mortgage of a minor, called in warranty his vendor, who appeared

COUNTESS
v.
BROWN.

pleaded to the action, and called in the heirs of the party under whom he had acquired the title of the property sought to be subjected to plaintiff's mortgage. One of those heirs is the plaintiff herself, who was already in court, and there are two others, her half sisters, minors, represented by their tutors.

These parties also appeared and pleaded to the call in warranty.

There was judgment for defendant, and plaintiff appealed by motion. The appeal bond is made in favor of defendant alone, without any mention of the first or second warrantors.

Defendant and appellee moves to dismiss the appeal for want of proper parties, and his motion must prevail.

The principle is too well settled to require a citation of authorities, that all parties to the record, interested in maintaining the judgment appealed from, must be made parties to the appeal from such judgment.

The counsel of appellant urges, in answer to the motion, that his client only having given bond for costs, there is nobody but the Clerk of the District Court interested in the bond; and if he be satisfied with it, the defendant or his warrantors have no cause of complaint. We are unable to admit the correctness of this position. It might even be said, that it proves too much; because the fair inference would be, that in appeals by plaintiff, (who, in the absence of a reconventional demand, is never bound for any thing but the costs,) the bond of appeal should be in favor of the Clerk of the court, and not of the opposite party in the suit, which would be plainly contrary to Articles 575 and 578 of the Code of Practice.

Rule absolute, and appeal dismissed with costs.

VOORHIES, J., absent.

14 816
4111 859

LUCINDA S. McCALEB v. ESTATE OF D. J. FLUKER.

Where a judgment was rendered on an act of mortgage in which it was stipulated that it was to secure the payment of the notes, and any costs that may be incurred in collecting the same—*Held*: That a receipt in full of the amount of the judgment, and consent that satisfaction of the judgment should be entered up, was a release from any obligation under the contract to reimburse money paid by the plaintiff to counsel in prosecuting the collection of the debt.

A PPEAL from the District Court of the Parish of East Feliciana, *Ratliff, J. J. McVea* and *D. Y. Duncan*, for plaintiff and appellant. *D. C. Hardee*, for defendants.

BUCHANAN, J. The plaintiff sold the late *David J. Fluker*, a plantation and slaves in the parish of Ouachita, for twenty thousand dollars, of which six thousand cash, and the balance in two promissory notes. The vendee mortgaged the land and slaves thus sold, to secure the punctual payment of the notes, and any costs that may be incurred in collecting the same. The notes not being paid at maturity, were put in suit, and judgment obtained therefor.

Upon this judgment a writ of *fiery facias* was issued, upon which a receipt was endorsed, "in full of the amount due us on that decree, including principal, interest, Clerk of court and Sheriff's costs—the last installment of \$7,000 and interest having been paid heretofore—and hereby consent that satisfaction in full be entered in the case." Signed by plaintiff, authorized by her husband.

The present action is brought for reimbursement of money paid by plaintiff to

the counsel employed by her in the District and Supreme Courts, in prosecuting the collection of this debt.

The administratrix of *Fluker* denies that the contract obliged the vendee to pay the fees of plaintiff's attorneys, and pleads the receipt and consent for entry of satisfaction of judgment above mentioned, in bar of plaintiff's demand.

We think the defendant has been released from the obligation of paying the charges now claimed, by the terms of the receipt and consent above mentioned; even on the supposition that the obligation previously existed.

The debt, of which the notes and the act of mortgage were the evidence, was merged in the judgment; and the judgment is acknowledged to have been satisfied in full. C. C. 2495; C. P. 156.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

VOORHIES, J., absent.

McCALEN
v.
FLUKER.

SUCCESSION OF JOHN RICE—On Appeal of W. RICE.

A mandate is gratuitous, unless there has been a contrary stipulation.

The dismissal from office of a curator, does not involve the forfeiture of his commissions.

14	317
109	518
14	317
118	429

APPEAL from the Second District Court of New Orleans, *Morgan, J.*
Collens & Woodbridge and Hunton & Miller, for appellants. *T. Gilmore & T. G. Morgan, Jr. and Hyams & Jonas*, for appellees.

BUCHANAN, J. Appellant claims to be a creditor of this succession for services rendered, as agent of *Dr. John Rice*, during fifteen years, at one thousand dollars per annum. The District court rejected the claim.

We find no error in this judgment. There is nothing in the evidence to support the claim. The case has a great resemblance to that of the *Succession of Fink*, 13 An. 103.

The claim is for compensation as mandatory. But Article 2960 of the Civil Code says: that a mandate is gratuitous, unless there has been a contrary stipulation. Besides, this claim is stale and suspicious. There is no evidence that the defendant ever demanded from, or was promised by his uncle, the deceased, any compensation for collecting his rents; especially a compensation amounting to about one-fourth of their gross amount. As was said in the case of *Simpson v. Powell*, 7 An. 555, the long delay in making such a claim, and the fact that it was never made of *Rice* in his lifetime, are to be taken into consideration and require explanation.

Appellees have answered the appeal by praying that the allowance made to appellant of commissions as curator of the estate, should be reversed, on the ground, that the appellant was dismissed from his curatorship.

The appellant was dismissed from office, and condemned to pay twenty per cent. per annum on a sum of \$2,500, collected by him for the estate, and not deposited in bank. This is the full extent of the penalty prescribed in such a case by law. We do not find that a forfeiture of commissions is superadded by the statute. Of course, the penalty will offset the commissions, as far as it goes.

Judgment affirmed, with costs.

VOORHIES, J., absent.

A. W. MERRIAM v. THE CITY OF NEW ORLEANS.

Where the language of a city ordinance is ambiguous and susceptible of two different significations, one of which is against law, the court will ascertain and give effect to the intent and meaning of the ordinance, provided the same be not contrary to law.

The city ordinance which declares that "a tax of sixty dollars shall be assessed and collected from every keeper of a billiard table, *the whole tax being levied on each and every billiard table*" was intended to impose a *license tax* upon the particular calling or business of keeping a billiard table, and not a property tax upon the table itself.

Such a tax is equal and uniform upon all persons engaged in that kind of business.

APPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
J. Livingston, for plaintiff. *J. J. Michel*, for defendant and appellant.

LAND, J. Section 102 of the charter of the city of New Orleans, approved March 20th, 1856, provides, that the city of New Orleans shall have power to levy taxes, commonly known as licenses, upon trades, professions, callings, and other business carried on, and upon carriages, hacks, drays, carts, and other vehicles used in said city; and said taxes, commonly known as licenses, laid as aforesaid, shall not be construed to be a tax on property, within the meaning of sections 36, 38 and 42 of this Act. Sess. Acts 1856, p. 158.

In pursuance of this section, the Common Council of the city of New Orleans passed an ordinance, approved December the 5th, 1856, and numbered 3671, to establish a uniform rate of taxes and licenses on professions, callings and other business, and on carriages, hacks, drays, and other vehicles; and by the 34th section thereof levied a license tax upon the keepers of billiard tables, in these words: "Every keeper of a billiard table, the whole tax being levied on each and every billiard table, sixty dollars."

Under this ordinance, the plaintiff paid the license tax on eight billiard tables on the 31st of January, 1857, and on the 1st of March, 1858, paid the same tax on sixteen billiard tables, amounting to the sum of \$1473 60. These payments were made under protest, and this suit is brought to recover back the taxes thus paid, on the ground, that the tax was illegal, unequal and unconstitutional.

The plaintiff contends that the tax is upon his property, to-wit, his billiard tables, and that the ordinance levying the tax is illegal and void—for the reason that it contravenes section 42 of the charter of the city of New Orleans, which is in these words: that the Common Council of the city of New Orleans shall, for the purposes of this Act, once, and not oftener, in each and every year, lay an equal and uniform tax upon all property, real and personal, in said city; but said tax, added to the Consolidated Loan Tax, and to the the special tax for payment of the annual interest on the bonds issued by the city for subscriptions to the stocks of the New Orleans, Opelousas and Great Western Railroad Company, the New Orleans, Jackson and Great Northern Railroad Company, and the Pontchartrain Railroad Company, shall not, in the aggregate, be more than one dollar and fifty cents on one hundred dollars of valuation, except in case of invasion or insurrection; provided it be sufficient to pay the interest on the consolidated debts and railroad bonds issued by the city of New Orleans.

The plaintiff further contends, that if the tax be a license tax, in the sense of section 102 of the charter, that the ordinance levying it is likewise illegal and void—for the reason that it violates the constitutional principle of uniformity

MENRIAN
v.
NEW ORLEANS.

and equality in taxation. First, that this tax was not intended by the Common Council to be a tax on property, in the sense of section 42 of the charter, is evident from the title of the ordinance, which is "*An Ordinance to establish a uniform rate of taxes and licenses on professions, callings and other business, and on carriages, hacks, drays, and other vehicles,*" as well as from the nature of the taxes assessed by the ordinance upon the various professions, trades, callings, &c., therein specially mentioned.

In the construction of ordinances, as in the interpretation of statutes, the court will ascertain and give effect to the *intent and meaning of the ordinance*, provided that the same be not contrary to law, *although the language may be ambiguous and susceptible of two different significations, one of which is against law.* Notwithstanding the language of the 34th section of the ordinance in question declares, that a tax of sixty dollars shall be assessed and collected from every keeper of a billiard table, *the whole tax being levied on each and every billiard table*, we have no doubt that the *intention* of the Common Council was *to impose a license tax upon the particular calling or business of keeping a billiard table*, and not a property tax upon the table itself.

Second. The remaining question is, whether the license tax imposed upon keepers of billiard tables by the ordinance is equal and uniform.

The power conferred upon the Common Council by Article 102 of the charter to levy license taxes upon trades, professions, callings and other business carried on, is without exception or limitation; and *in the exercise of this power it is necessary to determine what is a trade, profession, calling or other business carried on*, and the determination of these matters, *previous to the assessment of the tax*, has been left by the charter to the wisdom and discretion of the Common Council.

In the ordinance in question, the Common Council have determined that every person having more than *one shop, or store, or other establishment*, or who shall exercise or follow more than *one profession, trade, calling or business*, shall *pay the tax upon each separately.* Sec. 73 of the ordinance. And have also determined that the keeping of each and every billiard table *constitutes a separate and distinct business* subject to a license tax. Hence it follows, that as the keeping of *each billiard table*, in the sense of the ordinance, *is a separate business*, subject to a tax of sixty dollars, and no more, that the tax is equal and uniform upon all persons engaged in that kind of business, *as much so as the license tax upon merchants having separate stores or establishments.*

It is, therefore, ordered adjudged and decreed, that the judgment be avoided and reversed, and that there be judgment in favor of the defendant, with costs in both courts.

P. E. Bonford and J. Livingston, for re-hearing, argued :

The question in this case is one of construction, and its solution depends upon the proper application of principles which have been repeatedly recognized as controlling the subject.

The city of New Orleans derives its power of taxation from legislative grant. As was said of the corresponding power in the late general council of the city, the authority exercised by it in levying taxes, is derived from a special grant of power, and there is no warrant for extending this power beyond the objects specified. 4 An. 408.

The grant under which the city now exercises the right of taxation, is embodied in the Act of 1856, amending the Act consolidating the city of New Orleans. That Act provides for the taxation of *property* and the taxation of *persons*. The 36th, 38th and 42d sections determine the extent, and provides for the manner of levying taxes upon property. The 102d section gives the authority and provides the manner of taxing persons.

MERRIAM
v.
NEW ORLEANS.

Has this grant of the right to levy the personal tax conferred by section 102, been exceeded in the present instance, by the municipal authorities? This question has been solved by the decision of the court in favor of the city; but in so doing, it is submitted with all due respect, that the court has not allowed sufficient weight to several considerations which have an important bearing upon the controversy.

The particular manner in which the Legislature has authorized this personal tax to be laid, is in the shape of licenses on trades, professions, callings and other business.

No form of tax can be devised more strictly personal, than that of the license to pursue a particular trade, profession or calling.

It acts only on actual residents within the territorial limits of the taxing power, and is impotent by reason of this personal nature of the tax, to affect the interests of absentees in the occupation or business carried on within those limits.

It is so exclusively personal, that if he to whom the license has been granted should die, the right is not transmitted to his heir, to use it during the unexpired period. Neither can it be transferred to another by sale or otherwise, not even as an appurtenance to the business for which the license was taken out.

It is levied without reference to the amount of capital engaged, of property employed, or of revenue derived from the particular occupation or calling, which is the subject of the license. Thus the recently admitted attorney whose income barely reaches hundreds, pays the same license as the long established counsellor, whose professional emoluments are measured by thousands; and so one merchant with limited capital and stock, contributes precisely the same amount to the treasury, on receiving his license, as another whose business and property may be an hundred fold greater.

This distinguishing feature of the license was not lost sight of by the Legislature, when it vested the power in the city to raise a portion of its revenues by this means. It was distinctly provided, that the tax was not to be construed to be a tax on property.

But in the ordinance complained of, the license which every billiard table keeper is required to procure, as a condition precedent to the exercise of his calling, loses all the characteristics of a license or personal tax, and becomes in terms, as it is in fact, a tax on property.

For the 34th section provides that the whole tax of sixty dollars shall be "levied on each and every billiard table." This is in as plain terms as language can express the idea, a tax upon the thing, upon property, possessing the peculiarity of the property tax; which is, that it increases in amount according to the quantity of the property employed, and wanting, consequently, in the distinguishing feature of the license or personal tax, which is, that it should be a sum fixed, not variable according to the amount or value of the property used in the calling or business licensed.

This fatal antagonism as it would seem to the undersigned, between the idea of a license and the assessment in this particular case, is reconciled by the court, on the hypothesis that the Legislature has vested in the municipal authorities, the exclusive right of determining what are trades, professions and callings, within the meaning of the 102d section; a right which it is supposed they have exercised with respect to the billiard table tax, by holding every billiard table keeper to pursue a separate and distinct occupation as to each and every table he may have under the same roof or in the same room. The language of the court is, "the power conferred upon the Common Council by Art. 102 of the Charter, to levy license taxes upon trades, professions, callings, and other business carried on, is without exception or limitation; and in the exercise of this power, it is necessary to determine what is a trade, profession, calling, or other business carried on, and the determination of these matters previous to the assessment of the taxes, has been left by the Charter to the wisdom and discretion of the Common Council."

The Act of 1856 has been examined with care, for the purpose of ascertaining upon which of its provisions the court has formed its conviction, that the Legislature has either in express terms or by limitation, delegated to the city this unusual power of fixing, by its own interpretation, the nature and extent of the grant conferred upon it. Has it been left to the Common Council to decide as in the last resort, what is a trade, profession or calling; or was not the use of words having a known, definite and well ascertained meaning, intended to limit the grantees to the subjects fairly included within the definition of the terms employed?

MERRIAN
V.
NEW ORLEANS.

We hold the latter of these propositions to be indisputably the true one. As was said in the place in 4th Annual already quoted, the right of taxation is derived from special grant, and there is no warrant for extending it beyond the object specified. What these objects are, is a question like every other question regarding the legislative will—purely of judicial construction. To hold that this power of interpretation, and of consequent extension of the grant, is vested in the grantee, is, it is respectfully submitted, to destroy all the safe guards which the Legislature of the State has so wisely enacted, to anticipate and to prevent the abuses growing out of an irresponsible and unlimited power of taxation.

The jurisprudence of this court abounds in instances of its interference to restrain the abuses of the taxing power. It had always proceeded upon the assumption, that the power is a delegated one, and that the grant was to be construed strictly. In 1851, it refused to sanction the interpretation which the municipal authorities placed upon the legislative grant, and it held that the right to tax capital was not included in the general right to tax personal estate; and yet with such a canon of interpretation as the court seems to recognize in the present case, the counsel could have triumphantly insisted, that the right of determining what constituted personal estate was left entirely to their wisdom and discretion, and was not a proper subject of judicial inquiry or determination.

Undoubtedly, if this exclusive right of deciding what the Legislature meant by trades, professions and callings, belong to the Common Council, the exercise of this right, however extravagant, would not be the subject of review, and the plaintiff would be without remedy. But the undersigned are not without hope in view of the serious evils which may ensue from the recognition of this right, that the court will pause before it yields its final sanction to this doctrine. In the hands of a body disposed to extend its power of taxation, or to disregard the restraints to which it is subject, it would be a facile means of increasing the burdens of the citizens, without measure and without control. The sale of every package of merchandise, the call of every new patient, might be created into a distinct and separate occupation, and made the occasion of exacting a separate license. The collection of one's own income might thus be created into a trade, profession or calling, and the tax demanded for its pursuit. These may be extreme cases, but they afford a fair means of testing the soundness of the principle which could possibly result in such consequences.

If, then, it does not belong to the Common Council to determine without appeal, what subjects are included in the language of the 102d section of the city charter, we are thrown back upon the ordinary sources of interpretation, for the purpose of fixing the true limits of the power it vests in the city; and in this view, the decision of this cause ought not to present serious difficulty; because we have but to appeal to the common understanding of men upon these matters, to justify us in saying that the keeper of a billiard saloon is considered to pursue but one occupation, whether he has two or a dozen tables in his rooms. No one would speak of such a power as multiplying his pursuits or occupations upon each addition which the wants of his customers or his own enterprise, might induce him to make. With more propriety might the grocer be considered as pursuing different occupations with respect to the infinite variety of articles he vends, and be required to increase the number of his licenses with every new article he adds to his stock.

These views are fully supported by the decision in the case of the *Police Jury v. Nougues*, 11 An. 739; a case quoted in the original brief, though not noticed in the opinion of the court. The analogy between that case and the present, seems to the undersigned to be so striking, that the court will pardon them for again calling its attention to the identity of the question then discussed and decided, with that now before the court.

The Police Jury of the parish of Orleans had imposed a tax or license upon all dairymen carrying on their business within certain limits; the amount of tax being two dollars for every cow. It is true the tax was liable to the objection which does not exist here; that it was not uniform, inasmuch as it was not levied upon all dairymen in the parish, but only upon those pursuing their occupation in a limited district of the parish. But the court will observe that with respect to the point, whether, what was there called a license or tax on the person, was not in disguise a tax on property; the two cases are absolutely undistinguishable. There, as here, the right to tax persons pursuing any occupation, trade or profession, was held to be resident in the Police Jury. There each and

MURPHY
v.
NEW ORLEANS.

every dairyman within the limits, was taxed two dollars for each and every cow. Every keeper of a billiard table is taxed sixty-five dollars, the tax being levied on each and every billiard table. It was the circumstance that the tax was levied on the property, though in the shape of a license to the person, which induced the court to consider it, notwithstanding its name, to be a property and not a personal tax. The same reason should prevail here to induce the court to say that while *professing* to tax the occupation, the ordinance really imposes a tax upon billiard tables.

The change of legislation effected by the Act of 1856, may not be without its influence upon the question. The Charter of 1853, gave the city specially the right of imposing an uniform rate of taxes upon all billard tables; the Charter of 1856 took away this privilege, and placed billiard tables upon the same footing as all other personal property. It is not to be supposed that this change was made without object or motive; but under the operation of the decision in this case, it will be entirely ineffectual, since precisely the same result is attained, by the mode in which the personal tax on the calling of the billiard table keeper is permitted to be levied.

Re-hearing overruled.

VOORHIES, J., absent.

JAMES MURPHY v. J. S. SIMONDS & Co.

The Supreme Court cannot inquire into the ruling of a District Judge in refusing to grant a continuance, when no bill of exceptions has been taken to such ruling.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
M. M. Cohen, for plaintiff. *G. A. Breaux*, for defendant and appellant.

LAND, J. The defendant has appealed from a judgment against him, on a bill of exchange, and contends in this court, that the District Judge erred in refusing him a continuance.

In the case of *Dwight v. Richard*, 5 An. 366, Slidell, Justice, the organ of the court says: "The first subject presented for our consideration by the appellant, is the refusal of the court below to grant a continuance. The ruling of the court below cannot be inquired into here, the party not having taken a bill of exceptions to the ruling of the court."

In the case of *Crain & Jones v. M. D. C. Kane*, 5 An. 659, Judge Rost, who delivered the opinion of the court, says: "No bill of exceptions was taken to the opinion of the Judge refusing the continuance. In consequence of this omission, we have no means of ascertaining his reasons for the course he pursued, and we are bound to presume that they were sufficient in law, and that the party acquiesced."

In this case the appellant took no bill of exceptions to the ruling of the court refusing him a continuance. There is no error in the judgment appealed from.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed with costs.

VOORHIES, J., absent.

THE STATE, on the relation of CORDEVOLLE & LACROIX, v. JUDGE OF
THE FIFTH DISTRICT COURT.

An agreement by the parties to submit the report of experts and the whole matter in controversy, without argument to the court, does not deprive either party of their right of appeal from any judgment that may be rendered against them.

ON an application for a *mandamus* to the Judge of the Fifth District Court of New Orleans. *Collens & Wooldridge*, for relator.

BUCHANAN, J. The relators complain that the defendant refuses them an appeal from a judgment in a civil case where the amount in dispute was ten thousand dollars. The defendant, in his answer, acknowledges the correctness of the facts stated in the petition of relators, but contends that the case was submitted to him as an amicable compounder, and consequently that there is no right of appeal.

The submission upon the minutes of the District Court was in the following words :

“ When after hearing pleadings, evidence and counsel, the parties agreed in open court to submit the whole matter without argument, the court to pass upon the report and amend the same, without referring it back to experts, and upon the law and the evidence to give such judgment on said opposition as in its opinion may be just.”

There is nothing in the terms of this submission which withdraws it from the general rule, and deprives any party to the suit of his right of appeal. Indeed, we doubt whether the doctrine in relation to *amicable compounders* in matters of arbitration, can be applied to a Judge of a District Court. No precedent to that effect has been brought to our notice. Arbitrators constitute an exceptional tribunal created by the parties themselves, and to whom the law permits the parties to delegate a final and unappealable jurisdiction, (when there is no fraud or misconduct,) under the name of *amicable compounders*. But the District Judges are a part of the judicial organization created by the Legislature under Article 61 of the State Constitution ; and their judgments fall within that provision of Article 62 of the same instrument, which declares that the appellate jurisdiction of the Supreme Court extends to *all* cases where the matter in dispute exceeds three hundred dollars.

It is, therefore, adjudged and decreed, that the peremptory *mandamus* issue as prayed for, requiring the Honorable the Judge of the Fifth District Court of New Orleans to allow an appeal, and to permit the same to be carried to this court, and to proceed, notwithstanding the order of 21st of March, rescinding the same.

VOORHIES, J., absent.

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ALEXANDER POPE v. HALL & HILDRETH.

The oath of the party cannot be received to prove the deposit of his baggage or other articles of value at an inn.

When proof *aliunde*, establishes the fact of the possession by the party of the articles alleged to have been stolen, and their deposit in the inn, and that the room had been entered by thieves, the declaration of such party at the instant of discovering the theft may be given in evidence as part of the *res gesta*—not as proof of a deposit, but as a fact to be connected with other facts tending to prove the loss.

The inn-keeper will be liable for the necessary baggage of the traveler, his watch and personal apparel, and for money which he has about him for his personal use when stolen, notwithstanding a regulation of the inn requiring travelers to deposit certain articles of value in the safe at the office.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
A. G. Semmes, for plaintiff. Clarke & Bayne, for defendants and appellants.

MERRICK, C. J. This suit has been brought against Messrs. Hall & Hildreth, the proprietors of the well known St. Charles Hotel, of this city, to recover of them three hundred and forty-five dollars, for a watch and chain and gold coin, alleged to have been stolen from the trunk of the plaintiff whilst lodging with the defendants as a traveler.

The case was tried without the intervention of a jury, and an elaborate examination of the law and facts by the learned Judge of the District Court, resulted in a judgment in favor of the plaintiff for \$300, defendants have appealed.

The first question for our consideration, is presented by a bill of exception taken to the testimony of a witness (who lodged in the same room with plaintiff,) of the declarations made by him on the discovery of the theft or robbery. The particular statements objected to are, that "some person had entered his room and stolen his watch and pocket book," that "his belt and gold were gone," and "some one had been in the room and stolen his watch and pocket book."

In most of the common law States, we believe, the oath of the traveler is received with corroborating testimony to prove the contents of his trunk and loss, and in France the Judge has power, in a proper case, to order the oath to be deferred to the plaintiff.

Our law contains no such provisions, but on the contrary declares that no one interested in the event can be a witness in the cause. C. C. 2260.

The lawgiver has also had the particular case of travelers under consideration, and as he has declared the kind of proof necessary in order to *establish the deposit*, the courts cannot add other exceptions.

Art. 2940 is as follows: "the deposition on" (declaration under) "oath or affirmation of a single competent and credible witness as to deposit at inns, may be admitted as good proof even when the value of the thing so deposited exceeds five hundred dollars; but the Judge must admit this kind of proof in that case with circumspection according to the circumstances of the fact and the condition of the parties."

If the oath of the party cannot be received to prove the deposit, much less therefore can the unsworn declarations of the plaintiff be received for that purpose.

But where the proof *aliunde* establishes the fact of the possession by the plaintiff of the articles alleged to have been stolen, and their deposit in the inn, and that the room had been entered by a thief or thieves, we think the declaration

made by the party on the instant of the discovery of the theft or robbery may be given in evidence as part of the *res gesta*; not as proof of the deposit, but as a fact to be connected with other facts tending to prove the loss. In this case it is suggested that the plaintiff might have secreted the watch and gold himself, and that it is dangerous to admit the declarations of the party in evidence. But the same objection might be made, if, in order to ascertain the loss, the trunk had been first examined by a stranger instead of the plaintiff himself. The declarations were those made to a lodger in the same room on discovering that the door of the room had been opened and the watch was missing, and on a further examination, and discovering that the trunk had been opened, they were calculated to call the attention of the fellow traveler to the facts. As the declarations of the party were admissible as part of the *res gesta*, for the purpose we have indicated, the Judge did not err in receiving them.

It is next objected that the character of the plaintiff and his friend, the witness, ought to have been shown. It is true, that the article of the Code which has been cited does contemplate proof of the condition of the parties, but we think in this case we have sufficient proof on that subject, drawn out on the cross interrogations of defendants.

Supposing the deposit and loss to be established, the defendants oppose these further objections to the plaintiff's right of recovery, viz :

1st. That the loss was occasioned by the negligence of plaintiff and his friend in not locking the door of their sleeping apartment, and

2d. That the plaintiff was notified by the regulations of the hotel, posted in the apartment occupied by plaintiff, and in other conspicuous places, that the proprietors would not be responsible for the loss of money, watches, &c., unless deposited in the safe at the office kept for that purpose.

I. On the first ground, the proof shows that the plaintiff and his traveling companion on retiring to their room on the night of the theft, applied at the office and obtained the key bearing the number of their room, (which was in an upper story of the house,) that on reaching the room it was found that the key would not unlock the door, the key not throwing the bolt back; that they then reported to the office that the key would not unlock the door; that a porter was sent with a pass key, and he also tried in vain to unlock the door with the key furnished plaintiff; the room was then unlocked with the pass key, when it was found that the key handed plaintiff would *lock*, but not *unlock* the door; no other key was furnished the plaintiff, and as his companion objected to be locked up in a room which they had no means of unlocking in case of fire, it was left unlocked. The defendants were fully notified of the defect in the lock by the information communicated to the clerk, porter and chambermaid.

No reasonable man could be expected to shut himself up in an upper room in a large hotel without any means of egress, and become wholly dependent upon the casual presence of a servant outside to open the door. The neglect to lock the door is not a fault which can be imputed to the plaintiff. The key discovered the day after the theft explains the discrepancy between *J. A. Hildreth's* testimony and that of plaintiff's witness.

II. At the head of each stair-way a large card was posted, cautioning the boarders to beware of hotel thieves, and requesting them to deposit all money, jewelry, watches, plate, or other valuables, in the safe at the office, and notifying the guests, that the proprietors would not be responsible for any such articles stolen from the rooms.

POSE
V.
HALL.

The regulations of the hotel were posted in print in each of the rooms. Among other regulations, is stated that "money and articles of value may be deposited and a receipt taken, and no remuneration may be expected if lost when otherwise disposed of."

The defendants contend that the inn-keeper has the right to say where the property shall be kept as a sequence of his responsibility; that if he is to be held responsible as a custodian, he must be permitted to guard the property in his own way, and they derive this right to limit the responsibility from the Roman law, and cite the concluding paragraph to law 7. Dig., lib. 4, tit. 9, *De protestatione exercitoris*. It is as follows:

Item si prædixerit, et unusquisque rectorum res suas servet, neque damnum se præstaturum, et consenserint vectores predicationi, non convenitur.

It will be observed in the text cited, that the master of the ship limits his liability only by the actual consent of the passengers. In the present case, this right is claimed to the inn-keeper without such express consent of the traveler.

Without reviewing the cases, or entering into the prolix discussions which this question has given rise to in France, England and the United States, it is sufficient to say, that we think the District Judge very correctly took a distinction between articles of value and those ordinarily worn, together with such small sums of money as are usually carried about the person. He says, in conclusion: "They (inn-keepers,) have no right to require a traveler to deliver up to them his necessary baggage, his watch, which adorns his person and is a part of his personal apparel, and the money which he has about him for his personal use. Such a regulation is contrary to law and reason. If he had large sums of money or valuables the rules might be different."

Under this view of the case, which we adopt, it is a matter of indifference whether the plaintiff did or did not read the notices posted in the hotel.

The traveler who arrives at the inn where he intends to lodge during the night, ought not to be required to part with his watch which may be necessary to him to regulate his rising, or to know when the time of departure of the morning train or boat has arrived. Neither ought he to be required to deposit with the inn-keeper such small sums of money as are usually carried by the majority of persons in the like condition in life visiting such hotel.

The inn-keeper should provide safe locks or fastenings to the rooms, and in default of the same, he must be held responsible for the loss of such articles of apparel and small sums of money as are usually carried or worn by the class of persons favoring the hotel with their patronage.

The estimate of the damage sustained by the plaintiff is justified by the proof. Judgment affirmed.

VOORHIES, J., absent.

ESTELLE ALEXANDRIE, Wife of, &c., v. B. SALOY et al.

The deposit of the money in court, after the institution of a suit on a note, is not a payment of the note to the creditor or to any one authorized to receive it for him.

Where, in an act of mortgage, it was stipulated that, in the event of the note not being paid at maturity, the attorney's fees for collection should be paid by the debtor, but it was shown that the suit for the collection of the note was unnecessary—*Held* : That the fees could not be secured by the creditor.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
A. & A. Piat, for plaintiff. *G. & C. E. Schmidt*, for defendants and appellants.

LAND, J. The defendant was the holder of a promissory note made by the plaintiff, a married woman, payable to her own order, and by her endorsed in blank, for the sum of seven hundred dollars, and secured by mortgage on certain slaves.

The defendant instituted executory proceedings for the recovery of the amount of the note, and the sum of seventy dollars, attorney's fees, which the plaintiff had stipulated in the act of mortgage to pay, in the event the note should not be paid at its maturity.

This suit was instituted to enjoin the execution of the order of seizure and sale, on the grounds stated in the petition, as follows :

"That your petitioner being indebted to one *Joseph Pouet*, in the sum of one thousand dollars, secured by first mortgage on two slaves, and by second mortgage on the four slaves already securing the above sum of \$700 due to said *Saloy*, did apply to said *Pouet* and request him to pay the said note of \$700 in the hands of *Saloy*, and to become thereby her only creditor for the sum of \$1700, with mortgage on the six slaves. That said *Pouet* consented thereto, and for the purpose of carrying into execution the above propositions, applied to said *Saloy* and offered him the sum of \$700, being the amount of the note held by him. That said *Saloy* did not then accept the sum offered to him, but advised the said *Pouet* not to pay the said note before protest, for fear of losing the mortgage rights attached to the same, thereby leading the said *Pouet* into error as to the law, and told him to be quiet, and that as soon as the note would be protested, he would advise the said *Pouet* of the facts, so that he could pay and retain his privilege. That said *Pouet*, ignorant of the law, and reposing full confidence in the promise of *Saloy* to inform him of the protest of the note, withdrew without paying the same.

"That on the 10th of February, 1858, the said *Pouet*, having been previously informed by your petitioner that said note had been protested on the 13th, applied to said *Saloy* at 10 o'clock A. M., in order to pay him the amount thereof, when he was answered that the note was already in suit in the Fifth District Court of New Orleans. That said *Pouet* then went to the Fifth District Court, where he was soon followed by *Saloy*, and observed to him in the presence of the deputy clerk, that he had acted wrongly in putting said note in court so promptly, when he knew that the same would have been paid on presentation, and he had himself promised to bring it to said *Pouet* immediately after protest, and the said *Pouet* then offered again to give his check for the note and protest, when he was again

ALEXANDRE
v.
SALOY.

prevented by said *Saloy* from so doing, under the pretext that it was necessary to wait for the Judge, before whom *Saloy's* lawyer would make a motion to subrogate *Pouet* to all the rights secured by the mortgage.

"That afterwards, the said *Pouet* was informed for the first time, by *Saloy's* own lawyer, that, besides the note, there was a claim of \$70 for lawyer's fees, for filing the petition in court and demanding the writ of seizure and sale. That upon receiving information of such a claim, petitioner refused to pay the same, or to permit the said *Pouet* to pay the same in her name, inasmuch as *Saloy* had no business or necessity to institute proceedings against her to obtain payment of his note, and had positively promised to inform *Pouet*, who was then your petitioner's agent, of the protest of the note, which, if he had fulfilled his promise, would have precluded the necessity of any further proceedings on his part.

"Petitioner further avers, that she had deposited in court the sum of \$703, amount of note and protest, subject to the demand of said *Saloy*, &c."

The facts thus stated in the petition were substantially proved on the trial in the court below, and the District Judge perpetuated the injunction and condemned the defendant to pay the sum of \$75, attorney's fees, and the further sum of \$100 dollars damages sustained by plaintiff, by the wrongful acts committed by defendant.

I. The facts stated in the plaintiffs petition *do not constitute a real tender of payment of the note*. When the tender is for money due, it must be made to the creditor himself, or at his actual or chosen domicile, by the debtor, or by his agent in the presence of two witnesses residing in the place, by tendering to such creditor the sum which is due to him, with the interest, and such costs as he may have incurred, and exhibiting such sum to him in the presence of such witnesses, in the current coin of the United States. Code of Practice, 407. *DeGoër v. Hellar*, 2 An. 496.

II. *The deposit of the money in court with the clerk was not a payment of the note*—for the reason, that it was not a *payment to the creditor, or to any person authorized by him, or by a court, or by law, to receive it for him*. C. C. 2136. The deposit with the clerk was after the institution of the executory proceedings, and cannot, therefore, affect the question of the defendant's right to institute the same.

It was, however, stated and admitted in argument, that the defendant had ratified the payment to the clerk by receiving the money from him, and this statement the court will consider as true.

The defendant *had the legal right to institute suit on the note*, at the time of the commencement of the executory proceedings and *this right continued* until the amount of the note was paid to the clerk, and *ratified by him*. It was then extinguished, and the injunction was, therefore, rightfully perpetuated.

The question whether the plaintiff is bound to pay the attorney's fee of seventy dollars, stipulated in the act of mortgage, is independent of the *strict legal right* of the defendant *to sue on the note*—but depends on the intent and meaning of the parties, in making the stipulation.

We understand the stipulation to mean, that the plaintiff should pay the attorney's fees, in the event that *a suit should be necessary for the collection of the note*; and we are of opinion that no such necessity existed, and that the plaintiff is, therefore, not bound to pay the same.

The suit for the collection of the note was unnecessary, and perhaps ill-natured, but as the defendant had the legal right to institute it, he cannot be condemned in

damages for its exercise. There had been neither a legal tender, nor payment of the note.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed so far as it perpetuates the injunction, and that it be reversed so far as it condemns the defendant to pay seventy-five dollars attorney's fees, and one hundred dollars damages, and that the plaintiff pay the costs of this appeal, and the defendant the costs of the lower court.

VOORHIES, J., absent.

ALEXANDRE
v.
SALOT.

MAUNSEL WHITE v. MATTHEW RAMSEY.

The appeal will be dismissed when it is made to appear, in the Supreme Court, that the appellant had voluntarily executed the judgment after taking his appeal.

A PPEAL from the District Court of the Parish of East Baton Rouge, *Beale, J. T. G. Morgan*, for plaintiff. *Eltis & McCutcheon*, for defendant and appellant.

LAND, J. A motion has been made in this case to dismiss the appeal taken by the defendant, on the ground of his voluntary execution of the judgment by a payment in full of the principal, interest and costs, after the appeal was granted.

The record shows, that defendant took, in open court, a suspensive appeal from the judgment, but that he did not give bond according to law, for an appeal of that character; that an execution issued on the judgment, and his property was seized under it; that the seizure was released by order of the plaintiff's attorney, and that the costs of suit were paid to the Sheriff.

The motion to dismiss alleges full payment of the judgment, and is a judicial admission of the fact in this court by the plaintiff, and is sworn to by *C. Kohn*, representing himself to be an authorized agent of the plaintiff.

We are, therefore, of opinion, that the fact of payment sufficiently appears from the evidence in the record.

The failure of the defendant to give bond for a suspensive appeal, (in the absence of proof or suggestion of his inability to do so,) and his subsequent payment of the judgment, constitute a voluntary execution thereof, and extinguished his right of appeal. C. P. Art. 567.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed, and that the Clerk of the District Court enter satisfaction in full on the original judgment in his office; and that defendant pay the costs of this appeal.

MERRICK, C. J., dissenting. As we have no original jurisdiction, I am of the opinion that the case ought to be remanded to try the issue made by the motion to dismiss.

Where the costs are large, it might be the interest of an appellee to admit payment in order to obtain a dismissal of the appeal.

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E. Hiestand v. The City of New Orleans.

The city of New Orleans is a political corporation recognized by the Constitution of the State, to which the Constitution has imparted a portion of the executive and judicial functions of the government. The Common Council of New Orleans is within the sphere of its constitutional and legal attributions, a Legislature; and in the exercise of its power in relation to the collection of taxes due to the city, may empower a particular individual to collect the same for a fixed compensation, but they have the right at any time to change, modify, or repeal a resolution conferring such power, with the sole condition, that the city shall be liable for any compensation earned under and in pursuance of the resolution before its repeal.

The repeal of such a resolution is not the violation of a contract.

The commission of five per cent. under the Act of the Legislature of 1852, to the Assistant City Attorney, upon tax bills collected by suit, is due to the officer who obtains the judgment, and not to the one who collects the amount of it.

The law of hiring personal services for a term, has no application to such dealing between parties; if any contract would be thereby created, it would be the contract of mandate, and revocable at the will of the principal. C. C. 2997.

APPEAL from the Sixth District Court of New Orleans, *Howell, J.*
C. Roselius, for plaintiff. J. J. Michel, for defendant and appellant.

BUCHANAN, J. It is a fallacy to call the resolution of the Common Council of the city of New Orleans of the 23d of May, 1856, a contract; and the repeal of that resolution, a violation of a contract, which subjects the corporation to damages.

The city of New Orleans is a political corporation, as observed in argument by one of the counsel of plaintiff—a political corporation recognized by the Constitution of the State, to which the Constitution has imparted a portion of the executive and judicial functions of the government, and to which the Legislature has communicated many legislative functions; among them, that most important of all, the power of taxation. In fine, the city charter of the 20th of March, 1856, makes a systematic division of the powers of this corporation, into legislative, executive and judicial.

The Common Council of New Orleans is, then, within the sphere of its constitutional and legal attributions, a Legislature; and for the purpose of carrying out the objects of its organization, is necessarily invested with all power of regulating those details which are not specified, and which could not be specified in its organic law. Among those details, are necessarily comprised such as relate to the collection of the taxes, licences, fines, and other dues of the city, so far as not provided for by the city charter.

Now, on examining the amended charter of the 20th of March, 1856, which was in force from the date of its passage, we find that all that is said therein, in relation to the enforcement of the payment of taxes due the city, is contained in the first and second paragraphs of the 107th section. Session Acts of 1856, p. 159. It is there enacted, that the Treasurer shall put in suit, on the second Monday of May in each year, in a court or courts of competent jurisdiction, all unpaid bills for taxes levied upon property assessed; and that such suits shall be prosecuted in a particular form.

But there is nothing in this charter declaring that any particular law-officer of the city shall be charged with the professional management of suits for taxes, nor that any particular compensation shall be allowed for their collection. The

third paragraph of the same section of the charter, is more explicit on those subjects, in relation to the collection of fines and licences due the city, which, says that paragraph, are to be collected by the Assistant City Attorney, who shall receive, as compensation for such services, ten per cent., to be paid by the party in default.

HIESTAND
v.
NEW ORLEANS.

Whether this distinction in the provisions of the charter in relation to the two classes of city dues, has been made by the lawgiver *ex industria*, as was intimated in argument by one of the learned counsel for plaintiff, or whether it was the result of inadvertence, is of no great consequence.

It suffices that the charter is silent on the subject now under consideration, to make the legislative control of these details by the Common Council, attach. The resolution of the 23d of May, 1856, was an exercise of that control. That resolution consists of two sections. The first provides: "That *E. Hiestand*, Assistant City Attorney, be, and he is hereby authorized to make up, for the city of New Orleans, a tabular statement showing the condition of each suit for tax bills, due the city for the years 1852 and 1853, the same to be submitted to the Common Council."

The second section is as follows: "Be it further resolved, that he is hereby empowered to collect the same, making up his reports monthly, and paying the amounts collected into the City Treasury, for which services he shall be entitled to receive, as full compensation, ten per cent. on the amount collected; he, in all cases, to pay the costs for which the city may be liable, for attempting to enforce payment of the same."

We observe, that in this resolution, the plaintiff is mentioned by name. But that, we conceive, by no means restrained the Common Council in the exercise of their legislative functions. Whether it was made the duty of the Assistant City Attorney, or of *E. Hiestand*, the Assistant City Attorney, or of *E. Hiestand*, or any other named person, without an official designation, to make the tabular statement of tax suits, and whether this or that person, official or otherwise, was empowered to collect the tax bills due the city for 1852 and 1853, or for any other years, the Common Council, as the body in whom the legislative power of the city of New Orleans was vested by the third section of the charter, had, in our opinion, the absolute and uncontrolled right to change, modify and repeal, at any time that to it might seem meet, the said resolution and all its parts; with the sole condition, that the city should be liable for the payment of any compensation that had been earned under and in pursuance of the resolution previous to its modification or repeal.

When, therefore, the Common Council, by its resolution of the 14th of November, 1856, authorized *F. C. Laville*, Assistant City Attorney, to collect the amount of judgments obtained since the Consolidation Act, in favor of the city of New Orleans, by his predecessor in office, and allowed him a compensation of two-and-a-half per cent. for making such collections; and when, in the same resolution, all resolutions or ordinances contrary thereto, were repealed, the council acted within the purview of its legislative authority in the premises, and the plaintiff has no legal right to complain of its action, much less to charge that action as a violation of a contract.

We shall next proceed to inquire what are the particulars of the demand of plaintiff against the defendant in this action.

First, plaintiff alleges that, while holding the office of Assistant City Attorney, he collected and paid into the city Treasury the sum of forty-nine thousand

HEISTAND
v.
NEW ORLEANS.

three hundred and forty-eight dollars, proceeds of judgments obtained by his predecessor in office, upon tax bills for city taxes for the years 1852 and 1853, (the commissions for obtaining which judgments, plaintiff admits his said predecessor is entitled to,) for the collection and payment of which sum plaintiff has received nothing; and his services therefor are charged in his petition as being reasonably worth a commission of five per centum on the amount so collected and paid; which commission amounts to the sum of two thousand four hundred and sixty-seven dollars.

This item of plaintiff's claim is inadmissible. It was decided by this court, in *Heistand v. Labatt*, 11 An. 30, that the commission of five per cent., under the Act of 1852, to the Assistant City Attorney, upon tax bills collected by suit, was due to the officer who obtained the judgment, and not to him who collected the amount of that judgment. There is nothing in that law which imposes upon the city the payment of a second commission of five per centum, and the claim, as for a *quantum meruit*, cannot be allowed.

The plaintiff must be considered as having accepted office, with reference to the legislation regulating the duties and the emoluments of the office which he accepted.

The plaintiff next claims ten per cent. commission on the sum of \$8,378 05, collected and paid into the City Treasury by him, under the resolution of 23d May, 1856, above recited. The proof sustains this claim, which was allowed by the judgment of the District Court.

The next item is a claim of twenty-five thousand dollars as damages for an alleged violation of a contract, being ten per cent. on the total amount of outstanding and uncollected taxes due the city for the years 1852 and 1853, and which alleged violation of contract consists in the passage of the resolution of the 14th of November, 1856, above alluded to.

We have already disposed of this, by far the most important portion of plaintiff's demand, in the commencement of this opinion.

We will add, that the law of the hiring of personal services for a term, and the decisions upon that subject cited in argument, have no application to the dealings between the parties to this suit, which, if a contract at all, would be the contract of mandate; a contract essentially revocable at the will of the principal. C. C. 2997.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

MERRICK, C. J. Without assenting to all the reasoning of the court in its opinion, I concur in the decree pronounced by the majority of the court.

VOORHIES, J., absent.

H. HEREFORD v. V. BABIN, Sheriff.

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The District Court of the parish where a succession has been opened and is in due course of administration, has exclusive jurisdiction of a claim against the succession.

A party has no right to enjoin the execution of a judgment, absolute and unconditional as to the matters it professed to decide, during a litigation as to other matters in controversy reserved by the judgment.

An unliquidated claim cannot be pleaded, by way of compensation and injunction, against a judgment.

APPEAL from the District Court of the parish of East Baton Rouge, *Beale, J. A. M. Dunn*, for plaintiff and appellant. *T. G. Morgan*, for defendant.

BUCHANAN, J. In June, 1854, a judgment was rendered by the District Court of East Baton Rouge, in the suit of *Leverich, Curator of Walsh, v. Amos Adams and Harriet Hereford*, upon certain contracts and money transactions between those parties, in relation to a sugar plantation and its cultivation; by which judgment it was decreed that the plaintiff recover of the defendant, *Adams*, severally, a certain sum of money, with interest—of the defendant, *Hereford*, severally, another sum of money, namely, \$3846 66, with interest—of the defendants, *Adams and Hereford*, jointly, another sum, being ten thousand, three hundred and seventy dollars, with legal interest from the 8th December, 1851, until paid; and that the rights of *Amos Adams* and of *Mrs. Harriet Hereford*, if any they have, to recover of the estate of *Edward J. Walsh*, any sums due to them for the use and hire of their slaves, horses, mules, &c., &c., in making or assisting to make and take off the crops of sugar, &c., made on the Highland plantation be reserved to them, to be enforced in due course of law.

In May, 1855, the Supreme Court, on appeal, affirmed the said judgment of the District Court, with the exception of that portion which condemned *Mrs. Hereford* to pay, severally, \$3846 66, with interest.

Execution issued from the District Court against *Mrs. Hereford*, upon the judgment thus affirmed, for \$5185, with interest, being the one-half of the sum in which there had been judgment jointly against herself and *Amos Adams*.

The present suit was commenced by injunction of said execution. *Mrs. Hereford* claims in her petition to be creditor of the succession of *Walsh*, plaintiff in execution, for the matters reserved in the judgment of the District and Supreme Courts; that she have judgment against *Walsh's* estate for such indebtedness; and that the amount of such judgment be imputed to the payment of the judgment rendered against her, and upon which the execution had issued.

The defendant in injunction, plaintiff in execution, pleads:

1st. "That the District Court of East Baton Rouge is without jurisdiction of a claim against the succession of *Walsh*, which is opened and in course of administration, in the Second District Court of New Orleans.

2d. That the writ of *feri facias*, which is enjoined, issued upon a final judgment of the Supreme Court, duly enregistered and made executory in this court; that said judgment of the Supreme Court is absolute and unconditional, as to the matters it professes to decide, and its execution cannot be enjoined by the plaintiff while litigating other matters in controversy, which the judgment has reserved.

HEREFORD
v.
BARN.

3d. That the allegations of the plaintiff's petition, on which an injunction was prayed, constitute a plea of compensation, which, as the petition shows, is an unliquidated demand, and cannot be set up by way of injunction against a judgment.

And prays, that the suit be dismissed, and the injunction dissolved, and for judgment against the principal and surety in the injunction bond for twenty per cent. damages under the statute, and for five hundred dollars special damages for counsel fees.

It appears from the petition and from the documents annexed, that the succession of *Edward G. Walsh* is opened and in course of administration, in the parish of Orleans, as alleged in the exception. This fact was also admitted on the trial of the exceptions.

The declinatory exception was well founded. C. P. 164, § 2; 924, § 13; 986.

Upon the second plea of defendants :

The right of a party to enjoin the execution of a judgment, absolute and unconditional as to the matters which it professed to decide, during the litigation of other matters in controversy, which the judgment has reserved, was expressly denied in *Henderson v. Wilcox*, 2d An. 502; which was a suit commenced by injunction of the judgment in *Wilcox v. Henderson*, 7 Rob. 328, under circumstances precisely similar to those of the present case.

Upon the third plea :

The claim set up in plaintiff's petition is evidently in the nature of compensation or offset of the judgment of defendant; for the prayer of the petition is, that they be imputed to the payment of that judgment. Now, it is an elementary principle, that compensation only takes place between the debts which are equally liquidated and demandable. C. C. 2205. As a consequence of this principle, it is the settled jurisprudence of this court, that an unliquidated claim cannot be pleaded, by way of compensation and injunction, against a judgment. 10th An. 721 and 734.

The appellee prays that the judgment of the District Court be amended, by allowing him five hundred dollars as special damages for counsel fees, in addition to the allowance of damages by the judgment of the District Court. We think the circumstances of the case entitle him to the relief sought, to the extent of two hundred and fifty dollars.

It is, therefore, adjudged and decreed, that the judgment of the District Court be amended; that the injunction herein issued be dissolved, and that the defendant, *William E. Leverich*, curator of the estate of *Edward J. Walsh*, recover of *Harriet Hereford* and *William F. Tunnard*, in solido, six hundred dollars as damages, and interest, at the rate of eight per cent., on the judgment enjoined, from the date of the injunction (26th of June, 1857) until paid, together with costs in both courts.

VOORHIES, J., absent.

C. J. BARSTOW v. J. B. MURISON.

Where a boat is engaged to take freight on the Mississippi river, and the exact time of the delivery is not stipulated, a reasonable time must be allowed on the arrival of the boat, for the transportation of the freight to the bank of the river.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
Singleton & Clack, for plaintiff and appellant. *Lacy & Upton*, for defendant.

COLE, J. Plaintiff sues defendant for \$625, the price of the freight for five hundred barrels of molasses, which he had agreed to ship in plaintiff's boat, the "Rapides"; the molasses was to be delivered to the boat at the plantation of *J. N. Brown*, in the parish of Iberville, and to be thence carried to St. Louis.

Defendant called in warranty *Oakey, Hawkins & Co.*, from whom the boat had received an order for the molasses on *Brown*.

There was judgment for defendant and the warrantors, and plaintiff has appealed.

The evidence establishes that the steamer "Rapides" landed at the mouth of Bayou Manchac, about a half-mile above the landing of the plantation of *Brown*.

The molasses was at the sugar-house, ready for hauling to the landing, at the time of the arrival of the "Rapides."

Mr. Brown informed the clerk of the boat, who showed the order for the molasses, that it would not exceed from half an hour to an hour to get the first loads to his landing; and after that, the barrels would arrive at the landing as fast as they could be rolled aboard the boat, that he would at once commence hauling with ten mule carts.

The boat declined waiting.

The District Judge, in his opinion, says, "I am led to conclude, from all the circumstances connected with this contract, that the boat did not want the freight at the rate stipulated, and in order to free herself from responsibility, took advantage of the fact that the freight was not on the levee for delivery at the time of her arrival."

There was no time stipulated, that the boat was to wait, in case the molasses was not ready.

It is impossible for a planter to know the exact time that a boat will arrive for the purpose of taking molasses or sugar.

In the absence of a contract specifying the exact time of delivery, we are of opinion that a half-hour or an hour is not an unreasonable time for a steamer bound to St. Louis to wait, for a large quantity of molasses to be shipped from the coast of the Mississippi river, in this State, to St. Louis.

The testimony also shows, that in contracts of the character under consideration, an hour or two is not an unusual time to wait for the reception of the freight

Judgment affirmed, with costs.

VOORHIES, J., absent.

E. SURGI v. JAMES CALDER et al.

In a suit against the curator of a succession, in which a question of title between the succession and a third party is involved, the attorney of absent heirs has no authority to file an answer, making a different issue from the one presented by the answer of the curator.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*
C. Redmond, for plaintiff and appellant. *F. Haynes*, for defendant.

MERRICK, C. J. This suit is brought to restrain the defendant, who was the curator of *E. N. Collins'* succession, from selling five mules and six drays, alleged to be the property of defendant.

The attorney for the absent heirs, as well as the curator, answered the petition.

The District Court being of the opinion that the plaintiff had failed to prove the identity of the property, rendered judgment in favor of defendant, and plaintiff appeals.

Since the appeal has been pending, *James Calder* has died, and *John Coles* has been appointed a curator to *E. N. Collins'* succession, and made himself a party to this appeal.

We are of the opinion that the District Judge erred in deciding against the plaintiff on the question of the identity of the property. The case must be decided upon the answer of the curator of the succession, and not upon the general denial of the attorney of the absent heirs. C. P. 122.

The answer of the curator, who alone has capacity to form the *contestatio litis*, and stand in judgment on a question of title between the succession and a third party, admits, as we think, the identity of the mules, drays, &c., claimed, with those sold by *Barrett* to plaintiff. Now, when plaintiff shows a notarial act of sale from *Collins* to *Barrett & Fitzsimmons*, a verbal release from the latter to *Barrett*, and a sale from *Barrett* to the plaintiff, he exhibits a *prima facie* title to the property in question.

The burden is then upon the defendant to defeat such title by the proper averments and proof.

In this case, we think the defendant should be permitted to amend, by showing the insolvency of the succession, and that the sales are fraudulent or simulated, if such be the fact.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the District Court be avoided and reversed; that the present defendant have leave to amend the answer, and that the case be remanded for a new trial, and further proceedings according to law, the curator of the succession of *E. N. Collins*, deceased, as such, paying the costs of the appeal.

VOORHIES, J., absent.

ANTONIO HERNANDEZ v. HIS CREDITORS.

When property is sold at Sheriff's sale, and the party causing the sale to be made is not able to put the purchaser in the enjoyment of the premises, nor of the rents, he has a right to refuse payment of the price.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
Durant & Hornor, for plaintiff and appellant. *C. Roselius*, for defendant.

LAND, J. On the 17th of June, 1858, the Sheriff, by virtue of an order of court, adjudicated to *Bernardo Rodriguez* the fixtures and unexpired term of the lease of the property, at the corner of Gravier and St. Charles streets, in this city, for the price of three thousand, six hundred and fifty dollars.

The purchaser refused to pay the price of adjudication, and the syndic of the creditors of the insolvent took a rule on him, to show cause why he should not comply with the contract.

The answer of the purchaser is as follows :

"That he has been always ready and willing to comply with the terms and conditions of the adjudication of said lease as soon as the said syndic shall put him in possession of the premises leased ; that the greater portion of said premises is in the possession of tenants, who claim to have a right to retain the occupancy and enjoyment of said premises until the first of November next, under a lease from said *Hernandez*, to whom said tenants allege that they have given their notes for the rent up to said period, which notes said tenants allege they have discounted, and that they are not bound to pay any rent, nor to quit said premises until the first of November next."

The facts of the sub-letting of the premises by the insolvent, the giving of promissory notes for the rents, and the transfer or sale of them by the insolvent, and the possession of the premises by the sub-tenants, as alleged in the answer, were proved on the trial of the rule.

The purchaser was entitled to the possession and enjoyment of the premises, for the unexpired term of the lease, or at least to the rents for the unexpired term. But in consequence of the sub-letting by the insolvent, and the possession of the sub-tenants, and the payments of the rents in advance, the syndic could neither put the purchaser in the enjoyment of the premises, nor of the rents, and was, therefore, unable to comply, on his part, with the terms and conditions of the adjudication, and the purchaser had the right to refuse payment of the price.

The District Judge deducted from the price of adjudication the amount of rents paid by the sub-tenants in advance, and rendered judgment against the purchaser, for the balance of the price.

This judgment has been acquiesced in, without prejudice to the right of appeal, and will, therefore, be affirmed.

Judgment affirmed, with costs.

VOORHIES, J., absent.

W. T. DAVIS v. A. GRAILHE.

A party who exercises his right of making a wall, one in common, cannot resist the demand of his neighbor who erected the same, for one-half of its value, although he may have a claim to the soil upon which more than one-half of the wall was built.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Durant & Hornor, for plaintiff. *J. & E. Bermudez*, for defendant and appellant.

COLE, J. Plaintiff sues to recover from defendant the value of one-half of a party-wall, with interest from the 1st of October, 1856, the day the latter exercised the right of making petitioner's wall one in common.

Defendant knew, when he commenced building his house, that more than one-half of the wall built by plaintiff was on this land. He was also present when the wall was being erected, and made no objection.

Plaintiff appears to have acted in good faith.

The District Court was of opinion that the defendant was liable for one-half of the cost of the wall, without prejudice to the ownership of the land upon which it is built. Defendant has appealed.

Plaintiff having erected his house before the defendant built his, was entitled to rest one-half of his wall on the land of defendant. He could not, however, have compelled his neighbor, the defendant, to have contributed to the raising of the wall. If the latter had been willing to have contributed one-half of the expense for its erection, then it would have become a wall in common between the plaintiff and defendant. The latter having not offered to contribute, still preserved the right of making it a wall in common, by paying to the plaintiff the half of the cost of its construction. C. C. Art. 671, 672.

When the defendant became cognizant that more than one-half of the wall was upon his land, he had the right to keep it, or to compel the plaintiff to take away and demolish the part of the wall on his land, which exceeded one-half of its width.

In the former event, he would have owed to the plaintiff the reimbursement of the value of its materials and of the price of workmanship, without any regard to the greater or less value which the soil might have acquired thereby. In the latter case, the part of the wall on his land, exceeding one-half of its width, would have been demolished at the expense of plaintiff, without any compensation. C. C. Art. 500.

Supposing that, under Article 680, defendant has the right of making the plaintiff pay the excess of his soil occupied by the wall over one-half of the width of the wall, still he has not brought himself within the provisions of this Article, or that of Article 500.

He has exercised the right of making the wall one in common, when he knew that it was built, as he admits in his answer, more on his land than it ought to have been. He did not, however, before building his house and using the wall of plaintiff, as one in common, avail himself of his privileges, and upon the trial, he did not even prove the value of his soil, exceeding one-half of the width of the wall, which is occupied by it. Under these circumstances, plaintiff cannot be prevented from recovering one-half of the value of the wall, without prejudice to any rights that defendant may have to the soil upon which more than one-half of

the wall is built. Pardessus, Servitudes, No. 154; Solon, Traité de Servitudes reelles, No. 141. 1 Delvincourt, p. 554; 2 Marcadé, p. 581, *Bouchard v. Croc*; Sirey, 1838, 2, 159.

Judgment affirmed, with costs.

VOORHIES, J., absent.

DAVIS
v.
GRAHAM

G. S. HAWKINS, Administrator, v. C. McVÆ, Liquidator.

The wife was bound *in solido* with her husband in an act of mortgage to secure a subscription to the capital stock of the Clinton and Port Hudson Railroad Company, to which mortgage the State of Louisiana was subrogated. The State afterwards caused the property to be sold under execution against the husband, as a defaulting Tax Collector, and the wife, through the intervention of a third person, became the purchaser at the sale. *Held*: that such a sale did not extinguish the mortgage of the State.

Where the production of a certificate of mortgage is waived, notice of mortgages existing of record will be presumed.

A PPEAL from the District Court of East Feliciana, *Ralliff, J.*
Hardesty & Keenan, for plaintiff. *S. E. Hunton*, for defendant and appellant.

BUCHANAN, J. The plaintiff, bearer of a second mortgage, sues the defendant to have a prior mortgage erased and cancelled, on the ground that it has been extinguished by the act of the mortgagee. The property is in the hands of the mortgagor.

The first mortgage is one which was granted by *John W. Hays* and his wife *Catharine Hays*, on the 15th June, 1838, to the Clinton and Port Hudson Railroad Company, to secure a subscription by the mortgagors to the capital stock of the said corporation.

In 1852, *John W. Hays* was sued by the State of Louisiana, as a defaulting Tax Collector, and this property was seized in execution of that judgment. It was sold on twelve months credit, nominally to *B. M. G. Brown*; but the real purchaser was *Mrs. Catharine Hays*, as we learn from the recitals of a subsequent conveyance of the property from *Brown* to *Mrs. Hays*.

It was admitted on trial, that the Clinton and Port Hudson Railroad Company "mortgaged, and pledged, and subrogated the State of Louisiana, on the 19th day of June, 1839, among others, to the mortgage of *Hays* and wife," and it was agreed, "that any copy of said act, embraced in appeals from this court, may be used and referred to, if desired, by either party."

Upon this admission, it is contended by plaintiff, that the State is the party who held the stock mortgage of *Hays* and wife, at the time of the sale under execution; and that the State, having exercised the right, given it by Article 685 of the Code of Practice, of having the property sold to satisfy a debt of inferior rank to the said mortgage, has thereby released the mortgage. The legislative and judicial history of the Clinton and Port Hudson Railroad Company, is officially known to us; and the agreement above copied, made by the parties on trial, specially authorizes us to look into the records of other appeals, having reference to the subrogation of the State to the stock mortgages of this corporation.

HAWKINS
v.
McVRA.

In the case of the *Gas Light Company v. Bennett*, 6 An. 457, Judge Rost reviewed the legislation on the subject of the stock mortgages of the Clinton and Port Hudson Railroad Company. Those mortgages are shown by him, to be of two classes—the first, given for the stock subscribed under the amended charter enacted in 1834,—the second, for that subscribed under the Act of 1837. The first class of mortgages, is for the benefit of the holders of bonds of the Company. The second, is the security of the State for reimbursement of a loan of \$500,000, made by the State to the Company.

The mortgage of *Hays* and wife, belongs to the second of these two classes; and the State, in virtue of its subrogation, had the right to pursue the foreclosure of this mortgage, for contribution to the objects of the contract; but this could only be done through the liquidator appointed in pursuance of law, to settle the affairs of the Company. See the case of *Bennett* in 6 An. already quoted; and that of the *Gas Light Company v. Haynes*, 7 An. 114. For the mortgage of *Hays* and wife was connected with, and contingent upon, the general administration of the affairs of this insolvent corporation, and cannot be confounded with the other personal obligation of one of the mortgagors, *John W. Hays*, as Collector of Taxes; with which obligation the liquidator had nothing to do, its enforcement being the duty of a distinct officer. Neither the process verbal of adjudication, nor the Sheriff's deed to *Brown* are before us; being omitted from the record by the agreement of counsel. But it is alleged in argument by appellant, that the sale was made subject to the stock mortgage on the property sold. This is a matter which might be of importance, had the property been adjudicated in reality, to a third person; and were it now in the hands of a third possessor. But *Mrs. Hays*, the real adjudicatee, and actual possessor, is herself a mortgagor, and bound, *in solido*, for the debt secured by the mortgage. And as to the plaintiff, we are bound to presume notice, at the date of *Mill's* mortgage, of the existence of the stock mortgage. For in the mortgage from *Mrs. Hays* to *Mills*, the production of a certificate of mortgages by the notary, is especially waived. This waiver we hold to be equivalent to an acknowledgment of notice of the stock mortgage then extant upon the records of the parish.

Judgment of the District Court reversed; and judgment for defendant, with costs in both courts.

VOORHIES, J., absent.

MERRICK, C. J., took no part in this decision, having been of counsel on the the first series of bonds.

JAMES P. THOMPSON v. D. D. KILCREASE et al.

When the price of property is made payable in instalments, the vendor may sue for rescission of the sale at once, upon the failure of vendee to pay the first instalment.

The original vendor seeking to rescind the sale, is only compelled to reimburse the value of improvements made by a possessor in good faith. Improvements made after the institution of the suit to rescind the sale, must be considered as made by the possessor in bad faith.

A PPEAL from the Tenth District Court, Parish of Carroll, *Farrar, J.*
J. W. Montgomery, for plaintiff and appellee. *Goodrich & Defranz*,
Selby and Short & Parham, for defendants and appellants.

MERRICK, C. J. This suit was brought to cause a sale of three hundred and twenty-three and a-half acres of land in the parish of Carroll, to be rescinded for the non-payment of the price.

THOMPSON
v.
KILCREASE.

We shall place the case upon the facts as conceded in the argument, and consider only the questions discussed at the bar, and in the briefs.

We therefore assume (as conceded) that the instrument executed on the 26th day of November, 1855, was a sale from the plaintiff to the defendant, *D. D. Kilcrease*, of the land in controversy. The price was \$3235, for which it was agreed, that the defendant, *Kilcrease*, should give his promissory note payable one day after date, with eight per cent. interest thereon from the date thereof, to be paid in the following manner, viz: the net proceeds of twenty bales of cotton to be paid annually, the amount thereof to be applied to the credit of the note until the payment of the same.

Kilcrease went into possession of the land, and after making some improvements sold the same to the defendant, *Thomas L. Beard*, in August, 1856, at an advance of three thousand two hundred and thirty-five dollars, *Beard* assuming to pay his vendor's debt to *Thompson*. On the 28th day of January, 1857, the plaintiff demanded, through a Notary Public, a performance of the contract of *Beard* and *Kilcrease* in vain, and a formal protest was made. The same day *Beard* sold the tract of land to the defendant, *Emily Knox*, wife of *W. L. Knox*, she assuming the obligations of *Kilcrease* and *Beard*.

This suit was commenced in May following, against *D. McNeil*, the proprietor, *Mrs. Knox*, *Beard* and *Kilcrease*. In September, of the same year, 1857, *Madam Knox* sold to *McNeal*, who assumed her liabilities on account of the land.

The District Judge awarded to the plaintiff a dissolution of the sale, and to the defendant, *Kilcrease*, five hundred dollars, the value of his improvements.

Beard, *Mrs. Knox* and *McNeil*, prosecute the appeal.

The plaintiff prays for an amendment of the judgment in his favor as against *Kilcrease*. The latter alleges that he is only an appellee, and denies the right of the plaintiff to claim an amendment of the judgment; nevertheless, demands that instead of five hundred dollars, he be allowed one thousand dollars, as against the plaintiff, for improvements.

It has been contended, on behalf of the appellants counsel, that the mode in which the payments were to be made, formed a part of the promissory note, and was the same as though the mode of payment had been written in the note itself; that the installments were to be in sums equal to the net proceeds of twenty bales cotton annually; that the non-payment of one instalment at maturity, did not make the residue of the note exigible, and that the sale could not be rescinded until the maturity of, and default in paying the last installment, and that the promise to pay over the net proceeds of the cotton, is under Arts. 1762, 1763, an independent contract.

It may be conceded, for the purposes of this decision, that by the agreement, the note was to be paid in installments, and that the maturity and non-payment of one installment, did not enable the plaintiff to sue for the residue of the note, but this will not aid the case. The neglect and refusal to pay a single installment, in our opinion, gives the vendor the right to annul the sale. Whenever the vendee refuses to comply with the stipulation to be performed by him the vendor is obliged to wait no longer, but may at once demand a dissolution of the contract.

Why should the vendor, who has made a sale on long time, be compelled to see

THOMPSON
v.
KILCREASE.

his vendee enjoy the revenues of his property year after year, without paying any portion of the price, or even the interest upon the money?

The Code says : If the buyer does not pay the price, the seller may sue for a dissolution of the sale. C. C. 2539. What is meant by this article may be perceived by comparing it with Art. 2041, which says : "A resolatory condition is implied in all commutative contracts, to take effect in case either of the parties do not comply with his engagement." A party does not comply with his agreement when he refuses to pay the first installment of the price which has fallen due and which he has contracted to pay. Such also, is the view of Troplong on this subject. See Trop. vente, Nos. 642, 646. The promise to pay the price by installments, or in any particular mode, does not make the contract any the less commutative, for in the contract of sale the price is the equivalent or consideration for the thing. C. C. 2414. Pothier, vente, No. 2.

The plaintiff contends that he ought not to be compelled to pay for the improvements made upon his property by the vendee, who has refused to pay the price. It appears to us to be a consequence of Art. 2040, that he must pay for the improvement made upon his property prior to the putting of the defendant *in mora*, or a demand for the dissolution of the contract. For Art. 2040 requires matters to be placed in the same state as though the obligation had never existed, and obliges the creditor to restore what he has received. If he is to restore what he has received, and he cannot enrich himself at the expense of the vendee, he must restore what he receives in improvements placed upon the property in good faith and returned to him, as well as sums of money or anything given in payment. The revenues of the property during this period were nothing.

As to the improvement made by *McNeil* after the institution of the suit, which consisted in clearing land and ditching, we are of the opinion that he cannot recover.

They must be considered as made by a possessor in bad faith, and being of a kind not susceptible of being removed, the plaintiff cannot be compelled to declare whether he will take the same, or cause the defendant to remove them.

In regard to the person entitled to recover for improvements, we are not prepared to say that the District Judge erred in awarding the five hundred dollars to *Kilcrease*. If he receives the amount, he must account to his vendee in a settlement between them, and it will be understood in this action we do not undertake to settle the respective rights of the defendants, there being no demand in warranty between them.

The defendants did not apply to the court for an extension of time, in which to make payment.

Judgment affirmed.

BUCHANAN, J., concurring. On the 2d May, 1857, plaintiff filed his petition alleging the facts, as recapitulated in the opinion read by the Chief Justice, and moreover, that one *Daniel McNeil* was then in possession of the land, by what title petitioner did not know ; further alleging, that petitioner had never been paid any thing for his property thus sold ; and that all of the said purchasers were well acquainted with this fact when they respectively bought the said land ; that the continual change of title and possession, was intended to harass petitioner, and to elude his pursuit of the property, as well as to complicate and confuse the legal proceedings, which he might institute therefor. The petition concludes by praying citation for all the parties named above ; for rescission of all the sales afore mentioned ; for recovery of the land sold, free from any claims or incum-

THOMPSON
v.
KILCREASE.

brances placed thereupon by said parties ; for one thousand dollars damages, and for general relief. Citation was served on all the defendants, *Kilcrease, Beard, Mrs. Knox* and *McNeil*, within a few days after the filing of the petition.

On the 23d November, 1857, the defendant, *McNeil*, answered the petition, alleging himself to be in possession of the land claimed by virtue of a purchase by authentic act, from *Mrs. Emily Knox*, of date the 20th September, 1857, a copy of which conveyance he annexed to his answer. Respondent, *McNeil*, averred that he bought the land in good faith, and he and all the intervening purchasers under plaintiff, were abundantly able and willing to pay all that was due now, and when it was due ; but that plaintiff refused to receive any payment, unless all the consideration or price was at once paid to him, as well what was not due, as what was due ; that the sale cannot be rescinded, because the parties cannot be replaced in their original position ; respondent having expended more than three thousand dollars worth of labor upon the land since he bought it ; wherefore he prayed for judgment, quieting respondent in his title.

Defendant *Beard* answered, admitted the sales mentioned in the petition, and prayed for the dismissal of the plaintiff's demand.

The defendant *Mrs. Knox*, pleaded the general issue ; prayed that plaintiff's demand be rejected.

Defendant *Kilcrease*, pleads the general issue ; admits the conveyances as alleged ; avers that while in possession of the land, under his title from plaintiff, the respondent had improved the land, built a house thereon, fenced, and cleared, and put in cultivation, about thirty or forty acres of land ; that respondent has always been ready and willing to comply with his contract ; that the land has considerably enhanced in value ; that all the purchasers have been willing to perform their obligations under the sale, by paying the price in the manner therein stipulated ; but that plaintiff has refused to receive any thing less than the whole price. This respondent concludes by demanding in reconvention, from plaintiff, in case there should be a judgment of rescission, the sum of three thousand dollars, as the value of his improvements.

On these pleadings, the parties went to trial ; and after hearing evidence, the court rendered judgment in favor of plaintiff against all the defendants, for the land described in the petition. Judgment was also rendered in favor of defendant, *Kilcrease*, against plaintiff, for five hundred dollars, for improvements. Defendants *Beard, Mrs. Knox* and *McNeil*, have appealed. Plaintiff and defendant *Kilcrease* have both answered the appeal, praying, each of them, an amendment of the judgment in his favor. Plaintiff asks that he be relieved of that portion of the judgment which condemns him to pay five hundred dollars for improvements. *Kilcrease* asks that the judgment in his favor against plaintiff for improvements, be increased from five hundred to one thousand dollars. Neither of these prayers can be entertained.

Neither *Thompson* nor *Kilcrease* have appealed. They are both appellees. The right given by Art. 888 of the Code of Practice, to an appellee, to have judgment amended in this court in his favor, is a right to be exercised in the form of an answer to an appeal, and of course against an appellant alone.

If this question of improvements were before us, which it is not, I should say that nothing is to be allowed on that score, as against plaintiff ; the claim for improvements being offset by the fruits, which have been received by the defendants. It is in proof that the land has been in cultivation since the sale, and that cattle and hogs have been kept on it by defendants. *Kilcrease* sold to *Beard* a

THOMPSON
v.
KILCREASE.

standing crop of cotton and corn, and a stock of cattle and hogs. See the cases of *Haynes v. Harbour*, and *Yeatmen, Wood & Co. v. Erwin*, lately decided.

For the foregoing reasons, I concur in the affirmance of the judgment in this case.

VOORHIES, J., concurred in this opinion.

COLE, J., absent.

J. B. D. VIGNIÉ v. GOUAUX & VIALA—C. ROUGER, Intervenor.

The substitution of a new lessee to the old one, accompanied by the discharge of the latter, is a novation, under the second section of Art. 2185 C. C.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*
P. S. Byron, for plaintiff and appellant. *E. Filleul*, for *Gouaux & Viala*.
L. Castera, for *Aubry D'Ile Roupe*. *Preaux & Derbes*, for *C. Rouger*.

VOORHIES, J. The plaintiff proceeded against the defendants, *Gouaux & Viala* and *G. M. Aubry D'Ile Roupe*, to recover from them *in solido*, the sum of \$1,300, for two months' rent actually due and eleven months' rent to be due, monthly, from the month of March, 1857, to the 1st of April, 1858, at the rate of \$100 per month. This was the unexpired term of a lease originally executed by the plaintiff to the firm of *Angoz & Co.*, on the third day of April, 1855, for the term of three years.

A writ of provisional seizure was placed into the hands of the Sheriff, who then levied upon certain articles and effects, part of which were found in the leased premises, and part in the possession of *Charles Rouger*, the intervenor.

The latter, in his petition of intervention, claims the ownership of the articles seized in his possession; he further denies the existence of the privilege set up in the plaintiff's demand, and he avers that he was merely the sub-lessee of the defendant, *D'Ile Roupe*, whom he has punctually paid. The petition closes with a claim of \$500 damages incurred by the wrongful act of the plaintiff and of the Sheriff, in levying on his property.

The plaintiff, in answer to the demand of *C. Rouger*, sets up anew his right of privilege on the articles claimed, alleging that fifteen days had not elapsed from the time of their removal; and furthermore, that this intervenor and the defendant, *D'Ile Roupe*, who were partners in a tombola enterprize, are colluding for the purpose of defrauding him in this transaction.

The other defendants, *Gouaux & Viala*, state in their answer, that in the month of June of the year 1856, the plaintiffs' lessee, *Angoz & Co.*, transferred to them his lease, expiring on the 1st of April, 1858; that they occupied the premises from the month of June, 1856, until the month of March of the following year, when they themselves transferred and abandoned the lease to *Aubry D'Ile Roupe*, with the consent of the plaintiff, who discharged them from all liabilities, permitting them to remove all that they had on the premises, except a show case, which, by consent, was there left for the purpose of being sold for the respondent's benefit. The detention of this property serves as a basis for a reconventional demand of eight hundred dollars against the plaintiff.

The defence set up by *Aubry D'Ile Roupe*, need not be examined, inasmuch as

he appears before this court as an appellee, and does not pray for an amendment or reversal of the judgment of the District Court.

VIONTÉ
v.
GOUAUX.

The evidence establishes satisfactorily that the defendants, *Gouaux & Viala*, have transferred their unexpired lease to *D'Ile Roupe*, their co-defendant; and that, after making inquiry upon the subject, the plaintiff accepted this substitution or change of lessee. The substitution of a new lessee to the old one, accompanied by the discharge of the latter, is a novation, under the second section of Art. 2185 of the Civil Code.

After a careful examination of the facts, connected with the third opposition filed by *Charles Rouger*, the conclusion forces itself on the mind that, however unfavorable to him the circumstances of the case may appear at first blush, he was not colluding to defraud the plaintiff. Viewed as a sub-lessee (and under the Art. 2696 of the Civil Code, he might well have been the sub-lessee) of *D'Ile Roupe*, the payment of the rent by the former to the latter, even on the day the property in controversy was levied upon, would not of itself implicate fraud and collusion on the part of these parties. For it must be remembered, that *Roupe* held the written obligation of *Rouger*, and had the month previous offered it in payment or in pledge to the plaintiff, for the amount of rent accrued.

The defendants, *Gouaux & Viala*, have established their title to the show-case, described in their pleadings; but as it was with their own consent and for their own benefit, that it was left on the premises, it would be inequitable, in the absence of proof that the plaintiff has disposed of this article or refuses to deliver it, to pass definitively on this part of their case. Their rights in this respect are reserved.

Judgment affirmed.

COLE, J., absent.

ALLEN PIERSE v. CHARLES BLUNT—Curators of Oakey, Intervenor.

A person in possession under the first recorded title in the parish where the land is situated, must be quieted in his possession, unless the claimant have a superior title.

APPEAL from the Tenth District Court of the Parish of Madison, *Farrer, J. Goodrich & DeFrance, Hynes, and Mott & Frazer*, for intervenors and appellants. *Snyder & Montgomery*, for defendant and appellee.

MERRICK, C. J. The plaintiff instituted a petitory action against the defendant to recover about 667 acres of land in the parish of Madison.

The plaintiff having sold out his pretensions to the defendant, the controversy is now between the defendant and intervenors.

As we shall decide the case upon a single point raised by the defendant, we shall only state so many of the facts as are necessary to the decision of the point.

Both parties claim through one *Juan Mausol*, who being in possession of a Spanish grant, obtained a confirmation and title from the government of the United States.

There are in the record what purports to be three chains of title from *Mausol*.

PIERCE
v.
BLUNT.

The defendant, who is in possession of the land now in controversy, holds one, and the intervenors both of the others.

As the *Mausol* tract lies in two parishes, and the conveyances have been of the whole tract, the question which we have to consider, is the question of priority of registry.

The *Mausol* grant contains 1334 14-100 acres of land, divided equally by the Bayou Maçon, between the parishes of Madison and Carroll, and consequently giving about 667 acres to each parish.

The defendant and his vendee have, until recently, treated the whole tract as within the parish of *Madison*. The intervenors as in the parish of *Carroll*. Both parties have busied themselves about the title; the intervenors, by an application to the government at Washington, for a back concession. The defendant, by presuming the actual survey and tracing out the lines.

The oldest deed in intervenors chain of title, (the price being \$225,) purports to be dated in 1827, yet was never recorded until the 13th day of December, 1839, and then only in the parish of *Carroll*. The oldest deed in defendants' title (the price being \$1,500) was recorded on the 29th day of June, 1840, (six-and-a-half months after intervenors,) but only in the parish of *Madison*.

So far as the defendant and intervenors are concerned, it cannot be pretended that the latter have superior equities.

The defendant, then, who has the land in the parish of *Madison* in possession under a recorded title, and who has, in good faith, improved the same, must be maintained in possession, unless intervenors have a superior legal title.

The intervenor's title was not recorded in the parish of *Madison*, where the land in controversy is situated, until after defendant's title was recorded. The law is express that in order to effect "lands or other immovable property," the act of sale must be recorded in the parish "where the lands or other immovable estates are situated." See Act of 1813, 2 Moreau, p. 287.

The law does not say, that where lands are situated in two or more parishes, it is sufficient to record in either. It says, that the act of sale shall be recorded in the parish where they are situated. Six hundred and sixty-seven acres of these lands, perhaps the most valuable and sufficient for a plantation, were in the parish of *Madison*. Directly across, a deep bayou which can only be crossed by a ferry, lie six hundred and sixty-seven acres of this same original grant, in the parish of *Carroll*. Now, as courts of justice are not permitted to distinguish where the law does not distinguish, we are unable to discover any good reason why the recording of an act of sale in one parish, should effect an equal body of lands in another.

When the defendant's vendor purchased of *Mausol*, the whole tract was supposed to be in the parish of *Madison*. It was enough for him to examine the records of that parish, and his prior registry must protect him as to the lands embraced in his title, lying in the limits of the parish last named.

Judgment affirmed.

COLE, J., absent.

14	347
116	334

SAMPSON & KEENE v. E. P. NOBLE.

The enrollment of a steamboat is a record, of which the collector of customs is the custodian, under the Acts of Congress, and a copy thereof, duly certified by the collector, is competent evidence; so is such a copy of the act of sale recorded under the Act of Congress of 1850.

APPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Race & Foster, for plaintiffs and appellants. *Ogden & Stansbury*, for defendants and appellee.

BUCHANAN, J. The plaintiffs offered copies of the enrollment of the steamboat *Compromise*, and of the bill of sale of said boat to defendant, certified by the Deputy Collector of the port of New Orleans. The defendant, by counsel, objected to these documents as evidence, on the ground that the collector or his deputy, had no authority in the law to grant such certificates, so as to make them evidence in a court of justice. This objection was sustained by the court.

In this ruling, the court below erred. The enrollment of the steamboat was a record, of which the Collector of the Customs was the custodian, under the Acts of Congress of 1789, 1792 and 1793. Statutes at Large, vol. 1, p. 55, 287 and 305. By these Statutes, it is made his duty to deliver certificates of registry and enrollment of vessels. And as to the copy of the bill of sale, the Act of Congress of the 29th July, 1850, (Statutes at Large, vol. 9, p. 440,) requires conveyances, hypothecations, &c. of vessels to be recorded, in the office of the Collector of the Customs where the vessels are registered or enrolled, and provides (section 4) that the Collector shall furnish certified copies of such records on the receipt of fifty cents for each bill of sale, mortgage or other conveyance.

The Article 2249 of the Civil Code, and the cases of *Johnson v. Cox*, 13 La. 537, and *White v. Kearney*, 9 Rob. 499, relied upon by defendant's counsel, are not applicable to this case. A rule was taken upon defendant to produce his bill of sale on trial, which rule was served upon defendant and answered by him. After which the record from the customhouse was offered.

Plaintiffs proved their account sued upon to be correct; and that the furniture was selected by the captain of the steamboat, and delivered on board the same by plaintiffs.

As the bill of sale of the steamboat *Compromise*, annexed to the bill of exceptions above mentioned, shows that the defendant was sole owner of the said steamboat when the furniture was sold for the use of that boat by plaintiffs, the defendant is bound to pay for the same. The authority of the captain to make this purchase will be presumed, in the absence of any proof to the contrary, and of any offer to return the furniture.

Judgment of District Court reversed; and judgment in favor of plaintiffs against defendant for \$420 60, with interest from judicial demand, and costs of both courts.

COLE, J., absent.

HUGHES, VALETTE & Co. v. WALDO & HUGHES.

Where a party purchases an interest in a commercial house, entitling him "to an equal undivided one-third interest and ownership, and to all stock of merchandize, bills receivable, and debts in book accounts on hand, due or owing to the firm on a given day, (over and above the payment of the liabilities of said firm,)" he is responsible for the debts of the house existing at the time of purchase. C. C. 2782.

The phrase "over and above their liabilities" does not exclude responsibility from those liabilities.

APPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
Durant & Hornor, for plaintiff and appellee. *Collens & Woolridge*, for *Fassman* and appellant. *Geo. L. Bright*, for *R. L. Hughes*.

BUCHANAN, J. By notarial act dated September 1st, 1856, *Henry Fassman*, for the benefit of his minor son, who, says the act, "has been acting in the capacity of clerk in the hardware and ship chandlery store of *Waldo & Hughes*, and assisted in taking an account of stock on the 1st day of July, 1856, and being acquainted with the general business and affairs of the said firm, and is consequently fully aware of the amounts of goods, moneys, bills receivable and book accounts belonging to the capital stock of the said firm, as well as with their liabilities," paid into the capital stock of the firm of *Waldo & Hughes*, the sum of six thousand dollars, and agrees to take upon himself all the legal responsibilities of a member during the minority of the said *Frank Fassman*."—"It being well understood and agreed between the said *Charles H. Waldo*, *Robert L. Hughes*, and *Henry Fassman*, that payment and receipt of the six thousand dollars, as aforesaid, into the capital stock of the firm hereinafter instituted, shall entitle the said *Henry Fassman* to an equal undivided one-third interest and ownership in and to all stock of merchandise, bills receivable, and debts in book accounts on hand, due or owing to the said firm of *Waldo & Hughes*, under the provisions of their said act of copartnership, on and from the first day of July, 1856, (over and above the payment of the liabilities of the said firm)."

The parties to the said notarial act, *Charles H. Waldo*, *Robert L. Hughes*, and *Henry Fassman*, then proceed to establish themselves partners in the general hardware and shipchandlery business, under the firm of *Waldo & Hughes*, for the term of three years, beginning the first of July, 1856, and ending the first of July, 1859.

The indebtedness of the firm of *Waldo & Hughes* to *Morgan R. Hughes*, assigned to plaintiffs, arose from a loan of money by the latter to the former, on the 24th of June, 1856, and the account of *Morgan R. Hughes*, on the books of *Waldo & Hughes*, was balanced on the 1st of July, 1856, the balance to credit of *Morgan R. Hughes*, on that day, being exactly the amount of said loan.

The only question in this case for our decision is, whether *Henry Fassman* is liable for this balance.

It is contended by the counsel of defendants, that the engagements of *Fassman* in the contract recited above, were entirely prospective, and contemplated a liquidation of the affairs of the old firm, and an investment of the *net* proceeds of the old concern, as the share of *Waldo & Hughes* in the new one; that the terms of the contract do not imply an assumption, on the part of *Fassman*, of the liabilities of the old firm. This argument seems to be founded upon the somewhat ambiguous phrase "over and above the payment of the liabilities of the said firm."

But we are unable to understand that phrase as exempting *Fassman* from a share in those liabilities. The contract is certainly retrospective in its operation. It bears date the 1st September, 1856, but takes effect two months earlier, namely, the 1st of July. The preamble informs us, that a general balance has been struck on the 1st of July; that the accounts of the firm are well known to *Fassman*; and that, from the same date, he has an equal interest with the other contracting parties, in the balances of accounts due the firm, as well as in all their other assets. The phrase "over and above their liabilities," does not exclude responsibility for those liabilities. It rather seems to recognize the anticipation of profits to result from the partnership, which, says Art. 2782 of the Code, is of the essence of this contract; and to guard against the very pretension that is now urged on behalf of *Fassman*, to divide those profits, without a deduction of outstanding liabilities.

It was clearly intended, that the contracting parties should enter into the partnership upon a footing of perfect equality; but it would disturb that equality, and would give to *Fassman* a manifest advantage over his copartners, to say that he is entitled to a share in balances of book accounts of the firm, when those balances are to the credit of the firm, and that he has no interest in those balances that are to its debit. This would be unfair, not only to the other partners, but to the creditors of the firm. For the property of the firm is the common pledge of its creditors; and this construction of the contract under consideration withdraws one-third of that pledge from their reach.

We do not consider this a case for damages, as prayed for by appellecs.

Judgment affirmed, with costs.

HUGHES
D.
WALDO.

HENRY KEANE (HUGH KENNEDY, Testamentary Executor, substituted)
v. GOLDSMITH, HABER & Co.

Where an insolvent has given an unjust preference to one creditor over the others, it is for the syndic to bring an action to annul the contract by which such preference is obtained.

A person not a creditor cannot complain.

An executor is authorized to collect claims until the estate is closed, or he is discharged.

APPREAL from the Fourth District Court of New Orleans, *Price, J.*
H. C. Miller and *T. H. Clack*, for plaintiff and appellee. *J. Ad Rozier*, for defendants and appellants.

LAND, J. The plaintiff sues as the transferee of *Isaac Hart*, upon the following agreement:

"*Keane v. Fisher*—Fifth District Court of New Orleans.

"We hereby agree and bind ourselves to protect *Mr. Isaac Hart*, as surety for *Fisher*, in the above entitled suit, and desire that *Mr. Hart* should defend himself against this suit, and if necessary, take an appeal to the Supreme Court, and we bind ourselves in *solido* to protect him, fully including costs and all incidental expenses.

New Orleans, April 7th, 1853.

(Signed)

GOLDSMITH, HABER & Co."

KEANE
v.
GOLDSMITH.

The following statement of facts is taken from the opinion of the District Judge :

" Plaintiff instituted suit in the Fifth District Court, against *W. P. Fisher & Co.*, for fraud, under the 10th section of the Act of 1840, and the defendant, *Fisher*, was arrested. *Isaac Hart* became surety on a bond, in the sum of \$2000, for the release of *Fisher*.

Fisher was convicted by the verdict of a jury, of the fraud, and condemned to pay the amount of plaintiff's claim.

" The conditions of the bond were violated by *Fisher's* leaving the State, without the consent of the court, and plaintiff took a rule on *Hart*, the surety, to make him liable for the amount of the judgment. This rule was made absolute to the extent of \$729, with interest and costs, and dismissed as to the remainder of the judgment. From this judgment plaintiff appealed, and on a hearing in the Supreme Court, the judgment was reversed and *Hart* condemned to pay plaintiff \$2000, with legal interest from date of the decree, 2d of April, 1855, and costs of the rule in both courts.

" Before *Hart's* liability was fixed as surety on the bond given in the case of *Keane v. W. P. Fisher & Co., Goldsmith, Haber & Co.* on the 7th of April, 1853, executed their obligation *in solido* to hold *Hart* harmless as surety for *Fisher*, and bound themselves to protect him, *Hart*, fully including costs and all incidental expenses."

The present suit was formerly before this court on the appeal of plaintiff, and is reported in 12th An. 560. And is now before us on the appeal of defendants, who contend :

First. That *Isaac Hart* never transferred to the plaintiff the obligation sued on.

Secondly. That *Hart* has never paid any portion of the judgment recovered against him by plaintiff, and that until the payment of said judgment, *Hart* can have no cause of action against them.

Thirdly. That if said obligation was ever transferred to plaintiff, it was in fraud of the creditors of *Hart*, who was insolvent at the date of the transfer. And,

Fourthly. That *Hugh Kennedy* is no longer executor of the estate of *Keane*, and has no authority to represent his heirs.

I. There is no written evidence of any transfer, and the parol testimony on the subject is somewhat contradictory as to the nature of the transfer. A part of the testimony goes to show that the obligation was delivered to *Keane*, upon conditions, or events, which have not happened ; another part shows that the transfer was pure and simple, for the exclusive benefit of *Keane*.

Isaac Hart was examined as a witness in the cause, and was fully cognizant of the character of plaintiff's demand, and has made no opposition thereto. His knowledge and acquiescence will preclude him from gainsaying the validity of plaintiff's title, and a payment, therefore, by defendants to plaintiff, will be valid and protect them against the pursuit of *Hart*, upon the obligation in controversy.

The acquiescence of *Hart* is a strong corroborating circumstance to show an unconditional transfer to the plaintiff. In view of the relation of creditor and debtor existing between the plaintiff and *Hart*, and of all the facts detailed in evidence, we are satisfied of the verity of the unconditional transfer to plaintiff.

II. It has already been decided between these parties, that a right of action lies on the obligation before payment of the judgment by *Hart*. 12 An. 560.

KEANE
v.
GOLDSMITH.

III. We fully concur with the District Judge on this ground of defence, who says, "If *Hart* has given an unjust preference to one creditor over the others, it is for the syndic of *Hart* to bring an action to annul the contract by which the preference is obtained. C. C. 1965. But defendants cannot complain of such transfer, as it is not shown that they are creditors of *Hart*."

IV. On this point, we also concur with the District Judge, who says, "The succession of *Henry Keane* is not closed, nor has the executor been discharged, and until he is discharged, it is competent for him to collect the claims due to the estate."

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.

Re-hearing refused.

TAYLOR, HADDEN & Co. v. M. SIMON.

Where a party receives back a draft given by him in payment, upon an agreement to replace it by an equivalent, no novation takes place if he fails to do so.

The prescription of five years alone is applicable to a case like the present.

APPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
R. N. Ogden and *J. D. Augustin*, for appellees. *J. B. Cotton*, for appellant.

BUCHANAN, J. This suit grows out of an item of \$400 credited by plaintiffs, merchants in New Orleans, to defendant, a merchant in the country, in account current; which credit was for a city acceptance of a draft drawn by a planter in the country to order of defendant, and by him endorsed and delivered to plaintiffs in settlement. The acceptance thus endorsed had between six and seven months to run to maturity, at the time of its transfer and delivery by defendant to plaintiffs. In the interval, the acceptor failed, and the defendant received it back from plaintiffs, upon an agreement that the former would furnish the latter, in its place, something of equal amount that was available, or pay the money at the maturity of the draft. Had defendant replaced the draft by an equivalent, this would have operated a novation, as between plaintiffs and defendant, of the debt of which the endorsed draft was the evidence; but having failed to do so, the draft still remained the property of plaintiffs; and by the effect of the agreement, the contingent liability of defendant, as endorser, was converted into an unconditional and absolute liability, like that of an acceptor, to pay the draft at maturity to plaintiffs, as holders. Although the return of the draft by plaintiffs to defendant, was noted in the bill-book of the former, no counter-entry was made in the account of defendant; neither was there any equivalent furnished, nor was the amount of the draft paid at maturity. The evidence of these facts is positive and uncontradicted. We are, therefore, to consider plaintiffs as the holders of defendant's acceptance, matured the 4th October, 1853. The subsequent balances of account stated, and settlements made between the parties, although good *prima facie* evidence between the parties, of payments in full to the dates of such settlements of all previous obligations, must yield to the proof of error, caused by the

TAYLOR
v.
SIMON.

omission of a book-keeper to make a counter-entry in account-current, and perpetuated by subsequent changes of book-keepers.

The defendant has pleaded the prescription of three years for open accounts, under the statute of March 5, 1852, p. 90. But we are of opinion that the prescription applicable to this case is that of five years for bills of exchange and promissory notes. C. C., Art. 3505. But that prescription is not pleaded; and if it were, could not avail to bar this action, citation having been served four years and eighty days after the maturity of the draft.

Judgment affirmed, with costs.

COLE, J., absent.

JUDD LINSEED AND SPERM OIL COMPANY v. ALFRED KEARNEY.

Where the buyer refuses to accept goods, the seller is not obliged to let them perish on his hands, and run the risk of the solvency of the buyer.

Where the vendor, however, buys the goods offered for sale, or any part thereof, either directly or indirectly, or where, by an arrangement made by him or his agents, competition at the sale of the goods is prevented, he thereby forfeits his right to recover the deficiency in the amount of the sales.

APPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
Durant & Horner, for plaintiffs and appellants. *Geo. L. Bright*, for defendant and appellee.

LAND, J. The defendant purchased from the plaintiffs one hundred and fifty barrels of oil, to be forwarded from New York, in shipments of thirty barrels each, at the price of seventy-eight cents per gallon, payable three days after the arrival of the vessels at this port.

The defendant paid for, and received the first shipment of thirty barrels, but failed to pay for the remaining shipments, amounting in the aggregate, to one hundred and twenty barrels.

The agents of the plaintiffs, *Vredenburg & Co.*, in this city, refused to deliver to the defendant the 120 barrels of oil, without a previous payment of the price, and after notice to the defendant, caused the oil to be sold at public auction. At the sale, the oil was adjudicated to *L. L. Smith*, of the the firm of *Smith, Cooper & Co.*, at the price of fifty-five and five-eighths cents per gallon.

This suit is brought to recover the sum of fourteen hundred and sixty-two 9-10 dollars, the difference between the invoice price, and that at auction.

It has been held, that if the buyer refuses to accept of the articles sold, the seller is not obliged to let them perish on his hands, and run the risk of the solvency of the buyer. And that, on the neglect or refusal of the buyer to come, in a reasonable time, after notice, and pay for, and take the goods, the vender has the right to sell the same at auction, and to hold the buyer responsible for the deficiency in the amount of sales. *White v. Kearny*, 9 R. 501. And it was also held, in the same case, reported in 2d An. p. 641, that when by the breach of the contract, the merchandise was thrown upon the plaintiffs hands, *he became the trustee* of the defendants to manage it, *in good faith*, and with reasonable diligence. The plaintiffs, therefore, have a right to recover, unless that right has been lost or forfeited.

The defendant contends that the sale at auction, was an *absolute nullity*, or at

JUDD OIL CO.
v.
KEARNEY.

least deprived the plaintiffs of their right to recover from him the difference between the purchase price, and the price at the auction sale.

The evidence discloses the facts, that *Mr. Smith* purchased the one hundred and twenty barrels of oil, upon an understanding with *Mr. Vredenburg*, the agent of the plaintiffs, that if he, *Smith*, should want thirty barrels, he should have them. He says in his testimony, "previous to the sale, *Mr. Vredenburg* came to me and wanted me to buy the whole of the oil, provided it was sold under a certain price. I objected to this, because I wanted to buy a part for my own account. *Mr. Vredenburg* appeared so anxious that I should buy the whole that I consented, and we compromised about it; the understanding was, that if I wanted thirty barrels I should have them."

It also appears from the testimony of this witness, that he received thirty barrels, and the remainder was received by *Vredenburg & Co.*, by virtue of the sale at auction.

The testimony of *Vredenburg* shows, that the purchase of the oil by him, was ratified by the plaintiffs, as a purchase on their own account.

Upon the principle, that the plaintiffs were the agents of the defendant in the sale of the oil, they were without capacity to purchase the whole, or any part of it, either directly or indirectly, and having violated the legal relation existing between themselves and the defendant, they may be justly held to have forfeited their right to a recovery in this action.

The evidence shows, that *Vredenburg & Co.*, were willing to give sixty-two and one-half cents per gallon for the oil, and having, by an arrangement with *Smith*, purchased it for 55½ cents per gallon for account of plaintiffs, it is evident that they have not acted toward the defendant with that care and diligence which the law requires at the hands of every agent or mandatary.

We, therefore, hold, in a case like this, wherein the vendor buys the goods offered for sale, or any part thereof, either directly or indirectly, or wherein, by an arrangement made by him, or his agents, competition at the sale of the goods is prevented, that he thereby forfeits his right to recover the deficiency in the amount of the sales.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

DANIEL J. DOHAN v. J. M. WILSON.

A disease making its appearance within fifteen days after the sale, is presumed to have existed on the day of sale, the slave not having been in the State eight months.

It is incumbent on defendant to rebut this presumption.

APPPEAL from the Second District Court of New Orleans, *Morgan, J.*
Chilton & Perkins, for plaintiff and appellee. *Moise & Randolph*, for defendant and appellant.

MERRICK, C. J. This is an action brought to recover the price of two slaves sold by the defendant to the plaintiff, alleged to have died of the cholera.

The negro women were delivered under the sale, on the evening of the 21st of January, 1854, to the plaintiff, and taken to his plantation in the Parish of Tensas, where they were received on the 23d, apparently in good health. On the

DORAN
v
WILSON

25th, they were employed in picking cotton, and on the 26th, they were taken violently ill with the cholera, and subsequently died. On the 30th, the disease made its appearance among the other negroes on the place, and the first one attacked died the next day after being taken. Eight or nine other cases immediately followed, and the disease disappeared from the plantation after the negroes had been made to abandon their houses, and disperse and encamp in the woods and other parts of the plantation.

The disease having made its appearance in fifteen days after the sale, is presumed to have existed on the day of sale, the slaves not having been eight months in the State.

This presumption defendant has attempted to rebut by proving that the slaves had not been sick for some time previous to the sale; that they walked the day of sale a mile to the steamboat landing; that they were apparently well and in fine spirits when taken on board of the boat; that there had been no cholera in the slave yard of defendant from the 28th November, 1853, to the 28th February, 1854; that the slaves appeared to be well on the 23d, and even picked cotton on the 25th of January. Defendant contends that it is thus made probable that the sickness of the slaves originated during their removal, or after they arrived at their new home.

In this state of the case, however, it must be observed, it is not shown that cholera was not prevailing to some extent in the city, and the defendant's physician, who visited the establishment almost every day, while he says positively, there was no cholera there in November and December, 1853, will not so state as to January, and only gives it as his impression that there was none. Defendant's clerk, and the owner of one of the slaves are, however, positive that there was no cholera in the slave yard in January.

The plaintiff has not contented himself with relying on the presumption of law in his favor. He has shown that there was no cholera in the Parish of Tensas at the time of the arrival of these negroes, and that there had not been any since 1851, and the physician and overseer give it as their opinion, that it was brought there by these negroes from New Orleans.

One of the physicians called as a witness by defendant, was the one having charge of the slave yard, he is of the opinion that cholera does not lie dormant in the system so long as three days; the other, *Dr. Moss*, will not undertake to say that it may not exist in a latent state for eight days.

Now the proof makes it sufficiently certain, that these slaves did not take the cholera in the Parish of Tensas, for there was no cholera there, and had been none since 1851, and when it had prevailed as an epidemic on a certain plantation in 1851, it is shown how it was carried there by the removal of negroes from a plantation in another part of the State, where it was prevailing.

Then, did the negroes take the disease on the way? If it be assumed that they did, it destroys defendant's theory, because it shows that the disease was in a latent condition in the systems of the slaves from the 22d of January to the 26th, a period of four days; for the slaves had the same healthy appearance when received in Tensas, as when delivered in New Orleans. If the disease existed in a latent condition at one period, it might have also at the other.

It seems, therefore, that it was upon the defendant to show that there was cholera prevailing on the steamboat, or at some point through which the slaves passed, where they might have taken the disease, particularly as it is shown by defendant's witness that every winter and spring, there were sporadic cases of

DOWAN
v.
WILSON.

cholera in the city. The fact that another slave of plaintiff was taken sick on the 30th and died next day, does not disprove the presumption of law. He had then been exposed to the disease, perhaps for four days.

It is urged that, if the defendant had made it possible that the slaves did not have the cholera at the time of the sale, and that if anything more than a probability is required to overcome the presumption created by the statute, it never can be overcome.

This may be true as to cholera, until medical men have a more certain knowledge of the causes and origin of the disease. The fault lies in the statute, and the nature of the proof in this case. The defendant has not rebutted the presumption, fortified by facts as it is, proof amounting to a legal certainty. A mere probability is not sufficient. See *Landry v. Peterson*, 4 An. 96.

We cannot, therefore, say that the District Judge erred in his conclusions, and the loss must fall upon defendant under the statute.

Judgment affirmed.

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46 396

COHN & BRUEN v. L. LEVY.

A lease made by a third party and defendant, is properly rejected when offered in evidence in a suit, as between a plaintiff not a party to the lease and defendant. And so is testimony tending to prove facts not alleged.

On an allegation of a written lease, no evidence can be offered to prove one by parol.

An amendment should be presented before going into trial.

APPEAL from the Fourth District Court of New Orleans, *Price, J.*
Durant & Hornor and *C. V. Jonte*, for plaintiff and appellants. *Wm. H. Hunt*, for appellee. *J. B. Cotton*, for *Shaw & Co.*, Intervenor.

LAND, J. The plaintiffs alleged that the defendant was indebted to them, in the full sum of \$733 34, for rent of store No. 94, St. Charles street, in this city, as shown by the account, and *act of lease annexed to and made a part of their petition.*

They further alleged, that the defendant had abandoned the premises, absconded, and left the State, and prayed for, and obtained a writ of provisional seizure, which was executed on the property of the defendant, found on the leased premises.

Various creditors of the defendant intervened in the suit, and claimed to be paid by preference out of the proceeds of the property provisionally seized.

On the trial, the plaintiffs offered in evidence the act of lease annexed to their petition, to the introduction of which, the intervenors objected, on the ground that it was a lease between other parties, and not the plaintiffs and defendant—the objection was sustained, and thereupon plaintiffs' counsel moved the court to allow him to amend his pleadings in the language of the bill of exceptions, "*not with the view of changing the nature of the suit, but to throw out the said written lease,*" which amendment was refused by the court upon objections made by intervenor's counsel; after which, plaintiffs counsel offered *D. Bidwell*, a witness, to prove the correctness of the account referred to in the petition, and annexed thereto, and to prove that novation of the old lease had taken place, and a verbal lease was passed between said *D. Bidwell*, agent, sometime subsequent to the said

COHEN
v.
LEVY.

written lease—to which, also objection was made, and sustained by the court, and thereupon the plaintiffs took a bill of exceptions to these various rulings of the District Judge.

There was no error in the rejection of the testimony offered by plaintiffs, first, because the act of lease annexed to the petition, was a contract between one *Newman Pestvansky* and the defendant; and secondly, because the other facts which the plaintiff sought to prove, *were not alleged in their petition*.

The plaintiffs having alleged a *written lease*, could not offer evidence of one by *parol*. *Fisk v. Cannon*, 1 N. S. 346. *Delogny v. Smith*, 3 L. 420. *Nicholls v. Creditors*, 9 R. 476.

The plaintiffs did not present their amendment before going to trial, and under the circumstances of this case, it was not improperly rejected. *Dabbs v. Hemken*, 3 R. 123.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

SUCCESSION OF M. CARDONA.

Where an usufruct of community property is constituted by last will in favor of the wife, and there are no descendants, the usufructuary is compelled to give security according to Art. 552 C. C., unless it has been dispensed with by the terms of the will.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
G. & C. E. Schmidt, for executor and appellant. *Clarke & Bayne*, for *M. Cardona*.

BUCHANAN, J. The testamentary executor is appellant from a judgment upon an account of administration. An examination of the record has not satisfied us that there is any error, to the prejudice of appellant, in the conclusions of the court below. The appellee, widow in community of deceased, asks us for an amendment of the judgment in her favor in two particulars.

1. By charging the executor with \$776 05, mentioned in the inventory as being in the hands of the executor. This sum appears to have been allowed in the judgment upon a former account. In that account, the executor charged himself with \$174, cash in his hands per inventory, and the judgment of the court on the account, increased that charge, by \$600, making in the aggregate about the sum mentioned.

2. The appellee asks, that it be decreed that she have the possession as usufructuary under the will of her husband, of the sum of \$2825 15, which the judgment of the court below declares to be due to the minor nieces of the testator, by the executor.

This amendment should be allowed. All the property comprised in the inventory of the deceased, is admitted to belong to the community between himself and his surviving wife, the appellee. The will of deceased provides as follows: "To my said wife I give and bequeath the usufruct and life enjoyment of all the property I may have at my death, for and during the term of her natural life, on condition that she shall continue to provide for the support and education of my two nieces, *Esperanza* and *Agadida Grace*, living at present with us."

By another clause of the will, the testator institutes his said two nieces as his universal legatees. The evidence shows that *Mrs. Cardona* has supported and educated her husband's nieces since his death.

By another clause in the will, a sixth interest in the testator's estate is bequeathed to a minor named *Charles Matthews*, son of *Ann Anderson*, aged about two years, subject to the widow's usufruct.

The executor argues that he is not bound to hand over the net proceeds of the estate of the testator, to his widow, unless she gives security, according to Art. 551 of the Civil Code. *Succession of Pratt*, 12 An. 457.

The usufruct of *Mrs. Cardona* is not a right under the first section of the Act of 1844, page 99, relative to community property; because her deceased husband, although he left neither ascendants nor descendants, has disposed, by will, of his share in the common property. He has done, however, what the law would have done, had he made no will; he has reserved to his widow a life estate in his property. This is then an usufruct constituted by last will (C. C. 532,) and the usufructuary has not been dispensed with the obligation of giving security, by the terms of the Act by which the usufruct is established, (C. C. 532.) As the estate of which the usufruct is given, has been liquidated, and converted into cash, the amount of the security to be given must be twenty-eight hundred and twenty-five dollars and fifteen cents, the balance in the executor's hands, after the payment of debts, as shown by his account. The will directed the sixth part, bequeathed to the minor *Charles Matthews*, to be invested in real estate by the testamentary executor. But this has not been done, because, as the executor represents, the said minor's share only amounting to a sum of four hundred and seventy dollars and eighty-five cents, cannot be invested in the manner proposed by the testator. For the same reason, it cannot be ordered to be thus invested by the usufructuary. Neither of the three minors mentioned in the will, are represented in these proceedings.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be amended, that the testamentary executor pay over to the widow *Cardona*, appellee, the sum of two thousand eight hundred and twenty-five dollars and fifteen cents, the amount allowed by the said judgment to the minors, legatees of the deceased, *Matthew Cardona*, upon the said widow *Cardona* executing, and depositing in the Fourth District Court of New Orleans, a bond in favor of the Judge of the said court, and of his successors in office, with security to the satisfaction of said court, in the sum of eleven hundred and seventy-seven dollars and fifteen cents, conditioned according to Art. 551 of the Code, to secure the eventual rights of the minor *Esperanza Grace*, also a like bond, in the like amount, to secure the eventual rights of the minor *Agadida Grace*; also, a like bond, in the sum of four hundred and seventy dollars and eighty-five cents, to secure the eventual rights of the minor *Charles Matthews*; that, in other respects, the judgment of the District Court be affirmed, and that the succession pay the costs of appeal.

SUCCESSION OF
CARDONA.

R. WATERHOUSE v. R. A. BOURKE, Administrator.

Property found among that of the deceased is properly inventoried among his effects.

The true owner thereof can claim the proceeds only of sales of his property made by an administrator in good faith.

Having neglected to claim his property both before and at the time of the inventory, there was nothing to prevent the administrator from selling them according to law. If the requisitions of law, in making the sale, were not complied with, the creditors alone would have recourse against the administrator, if they suffered by his unlawful act. The owner of the property would have no right to complain, particularly when he suffered no damage thereby.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
Benjamin, Bradford & Finney, for plaintiff and appellees *Chilton & Harrison*, for defendant and appellant.

COLE, J. The plaintiff, who is a citizen of Texas, deposited with the late *R. W. Powell*, of New Orleans, certain Texas "red back" bonds, or notes, for which he holds the following receipts :

"NEW ORLEANS, May 23, 1850.

"*R. Waterhouse*, left in my care a lot of Texas red back bonds, amounting to, say \$3,083, nominally, which will be delivered to him or his order.

(Signed) *R. W. POWELL.*"

"February 6, 1852.—Received, also, nine hundred and ninety-one of the above bonds or notes of Texas, deliverable as above.

(Signed) *R. W. POWELL.*"

Powell died on the 18th of September, 1855, and his succession was opened in the Second District Court of New Orleans, on the 15th December, 1855, when the defendant, *R. A. Bourke*, was appointed administrator.

The inventory taken on January 30th, 1856, contains the following statement :

"Two packages of bonds of the Republic of Texas, found in the tin-case of *R. W. Powell*, delivered by *Mr. Girault*, one of which containing in notes of various denominations \$991 ; and the other, containing \$3,128, comprising a total sum of \$4,119, which not having been presented within the time prescribed by the laws of Texas, the whole amount is without present value by limitation of those laws—no value."

About the 21st of February, 1856, *R. P. McMasters*, a broker of New Orleans, applied to the defendant and offered to purchase these bonds. Defendant at first declined selling them at *private sale*, but afterwards, having conferred with his counsel, agreed to sell, and did sell and deliver them to *McMasters*, on the 21st day of February, for twenty cents on the dollar.

Previous to this sale, *Bourke* had applied to *McMasters* for information respecting the value of this script, and had been informed by him that it was prescribed and of no market value ; and *McMasters* further testifies, that it was of no market value at the time he purchased from the defendant, and that his only motive for buying it, was that he had an order from Texas to buy it, for a person who was indebted to the government as security of a defaulting officer, and could use it in paying the indebtedness. But for this fact, *McMasters* says, he would not have bought it.

It is further testified to by the counsel of defendant, that he informed *Bourke* that he could not legally sell this script, as administrator, at *private sale*, but that as it was worthless, and he might never again receive an offer for it, it would be

WATERHOUSE
v.
BOURKE.

the best policy to sell it, and thereby save twenty cents in the dollar to the succession, which otherwise would be lost; and that then he could apply to the court by petition, stating the special facts, and obtain an order of sale, under which the title of *McMasters* might be legalised.

Accordingly, in April 1856, an order of sale was made, and on the 11th day of July following, the script was sold by the Sheriff.

Up to this period, no claim or demand had ever been made by *Waterhouse* upon the defendant for this script, and the only information he had received, was from *L. H. Gardner*, formerly employed by the firm of *Powell & Co.*, of which *R. W. Powell* was a member. *Gardner* was present when the tin-box containing *Mr. Powell's* private papers was opened, in order to be inventoried. There was a package of "red backs," Texas bonds, found in this tin-box. *Gardner* testified that he told *Mr. Bourke*, that whilst he was in Texas, he called upon *Mr. Waterhouse* in relation to the business of the debt he owed to *Powell & Hopkins*. *Mr. Waterhouse* produced two receipts for the "Texas red back bonds," as a proper credit on the debt, the payment of which he claimed. That he then stated to *Mr. Bourke*, he believed these bonds were the property of plaintiff, and that he believed them to be the same, the receipts of which he saw in the hands of *Mr. Waterhouse*.

It further appears, that "red backs" were redeemed in June, 1856, at 76 cents on the dollar, at Washington, but it does not appear that *Bourke* knew this fact, or that indeed it was known to any except speculators.

McMasters says, it was known when he bought of *Bourke*, in February, 1856, that the creditors of Texas were supplicating Congress to pay all the debts of Texas, but *McMasters* did not reveal this fact to *Bourke*.

On the 12th of May, 1857, plaintiff instituted this suit, in which he prays that *Bourke* be ordered individually, as well as in his capacity as administrator of the succession of *R. W. Powell*, to deliver said bonds deposited as aforesaid, to petitioner, or in default thereof, to pay him \$4,074, their present value.

There was judgment in favor of the plaintiff against the succession of *R. W. Powell*, for \$914 85, the amount paid to the administrator by *McMasters* for the bonds, which sum is to be taken out of the assets of the succession by preference and privilege over every other person. It was further decreed, that the plaintiff recover from the defendant, individually, \$2,217 89, the difference between the price given by *McMasters* and the value of the bonds as proved upon the trial. Defendant has appealed.

There is a bill of exceptions to the exclusion by the court, of the testimony of *J. M. Chilton* and the cross-examination of *McMasters*.

The testimony of *Chilton* ought to have been admitted, except as to that part containing the communications of *Bourke* to him.

The cross-examination of *McMasters* was also admissible, for this as well as the testimony of *Chilton*, tend to show the good faith of *Bourke* in disposing of the bonds.

We are of opinion that *Bourke* ought only to be held liable in his administrative capacity for the amount received by him and put upon his tableau, as the proceeds of the sale of the bonds.

It is clear that he acted in perfect good faith, and even admitting that the sale to *McMasters* was illegal, still plaintiff cannot raise this objection, because he does not sue as a creditor of the estate, but claims a special deposit made with the deceased in his lifetime.

WATERHOUSE
v.
BICKER.

It does not appear why this deposit was made, and it appears singular that the bonds should have been left for so many years with *Powell*.

Gardner, indeed, testifies that plaintiff produced to him in Texas, the two receipts for the bonds, as a proper credit on the debt, the payment of which *Gardner* claimed as due to *Powell & Hopkins*.

This testimony is not explained, and it leads to the conclusion that plaintiff considered these bonds as compensated by his debt. However this may be, there was certainly great neglect in plaintiff to permit the bonds to remain so many years with *Powell*, if the latter had no offset against them, or did not hold them as collateral security.

Powell is now dead, and it is impossible for his administrator to explain the cause of this long deposit, and the claims that the deceased may have had against the bonds.

The facts of this case establish that the bonds brought as much as they would, if the order of court had been first obtained for their sale.

Defendant had the right to put the bonds upon the inventory as the property of *Powell*. He found them among his papers, and the testimony of *Gardner* was not of such a nature as to authorize *Powell's* administrator to consider the bonds as the property of plaintiff.

Art. 1099 of the Civil Code, instructs the Judge or Notary, to "make mention of the effects and property which are claimed by third persons, as having been intrusted to the deceased to keep on deposit, consignment, or otherwise, all of which must be estimated with the effects of the succession, though they can be taken out of the inventory, *if the claim to them is established.*"

These bonds were not claimed by plaintiff; he made neither before nor at the time of the inventory any demand for them.

There was nothing then to prevent the administrator from selling them according to law. If he erred in not following in their sale the requisitions of law, the creditors of the estate may have their recourse against him, if they have suffered by his unlawful action, but plaintiff not being a creditor can only object under the circumstances of this case, and hold the administrator liable, in the event he had no right whatever to sell the bonds.

If he had the right to sell, then the neglect to follow the strict formalities of law incumbent upon administrators, cannot be complained of by him, particularly when he suffered no damage thereby. Plaintiff, with a bad grace, invokes the enforcement of the most rigid principles of law, when his own *laches* has produced the difficulties, and when the administrator acted in good faith for what he believed, under the advice of counsel, to be for the best interests of the estate.

The succession of *Powell* was opened in December, 1855; *McMasters* purchased the bonds about the 22d of February, 1856, at which time, the period for a sale of all the effects had not only arrived, but had passed, for more than a year had expired from the opening of the estate. The administrator was not bound to wait any longer to see if any one would claim the bonds.

Even supposing that plaintiff has the same rights as creditors of the estate, for recovery of damages for selling illegally these bonds, still he can recover none, for he has not suffered any. He obtained as much by the private sale, and the attempt to cure the illegality by the public sale, as if the order of court had first been obtained for their sale.

Besides, if this script, in consequence of the failure of Congress to act, had remained of no value, the defendant could not have withheld from plaintiff what he

received for it. It would seem, then, that if he could not be benefited by the continued want of value of these bonds, that he should not suffer by their accidental increase of value. C. C. 2291 ; 7 An. 487 ; 12 La. 124 ; C. C. 2489 ; 5 An. 550 ; 3 An. 381 ; 2 La. 69 ; C. C. 2427 ; 17 La. 281 ; 6 La. 452 ; C. C. 1140.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be amended as follows, to wit : that that part of the judgment which decrees that plaintiff shall recover judgment against the defendant *Bourke*, individually, for \$2,217 89, be avoided and reversed ; and that there be judgment in *Bourke's* favor against the individual demand against him, and that the judgment so amended be affirmed, and that plaintiff pay the costs of appeal.

MERRICK, C. J. I concur in this case on the ground that the rule of damages was the market value of the bonds when sold by the administrator, in February, 1856. It does not appear that their market value at that time exceeded the price received by the administrator.

WATERHOUSE
v.
BOURKE.

SAMUEL LOCKE v. MACKINSON & MURPHY.

When a party takes accounts from his debtor to be credited if collected, otherwise to be returned, with full power to settle them in any manner he can, taking a note on time for an account, it operates no novation and no payment.

APPEAL from the Fourth District Court of New Orleans, *Price, J.*

G. A. Breaux, for plaintiff and appellee. *M. M. Cohen*, for defendants and appellants.

MERRICK, C. J. "Plaintiff sued on an open account and obtained a judgment in the lower court for the sum of four hundred and forty-one dollars and thirty-eight cents, with five per cent. from September 23d, 1855, against the defendants *in solido*. From this judgment *Murphy* has appealed.

"The grounds of defence are : 1st, payment ; 2d, novation ; 3d, that by taking the note of *J. B. Stiles & Co.* in settlement of the account due defendants, plaintiff has made the debt his own."

The proof shows that the accounts of *Stiles & Co.* were taken conditionally ; if they were paid, they were to be credited ; if not, they were to be returned and the Clerk, of plaintiff to whom they were delivered, was authorized to settle the matter in any way he could.

Here was no payment and no novation. Neither did the taking of a note at twenty days after date, under the power granted in this case, make the plaintiff responsible as defendant's agent, under the authorities in 16 La. 150 ; 12 Rob. 428 and 6 An. 763. When he could not obtain payment of the note, he was, by the agreement, authorized to return it.

The answer praying for damages as for a frivolous appeal, was not filed in time. 7 N. S. 657 ; 14 La. 288, 391.

Judgment affirmed.

14	369
45	372
14	362
108	306

THOMAS EDWARDS, Curator, v. R. C. BALLARD.

Although no real action would lie in Louisiana for lands situated in Mississippi, yet a suit brought to recover the proceeds of those lands, from a defendant domiciliated in Louisiana, would fall within the jurisdiction of our courts.

In a question of location, the only authorized evidence is a survey made by proper authority.

The plea of *res judicata* is without force, unless the object demanded in the former suit was precisely the same as that demanded in the action pending.

The prescription of one year does not bar an action *en declaration de simulation*.

Good faith is essential to the acquisition of property by the prescriptions of five and ten years.

A PPEAL from the District Court of the Parish of Madison, *Farrar, J.*
A. F. Steele, for plaintiff and appellant. *Snyder & Sparrow*, for defendant.

BUCHANAN, J. This is an action for the recovery of lands and slaves, and their fruits, alleged to belong to the succession of *Silas Lillard*, administered by plaintiff, and alleged to be in the possession of defendant, by virtue of simulated conveyances from *Lillard*. The cause was tried by a jury, who found a verdict for defendant. Plaintiff has appealed.

The plaintiff asked for a new trial, on several grounds :

1st. That the court had erred in ordering certain portions of plaintiff's petition to be stricken out, and in refusing to permit testimony to go to the jury in relation thereto.

The petitioner alleges that *Silas Lillard*, deceased, of whose vacant estate plaintiff is curator, made two simulated sales of movable and immovable effects, to the defendant, *Ballard*, for the purpose of defrauding *Lillard's* creditors, he, *Lillard*, being then insolvent ; that one of those simulated sales was made at Natchez, Mississippi, on the 18th February, 1840, and the other in Concordia parish, Louisiana, on the 28th April, 1840. Various allegations are made of facts tending to show the simulation alleged ; and the petition concludes by a prayer for judgment in favor of plaintiff against defendant, for the value of the property conveyed (by the two sales alleged to be simulated) by *Lillard* to defendant, and which has been alienated by defendant ; and also for the hire of slaves and profits of lands so conveyed, which are now in defendant's possession ; and for the present value of the slaves of *Silas Lillard* now in defendant's possession, and for general relief.

The portions of this petition which the District Court, on defendant's motion, ordered to be stricken out, were those relating to the simulated sale of property in Natchez, of the 18th of February, 1840, and to a quit claim conveyance of said property, by defendant, to *Lillard's* widow.

The grounds of the motion to strike out were, that the allegations of the petition in question had no connexion with the prayers of the petition, nor is any thing asked of defendant, based or depending in any way upon said allegations ; that neither the property mentioned therein, nor its value, is demanded, nor could said property be demanded of defendant in this action.

The plaintiff, on the trial of the cause, after the order to strike out, offered evidence in support of the allegations in question, which being rejected by the court, a bill of exceptions was reserved.

The order to strike out the allegations of the petition, appears to us clearly erroneous. The allegations have a direct bearing upon the prayer of the petition.

The defendant is a resident of Madison parish, in this State, in which parish this suit was brought, and the defendant personally cited. And granting that no real action would lie in Louisiana for lands situated in Mississippi, we do not find the plaintiff's demand to be of that nature.

Instead of the petition claiming property situated in Mississippi, it seems to claim at the hands of plaintiff, the proceeds of property in Mississippi, which has been disposed of by defendant, and which he had acquired by the conveyance of the 18th of February, 1840. As to the place when that conveyance was made, we do not suppose, nor do we understand the counsel of defendant as maintaining, that this would affect the jurisdiction of our courts.

Another bill of exception was taken by plaintiff to the admission of the deposition of *H. O. McEnery*. The objection made to this testimony and overruled by the court, was, that the statements of this witness could only be legally proved by a survey and map of township No. 7, of range 7 east.

We think this objection should have been sustained. The witness was offered to sustain the allegation of defendant's answer, that the largest and most valuable portion of the land sold by *Lillard* to the defendant, on the 28th of April, 1840, was included within the limits of the Curry & Garland, or Bringier grant. His testimony was, that being Register of the land office at Monroe, in October, 1843, when public lands, including the township in question, were offered for sale under a proclamation of the President of the United States, the witness had been instructed by the Commissioner of the General Land Office, to withhold that township from sale, as being included in the Bringier claim. This appears to us a question of location, of which the only authentic evidence was a survey made by proper authority.

The defendant has pleaded the exceptions of *res judicata*, and of *prescription* in bar of this action.

The plea of *res judicata* is based upon a suit instituted by plaintiff against defendant, about two years prior to the institution of the present suit, and the verdict of a jury rendered in said suit about three months before the institution of this suit.

The object demanded in that suit, was not the same as that demanded in the present. The plea of *res judicata* cannot, therefore, be sustained. Civil Code, Art. 2265.

The prescription pleaded is that of one, of five, and of ten years.

The prescription of one year, does not bar this action, which is the action *en declaration de simulation* *Cammack v. Watson*, 1 An. 132; *Erwin v. Bank of Kentucky*, 5 An. 4; see also 8 An. 453; 10 An. 20; 11 An. 265.

The prescriptions of ten and five years, pleaded by defendant, are those by which the property of lands and slaves is acquired by the possessor, who holds by a just title.

Good faith is an essential to the acquisition of property by this prescription. C. C. 3445. But bad faith is expressly charged in the petition. C. C. Arts. 3414, 3415.

The counsel for defendant refers us to the provision of the Code, Art. 3447, that good faith is always presumed in matters of prescription. But the same Article permits bad faith to be alleged and proved against the party in possession.

It is, therefore, adjudged and decreed, that the verdict and judgment of the court below, be set aside and reversed; that this cause be remanded for a new

EDWARDS
v.
BALLARD

trial according to law, and to the principles enounced in this decision ; and that defendant and appellee pay costs of appeal.

LAND, J., dissenting. Separate actions may be cumulated in the same demand or suit, unless one of them precludes, or is contrary to the other. C. P. 148, 149.

It has been held that an action of nullity may be cumulated with a petitory action.

Such is this suit ; the plaintiff has cumulated an action of nullity with a petitory action. He sues to annul a sale of land and slaves, on the grounds of fraud and simulation, and to recover the property conveyed.

He cannot succeed in the petitory action, unless he also succeeds in the action of nullity.

Prescription has been pleaded to both actions, and if the plea is good, it disposes of the whole case.

The act of sale was executed, and the defendant was in possession of the property conveyed, more than ten years before the commencement of this suit, and has remained in possession ever since.

The revocatory action is prescribed by one year, to be computed from the time the creditor has obtained judgment against his debtor. C. C. 1980.

The *action* of nullity or rescission of contracts, testaments, or other acts, is prescribed by five years. C. C. 3507.

All *personal actions* are prescribed by ten years, unless prescribed by a *shorter period*. C. C. 3508.

The action to annul the sale in this cause, is one of the three mentioned, i. e. a *revocatory action*, an *action of nullity*, or a *personal action*.

In whatever light it may be viewed, it is prescribed by one, five or ten years.

As the plea of prescription bars the *action of nullity*, and as the plaintiff *cannot succeed in the petitory action* cumulated with it, *without annulling the sale* ; in other words, without *succeeding in both demands*, the judgment should be affirmed.

The defendant cannot be deprived of his defence to a *personal action* by its cumulation with a *real one*.

MERRICK, C. J., concurred in this opinion.

14	364
47	418
14	364
48	1020
14	364
50	463
14	364
120	437

STATE OF LOUISIANA v. MESHAC ROSS.

The State has the right to appeal, provided it is limited to the class of cases found in the precedent, to-wit : those where the indictment has been quashed before a trial, or held bad upon a demurrer ; and where it purports to charge an offence punishable with death or imprisonment at hard labor. Prosecutions must be by indictment or information ; and the State has the right to choose either mode, but cannot prosecute by both at the same time.

After prosecuting under an indictment which has been ignored, the State is not barred, in new proceedings, from selecting indictment or information, as provided by the Constitution.

APPEAL from the Tenth District Court, Parish of Carroll, *Farrar, J.*
James Nolan, District Attorney, and *E. Warren Moise*, Attorney General,
for State. *Short & Parham*, and *Jones & Dougherty*, for defendant and appellee.

COLE, J. The 1st of October, 1858, the Grand Jury of the Parish of Carroll, returned into court ignored, a bill of indictment, which charged the defendant with manslaughter.

The same day, after this action of the grand jury, the District Attorney filed an information, charging the defendant with manslaughter.

The court ordered the information to be spread upon the minutes, and a warrant of arrest to issue.

The following motion to quash the information was then filed by the counsel of the accused :

"And now, on this, the 6th day of October, 1858, comes the said *Meshae Ross*, who is under arrest by virtue of an information by the District Attorney, on behalf of the State, on a supposed charge of manslaughter, and says that this honorable court ought not to have, or maintain any action or jurisdiction on said information, because the said District Attorney, on behalf of the State, at the present term of the court preferred the same charge before the grand jury, who were empanelled and sworn to inquire in and for the body of the said parish by way of indictment, who informed this court by the return thereon, that the said indictment was not found, which action on the part of the attorney for the State and the said grand jury, precludes the District Attorney from filing an information for the same supposed offence. Wherefore, he asks the judgment of this honorable court on said information, and that the same may be quashed, and the accused may be discharged without any further plea on his behalf."

To this motion the District Attorney filed the following demurrer :

"And now comes the District Attorney, who prosecutes in behalf of the State of Louisiana, and says, by reason of anything alleged in defendant's motion, the said State is not precluded from filing said information, and holding said party to answer thereto. Wherefore, the court is asked, whether by reason of the action of the grand jury, as set forth in defendants plea, the State be precluded from proceeding further on said information."

The District Judge sustained the motion of the accused, and ordered the information to be quashed.

It thus appears that the information was quashed for the reasons given in the motion of the accused, after the court had ordered the information to be filed.

And it was not quashed because the District Judge had not consented to have the information filed.

The decision of this cause cannot then depend upon any supposed want of consent on the part of the District Judge to the filing of the information.

After the information was quashed, upon motion of the District Attorney, in open court, an appeal was granted to the State.

The defendant has moved to dismiss the appeal upon this among other grounds, that there is no law authorising the State to prosecute an appeal upon an indictment or information.

Art. 62 of the Constitution of 1852, vests this court with jurisdiction over "all criminal cases on questions of law alone, whenever the offence charged is punishable with death or imprisonment at hard labor, or when a fine exceeding three hundred dollars is actually imposed."

Under the Constitution of 1812, the Supreme Court of this State had no jurisdiction in criminal matters.

The Legislature of 1843 created a Court of Errors and Appeals in criminal matters, with "jurisdiction of all questions of law arising in the progress of any

STATE
v.
ROSS.

prosecution for violation of any penal law of the State, where the punishment may be death or imprisonment at hard labor." Sess. Acts 1843, p. 59.

The Court of Errors in the case of the *State v. Jones*, held that the State was authorised to appeal from a judgment quashing an indictment. 8 Rob. 575.

The Constitution of 1845, vested the Supreme Court with jurisdiction in "criminal cases on questions of law alone, whenever the punishment of death or hard labor may be inflicted, or when a fine exceeding three hundred dollars is actually imposed."

The only difference between this Article and Article 62, of the Constitution of 1852, is that in the latter the appeal exists, whenever the offense charged is punishable with death or imprisonment at hard labor, whilst in the former, it lies wherever the punishment of death or hard labor may be inflicted.

Under the Constitution of 1845, our predecessors exercised jurisdiction over an appeal by the State from a judgment quashing an indictment. *State v. Cheevers*. 7 An. 40.

Under the Constitution of 1852, this court has entertained jurisdiction of appeals by the State from judgments quashing indictments. *State v. Hendry*, 10 An. 207. *State v. Ellis*, 12 An. 391.

In none of these cases does the question of the right of the State to appeal appear to have been raised, except in the *State v. Jones*, tried before the Court of Errors, and in the *State v. Ellis*, decided by this court under the Constitution of 1852.

If it had not been the intention of the framers of the Constitution of 1852, to have granted in certain cases to the State the right of appeal, they would have worded differently Article 62, for they knew that appeals by the State had been sustained by the Court of Errors under the Act of 1843, and by the Supreme Court under the Constitution of 1845. Instead of this, however, they construe this Article, which vests this court with jurisdiction in criminal matters, to express almost identically the same idea, as the corresponding Articles in the Act of 1843, and Constitution of 1845, except that in the Act of 1843, there was no appeal in the case where the punishment was fine alone.

It is true, it is a recognised principle of the common law, that no person shall be twice put in jeopardy of life or limb for the same offence. This principle is also adopted in the Constitution of the United States, and governs offences against the United States. Amendment to Constitution United States, Art. 5.

An accused has not, however, been put in jeopardy of life or limb, when he has not even been tried before a jury, but when the indictment or information has been quashed before his case has been submitted to the jury.

It has been objected that the State cannot appeal from the decisions of its own courts. There does not appear to be any reason why the State should not be entitled, as a private individual, to an appeal from one of her inferior courts to a superior tribunal.

We concur with the opinion expressed by this court, in the *State v. Ellis*, that there is no objection to the right of the State to appeal, "provided it is limited to the class of cases found in the precedents, to-wit: those where the indictment has been quashed before a trial, or held bad upon a demurrer, and where it purports to charge an offence punishable with death or imprisonment at hard labor."

It is objected that the Legislature have not provided a mode of prosecuting an appeal on the part of the State from judgments of the inferior courts in criminal matters. This court cannot, however, be divested of jurisdiction by this Legisla-

tive omission. If it could, then it might also be deprived of its jurisdiction in civil cases, by the neglect of the Legislature to direct the manner of appeal in civil affairs. Suitors would thus lose a constitutional privilege.

The conclusion would be different, if this Article had ordained that the appeal should be taken in a mode to be provided by the Legislature, for then the Article would not have conferred the full right of appeal until the Legislature had acted and provided the manner of appeal. The motion to dismiss the appeal must therefore be overruled. Upon the merits, the action of the District Court in quashing the information has been assigned by the District Attorney in this court, as error.

The material question is, whether the District Attorney, at the same term of court, and on the same day that the grand jury had ignored the indictment, could file the information, after this action of the grand jury. Art. 103, of the Constitution of 1852, provides, that "prosecutions shall be by indictment or information."

The State can select either mode, but cannot prosecute by both at the same time.

After, however, it has prosecuted by indictment, and the grand jury not being satisfied by sufficient evidence, or for other causes, have not found a true bill against the accused, it is the same as if the matter had never been before a grand jury, and the District Attorney, in commencing new proceedings, has the right to select indictment or information, as provided by Art. 103.

As there can be no doubt that the District Attorney could thus prosecute the accused at the next term of the court, we can see no reason why he should not be permitted to do so at the same term that the grand jury have ignored the bill, if he fears that the crime would be prescribed before the next term of court, or for other good reasons.

It is, therefore, ordered, adjudged and decreed, that the order of the District Court, quashing the information be set aside, that the information be restored to its full force on the records of said court, and that the prosecution under the information be allowed to be proceeded with, and that this cause be remanded to the lower court for further proceedings according to law, and that the costs of this appeal be paid by appellee, and the costs of the lower court abide the final decision of the prosecution.

MERRICK, C. J., dissenting. The District Attorney cannot file an information as a matter of right. It must be filed *with the consent of the court first obtained*.

It was, in my opinion, within the discretion of the District Court to give such consent even at the same term at which the grand jury had "ignored" an indictment for the same offence. But then, the court might have required some showing before it gave the consent, and in the absence thereof, it might have refused. If the information were impropiously filed, it might order the filing to be erased and the previous order rescinded. I see nothing in this case, which shows an erroneous exercise of the discretion vested in the District Judge.

Had the information been accompanied with affidavits, it might have presented a different case.

I think the judgment of the District Court ought to remain undisturbed.

LAND, J., also dissenting. The District Attorney preferred to the Grand Jury, of the Parish of Carroll, a bill of indictment, charging the defendant with the crime of manslaughter.

After hearing the evidence, they returned the bill into court with this endorse-

STATE
v.
ROSS.

ment upon it, "*bill not found*," signed, *T. M. Tucker*, foreman of the Grand Jury.

On the same day, the 1st of October, 1858, the District Attorney presented to the court an *information* against the defendant for the same crime charged in the bill of indictment, which was filed, and ordered to be entered on the minutes, and which afterwards was quashed on the motion of defendant, and the State appealed.

This case, therefore, comes before us without either an indictment or information against the defendant, and his counsel has filed a motion to dismiss the appeal for the want of jurisdiction in this court.

Prosecutions can only be carried on by indictment or information. There can be no prosecution by indictment without the finding of a grand jury. There can be no prosecution by information without the consent of the court first obtained. Acts of 1855, sec. 1, p. 151.

In this case the grand jury refused to find a bill, and the court refused its consent to a prosecution by information after hearing the parties.

Whether the party charged, should be put upon his trial either by indictment or information, is a question *necessarily involving the consideration of facts, of which this court has no appellate jurisdiction.*

No appeal lies from the refusal of a grand jury to find a bill upon the evidence before them. Nor will an appeal lie from the refusal of a District Judge to give his consent to a prosecution by information.

The judgment quashing the information, is proof conclusive, that the filing was only *pro forma*, and was not preceded by the consent of the court, to a prosecution in that form,—but that the Judge withheld his consent until the defendant could be heard, and *then refused it.*

This court is, therefore, without jurisdiction of the case, in my opinion.

HEIRS OF WM. WILSON v. A. H. SMITH—B. FONTENELLE v. the same.

An *ex parte* decree ordering property to be inventoried is only *prima facie* evidence of title in the decedent.

The appointment of a curator to the estate of an absentee is authorized by Articles 50, 52 and 53 C. C.

APPPEAL from the District Court of the Parish of Plaquemines, *Rousseau, J. Filleul, Coxe & Beaux and Collins*, for plaintiffs and appellants. *Penrose*, for defendants.

COLE, J. In 1809, a sale was made of a tract of land in the Parish of Plaquemines, to *T. B. Robertson* and *William Wilson*, who are described in the deed as residents of New Orleans. *Wilson* did not sign the act of sale. *Isaac T. Preston* purchased the undivided moiety of *Robertson*, and sold it in 1847 to *H. L. Smith*, who took possession of the property, then in a state of waste, and made, at his own expense, many improvements thereupon. During this time nothing was known of *Wilson*.

In 1853, *H. L. Smith* instituted a suit against *Wilson*, and obtained an attachment upon affidavit of his belief that *Wilson* resided permanently out of the State of Louisiana; and claimed a large amount of money against him as owner

of the undivided moiety of the said land, for the expense of the improvements aforesaid, and the enhanced value thereby of the land.

The suit was dismissed by the District Judge, and the judgment was affirmed by this court. See *Smith v. Wilson*, 10 An., 257.

In 1826, one *Catherine Wilson* presented a petition to the Court of Probates, for the Parish of Orleans, in which she represented herself as widow, and lately the wife of *William Wilson*, deceased, of the Parish of Orleans, and averred that the only property to which he had a claim in his lifetime, was situated in the town of Ayre, Scotland, being an unliquidated claim upon the succession of an uncle, named *Wilson*, late of the said town. She prayed to be appointed tutrix of her minor child, *Mary Ann Wilson*, the issue of her marriage with *Wilson*, and his only heir. She was appointed.

In 1856, *Evelina German*, widow of *George Hearsey*, tutrix, and other persons presented a petition to the Second District Court of New Orleans, in which they represented that the minor child, *Mary Ann Wilson*, died previously to her mother, and that the latter inherited her succession, and became through her daughter the heir of *William Wilson*, her husband; that they are the next of kin to *Catherine Hearsey*, the widow of said *Wilson*, who is deceased; that *Wilson* left certain property in the Parish of Plaquemines. They prayed for an inventory of the property of *William Wilson*, deceased, and to be recognised as his heirs.

The inventory was ordered, and petitioners were recognised as the sole and legitimate heirs of *William Wilson*; the decree also ordered them to be put in possession of his estate.

The only evidence offered, appears to have been the affidavit of one *Lucinda Abbot*.

The inventory, comprising the undivided half of the tract of land sold to *Wilson*, and no other property, was approved and homologated.

On the 18th of June, 1855, in accordance with petition to that effect, *B. Fontenelle*, was appointed curator of the estate of *William Wilson*, an absentee, by the Second District Court for the Parish of Plaquemines.

The heirs of *William Wilson*, and, also, *Fontenelle*, curator, respectively claiming titles to the undivided half of said land, sued defendant, *Mr. Smith*, before the said District Court of Plaquemines, for a partition of the land. The two suits were consolidated. The judgment non-suited the heirs of *Wilson*, and ordered that the curator of the absentee be maintained as such, authorised to proceed with his demand in partition against *Mrs. Smith*, and to administer agreeably to law, the portion of said land which in the suit for partition, may be allotted to *William Wilson*, the purchaser thereof, for any person who may hereafter show a just title thereto. Sess. Acts 1855, p. 1. C. C. Arts. 50 to 57. The heirs of *Wilson* have appealed.

The decree of the Second District Court of New Orleans, recognised *Evelina German* and others, as heirs of *William Wilson*; but it does not necessarily follow that they are the heirs of *William Wilson* who owned land in Plaquemines.

Before they can carry into effect the decree ordering them to be put into possession of the property of *Wilson*, so as to claim, as owners, the land, they are obliged to establish, when their right is contested, that this land belonged to the *Wilson* whom they represent.

The *ex parte* decree ordering the inventory of this land as their property, is only *prima facie* evidence of title, and not conclusive when the title of their ancestor is contested.

WILSON
v.
SMITH.

In this suit, the heirs of *Wilson* have failed to prove themselves to be the heirs of the *Wilson* who owned the land in Plaquemines. If they can get satisfactory evidence of their heirship to the *Wilson* who was the owner of this land, then the judgment cannot defeat their claim.

The judgment as to *Fontenelle* was correct. *Wilson*, the absentee, has not been heard from for over ten years, and there are no known heirs to his estate, residing in the State. It will be his duty, under the judgment, to have the property of the absentee sold according to law, and to pay the funds into the State Treasury, as in cases of vacant successions, after the payment, according to law, of the debts of *Wilson*; and thus, in the language of the judgment, the portion of the land coming to *Wilson*, will be administered for any person who may hereafter show a just title thereto, and the heirs of *Wilson* can claim the funds from the State, if they hereafter prove themselves to be the heirs of *Wilson* who owned the land.

It is objected by the appellants, that *Fontenelle* obtained letters of curatorship to the estate of *William Wilson*, and is commissioned as curator of the absentee. There is nothing illegal in this form of appointment. The 50th Art. of the Civil Code, authorises the appointment of a person "to administer the estate" of the absentee. C. C. Arts. 52, 53.

Appellants also aver that *William Wilson* is not an absentee, and there is no proof of his existence.

The act of sale to *Wilson*, although it is not signed by him, raises the presumption of his existence at the epoch of its execution.

Robert Johnson, testifies that he has resided in the Parish of Plaquemines since 1824, that he knew a person residing in the parish by the name of *William Wilson*, from 1824 to 1832. This *Wilson* resided on the land now in contestation. In 1832, *Wilson* told him he was going to Texas, and left the place.

It is established, that he once existed, and there is no proof of his decease, and Art. 50 of the Civil Code provides, that when a person possessed of either movable or immovable property within the State, shall be absent, or shall reside out of the State, without having appointed somebody to take care of his estate, a curator shall be appointed by the Judge of the place where the property is situated, to administer the same.

Judgment affirmed, with costs.

VOORHIES, J., absent.

J. P. BARRIÈRE v. A. A. PEYCHAUD.

Where a party permits a broker to act as principal, in effecting a compromise with his debtor, on a promissory note, and is notified of the broker's act, without repudiating his authority at once, he is bound by the compromise entered into between the debtor and broker.

The agent is a competent witness to prove acts done within the scope of his authority; his liability for damages for falsely representing himself as agent, is an objection to his credibility.

APPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
J. Magne, for plaintiff and appellant. *G. LeGardeur*, for defendant and appellee.

BARRIÈRE
v.
PEYCHAUD.

COLE, J. Plaintiff institutes this suit, as the holder of a promissory note for \$3500, subscribed by *A. A. Peychaud*, to the order of and endorsed by *P. A. Hébrard*, dated 14th July, 1856, and payable six months after date, duly protested for non-payment. He prays for judgment against *Peychaud*, the maker.

The answer avers, that defendant, finding himself, in consequence of the failure of *Hébrard*, in which he was deeply involved, unable to pay his just debts, called upon all the parties who held notes, drawn and endorsed by himself and *Hébrard*, submitted to them a statement of his affairs, and offered to surrender to them at once all the property he possessed, or to pay them thirty per cent. on the whole amount due by him, as drawer or endorser aforesaid, in notes at one, two and three years, bearing six per cent. interest, and secured by the endorsement of *Pierre Deverges* for one-third, of *Claude Forstall* for another third, and of *Louis Deloche* for the remaining third.

That the parties refused the proposed surrender, and accepted the thirty per cent. in full payment and satisfaction of their claims against respondent.

There was judgment for defendant, and plaintiff has appealed.

The principal question is, whether *J. M. D. Gauthier* was authorized to act as agent of plaintiff in accepting the thirty per cent.

The note sued upon had been purchased by *Gauthier*, who is a broker, for plaintiff, and as the latter did not wish his name to be known in the transaction, he requested *Gauthier* to represent him in the matter of the insolvency of *Hébrard & Peychaud*, and he told *Gauthier* that everything he might do would be well; and that he might do as he pleased, just as if the note was his."

The evidence of *Gauthier* fully establishes, that he was empowered to agree to the compromise. The notes which were to be substituted for the original one have been tendered to plaintiff, but he has refused to take them. Defendant has deposited the notes in bank for the benefit of plaintiff.

The conduct of plaintiff creates the impression, that he was willing to allow *Gauthier* to represent him until the other creditors had consented to the compromise, and then, that he intended to deny the agency of *Gauthier*, and seek to collect the whole amount of his debt.

If plaintiff can succeed, it would certainly work a great injustice to the creditors, who were parties to the compromise, and also to the endorsers of *Peychaud*. For the former consented to the release, without doubt, upon the supposition that all who held notes drawn and endorsed by himself and *Hébrard* had agreed to the compromise, and that the property and future exertions of *Peychaud* would be devoted to the payment of thirty per cent. only upon those debts; and the endorsers, *Deverges*, *Forstall* and *Deloche*, doubtless, were influenced by the idea, that the property and labors of *Peychaud* would suffice to guaranty them from loss, by being responsible for thirty per cent., although they might not be, if any particular creditor should be paid in full.

Gauthier is a competent witness, to prove acts done within the scope of his agency. The objection, on the ground of his liability to actions for damages and the costs of this suit, if he falsely represented himself as agent, goes simply to his credibility. 1 Greenleaf on Evidence, § 416; Phillips, vol. 1, p. 52; 1 An. 399; 4 An. 409; *ibid*, 540.

Independently of the testimony of *Gauthier*, there is also corroborating evidence. On the 19th January, 1857, two days after the note sued upon had been protested, the plaintiff addressed a letter to the defendant, in which he stated that he was the holder of the note, and if defendant had any arrangement to propose

BARRIÈRE
v.
PEYCHAUD

by the 24th inst., which would be satisfactory, he would accept it; if not, that he would be obliged to resort to legal measures to obtain payment of the note.

To this letter, in which plaintiff asserts his title to the note, and menaces with a suit after the expiration of five days, the defendant answers, upon the 19th January, the same day it was received, as follows :

“ Monsieur :

En réponse à votre lettre de ce jour, je me hâte de vous dire que l'arrangement que j'ai fait, il y a quelque temps, avec mes créanciers, embrasse le billet dont parle votre lettre, et qui se trouvait en la possession de *Mr. J. M. D. Gauthier* ; ce dernier a, comme tous les autres créanciers, accepté les propositions que je lui ai faites, et dont le règlement doit se faire incessamment. Veuillez, donc, voir *Mr. Gauthier* à ce sujet.”

This letter announced to plaintiff, that *Gauthier* had acted as owner of the note, and entered into an arrangement in relation to it. If *Gauthier* were not so authorized, it was his duty to have repudiated the agreement as soon as he was notified of it. He did not do so ; he is, therefore, presumed to have ratified it, and is bound by it.

The evidence of *Gauthier* establishes that he entered into the compromise.

There is also an act of compromise in writing, in which certain creditors agreed to take thirty per cent. in notes, signed by *Gauthier* and other creditors.

The character of the creditors who consented to the compromise and passed acts of release, shows that this compromise was advantageous for the creditors. There are releases in the record of the original debts for notes given, according to the compromise, by the Mechanics' and Traders' Bank, the Branch of the Louisiana State Bank, the Louisiana State Bank, the Bank of Louisiana, and *A. Carrière*.

Gauthier did not, then, act adversely to the interests of his principal, but for his advantage.

The agency of *Gauthier* is then proved by his parol testimony, and by the conduct of plaintiff in relation to the answer sent by defendant to the letter of plaintiff.

There is also the compromise in writing, signed by *Gauthier*.

Plaintiff, however, contends that parol testimony ought not to have been allowed to show in what capacity *Gauthier* signed the act of compromise.

It was properly admitted ; the object of the testimony was not to vary or contradict the terms of the agreement. The agreement purported to be signed by *Gauthier* ; the parol evidence, which showed that he signed it as agent of plaintiff, did not vary or contradict the signature of *Gauthier*. It was simply explanatory of the capacity in which he signed it.

The mere signature to an act of compromise does not prove that the party signed as principal ; he may have signed as agent, and he ought to be permitted to prove it, except in such particular cases as may be prohibited by law.

The objection, that the agreement was a voluntary respite, and as such, required the concurrence of *all* the creditors, is without force in the present case ; for this agreement was merely a compromise between a debtor and some of his creditors, with which the respite laws of Louisiana have nothing to do.

Judgment affirmed, with costs.

LOW & WHITNEY v. PROCTOR & THOMAS.

The record not disclosing any interest in the garnishee, in the result of the suit between plaintiffs and defendants, he is considered a mere stake-holder, and not entitled to demand service of the interrogatories taken out by plaintiffs.

APPEAL from the Fourth District Court of New Orleans, *Price, J.*
Mott & Fraser, for plaintiffs. *V. F. & J. B. Cotton*, for defendants and appellants.

LAND, J. This suit was commenced by attachment, for the recovery of \$619 38, and *James Turner* was made a party garnishee, who, in answer to the interrogatories propounded to him, says: "In the months of February and March, I received for, and on account of *Proctor & Richardson*, of Rockport, Indiana, sixteen hogsheads of tobacco, all of which I sold on the 27th day of February, 1858, for the sum of \$1488 92. Five hogsheads I also still hold for *Proctor & Richardson*, and are now worth about \$550. I do not know whether the *Proctor*, of the firm of *Proctor & Thomas*, of Yelrington, Kentucky, is the same man who is of the firm of *Proctor & Richardson*, of Rockport, Indiana, or entirely different persons."

The answer of the garnishee raised a question of identity of person between plaintiffs and defendants. The evidence satisfied the District Judge, that *Proctor*, the partner of *Thomas*, was also the partner of *Richardson*, and he rendered judgment against him for the amount claimed in the petition, with privilege on the property attached.

The plaintiffs afterwards took a rule on the garnishee, to show cause why he should not pay the amount of the judgment, interest and costs against the defendants. The rule was made absolute, and the garnishee has appealed.

The plaintiffs caused a commission to issue for the purpose of taking testimony, to prove the identity of the defendant, and the existence of the debt; and the garnishee contends that the testimony was improperly received, because the interrogatories and notice to cross the same, were served only on the curator *ad hoc*, appointed to represent the defendant, and not on himself.

The counsel for the garnishee, has furnished us with no authority in support of the position on which he relies for a reversal of the judgment. The record does not disclose any interest in the garnishee, in the result of the suit between plaintiffs and defendants, and he was, therefore, a mere stake-holder, and not entitled to demand service of the interrogatories taken out by the plaintiffs.

When the rule was taken on the garnishee to show cause why he should not be condemned to pay the judgment rendered against the defendants, he had an opportunity of raising the question of identity, contradictorily without the plaintiffs, which, however, he declined to do.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed with costs.

ROSE & MCCARTHY v. WHALEY & EDWARDS.

14 374
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In an attachment suit, the garnishee has the right, even after the interrogatories have been taken *pro confesso*, to ask of the court, at any time before judgment, that the order taking the interrogatories for confessed may be set aside, and that he may be allowed to answer. And it is within the sound discretion of the court, and also its duty, to grant the request, if the ends of justice would be thereby attained.

Where the garnishees answer that they have no property, the court is without jurisdiction.

APPEAL from the Third District Court of New Orleans, *Duvignaud, J.*
Hyams, Labatt & Jonas, for plaintiffs and appellants. *A. Viavant*, curator *ad hoc*. *Clarke & Bayne*, for garnishees.

COLE, J. Plaintiff brought suit by attachment against *Whaley & Edwards*, as non-residents, and garnisheed *Wright, Allen & Co., Coleman, Button & Withers, G. S. Hawkins*, and *Oakey & Hawkins*.

The two first failed to answer within ten days, and an *ex parte* order was entered, taking the interrogatories for confessed.

No judgment was entered against the garnishees for any sum of money.

After this order had been entered against *Wright, Allen & Co.*, and before any service had been made, even upon the curator *ad hoc* of the defendants, they appeared and asked that plaintiff show cause why the order taking the interrogatories for confessed against them should not be set aside.

After hearing of the application, the court rescinded the order, and allowed the garnishees to answer.

A similar order was made in behalf of *Coleman, Button & Withers*, and their answers were also filed. The answers of both of these parties showed that they had in hand at the time of the garnishment, or at the time of their answers, no property of the defendants.

The case was subsequently called and fixed for trial, and tried on the 13th December, 1858, as between the plaintiff and the curator *ad hoc*, the garnishees not being then before the court. The District Judge, being of opinion that he was without jurisdiction, dismissed the plaintiffs' petition.

The only question in the case is, whether the court erred in permitting the garnishees to answer, after the interrogatories to them had been taken for confessed.

The court did not err.

The object of garnisheeing is to know whether a party has funds in his hands belonging to another, against whom plaintiff either has or expects to get judgment; so that, after he has obtained judgment, he may also obtain judgment against the garnishee, for the amount of his judgment against his debtor, or for as much as there may be funds in the hands of the garnishee, due or belonging to the debtor.

Until the creditor has judgment against his debtor, he cannot have judgment against the garnishee, for the latter is not indebted to the creditor, but to his debtor.

The mere order of court taking the interrogatories for confessed, before a judgment has been obtained by the creditor, cannot, then, *absolutely* benefit him, and is not an order which he can in all events enforce against the garnishee, for if the

creditor does not succeed in getting a judgment against his debtor, the order taking the interrogatories for confessed will not profit him.

As then the creditor cannot get judgment against the garnishee, until he has obtained it against his debtor, the object of the law in forcing him to answer within a certain time, will be effected if he answers any time before judgment be rendered against the debtor.

The garnishee has then the right to ask of the court, at any time before judgment, that the order taking his interrogatories for confessed may be set aside, and that he may be allowed to answer. And it is within the sound discretion of the court, and also its duty, to grant the request, if the ends of justice would be thereby attained.

It is objected, unless a party be entitled to show, by the silence of the garnishees, that they tacitly admit having property of the defendant in their hands, the plaintiff cannot proceed to put the cause at issue, because the defendant is only in court by the attachment of his property.

In answer to this we would remark, that when a party is proceeding against an absentee, the silence of the garnishees to answer within the specified time, and the order taking the interrogatories for confessed, are sufficient to raise the presumption that they have funds in their hands, and thus to maintain the jurisdiction of the court, until they have answered, denying the possession of any funds; and even after this, if their answers can be proved to be untrue.

As the garnishees in this case answered that they had no funds or property, and as their answers were not contradicted, the District court was without jurisdiction. *Prosens v. Mason*, 12 L., p. 16; *Elder v. Rogers*, 11 An. 606, 10 M. 630; *Caldwell v. Townsend*, 5 M., N. S., p. 308.

Judgment affirmed, with costs of appeal.

ROSE
v.
WHEALEY.

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117	306
117	899

HENRY W. CATER, for use of the CENTRAL BANK OF ALABAMA, v. H. B. MERRELL & Co.

In the contract of pledge, the mention of the amount of the debt intended to be secured, required by Article 3125 of the Civil Code, is in no sense a formality. It is essential to the contract, and as such not abolished by section 21 of the Act of 1855 relative to pledges.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
Semmes & Labatt, for plaintiff and appellant. *Singleton & Clack*, for defendants.

BUCHANAN, J. We are of opinion that the answer of the garnishee and appellee, *Eagar*, to the two sets of interrogatories propounded to him by plaintiff, and the documents annexed to those answers, give the date of the advance by *Eagar* to defendants, and of the instrument of pledge subscribed by defendants for the security of that advance, with sufficient precision.

But the objection made to the validity of the pledge appears well founded. The instrument of pledge does not state the amount of the debt which it was given to secure. It reads as follows:

"For value received, I hereby pledge to *J. Eagar, Esq.*, all right, title, and in-

CATER
v.
MERRILL.

terest that I have, in six hundred and twenty-nine bales of gunny bags, to be disposed of by him at any time he may think proper."

The Civil Code, Art. 3125, provides that the privilege of the pledgee of movable effects, "shall take place against third persons only in case the power is proved by act made either in a public form, or under private signature; provided that in this last case, it be duly registered in the office of a notary public, at a time not suspicious; provided also, that whatever may be the form of the act, it mentions the amount of the debt as well as the species and nature of the thing given in pledge, or has a statement annexed thereto of its number, weight and measure."

The Act of 1815, page 348, relative to pledges, section 2d, has modified, in some respects, the law as laid down in this Article of the Code quoted. The section reads as follows:

"All pledges of movable property may be made by private writing, accompanied by actual delivery; and the delivery of property in a warehouse, shall pass by a private assignment of the warehouse receipt, so as to authorize the owner to pledge such property; and such pledge, so made, without further formalities, shall be valid as well against third persons as against the pledgees thereof, if made in good faith."

By comparing this law with the 3125th Article of the Code, it is obvious that the clause "without further formalities," means the registry of private acts of pledge in the office of a notary public, required by the Code. But the mention of the amount of the debt intended to be secure, like that of the specific property pledged for the security of the debt, is in no sense a *formality*. It is essential to the contract of pledge—so essential, that without such mention, the contract would be unintelligible.

For what is a pledge? It is an auxiliary contract for the enforcement of any lawful obligation. C. C. 3100, 3103. It results from this definition, that there should be no uncertainty or ambiguity as to the nature and extent of the principal obligation, which it is the object of the pledge to aid and enforce.

Otherwise, it is impossible to ascertain the nature and extent of the rights and obligations of the pledgor and pledgee, reciprocally, from the instrument itself. Recourse would necessarily be had to parol proof, to explain the intention of the parties. And thus the object of the law which requires this contract to be reduced to writing, would be defeated, and the door opened to the perpetration of frauds upon the parties contracting, and upon their creditors.

The garnishee cannot, therefore, retain possession of the proceeds of the gunny bags of defendant, under his so called pledge; and the rule which calls upon him to pay over said proceeds to the Sheriff, must be made absolute.

On the trial of this rule, the garnishee offered proof that he was a commission merchant or factor. The District Court properly refused such evidence. It seems to have been offered for the purpose of establishing a different privilege upon the gunny bags, from that of the pledge, which was the only privilege asserted in the answer to interrogatories. But the appellee should have laid the foundation of such proof by a third opposition, which he has not done, but which he is, probably, still in time to do.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed; that the rule be made absolute; that the appellee, *Jennison Eager*, pay into the hands of the Sheriff, within three days, the sum of sixteen thousand seven hundred and seven dollars and eighty-four cents, proceeds of gunny bags of

CATER
V.
ME JELL.

defendant in his hands, in part satisfaction of the execution levied in this case without prejudice of said *Eager's* right to claim the said proceeds, by way of third opposition, under the privilege accorded by law to consignees, commission agents or factors; and that the appellee pay the costs of this appeal.

COLLÉ, J., concurring. Articles 3121 and 3122 of the Civil Code, are explanatory of what species of property may be pledged. They declare that: "One may pawn every corporeal thing, which is susceptible of alienation. One may even pawn money, as security for performing or refraining to perform an act. One may, in fine, pawn incorporeal movables, such as debts and other claims of that nature."

Articles 3123, 3125, 3127, 3128 and 3129 of the Civil Code, explain the formalities necessary for the execution of pledges.

Articles 3121 and 3122, defining the kind of property that may be pledged, are not affected or changed by the Acts of 1852 and 1855.

These Acts are identical, except that in the Act of 1855, there is a section repealing all laws contrary to its provisions, and all laws upon the same subject-matter, except what is contained in the Civil Code and Code of Practice. These Acts do not relate to the nature of property that may be pledged, but only to the formalities to be pursued, and, therefore, affect the several Articles of the Code already quoted, relative to the forms necessary for the creation of pawns.

These Acts make three distinctions as to the kind of formalities necessary for the perfection of the pledge.

The first section refers to the pawning of promissory notes, bills of exchange, stocks, obligations or claims upon other persons, and the only formality required as to them is, that the debtor shall deliver to the creditor the notes, bills of exchange, certificates of stock, or other evidences of the claims or rights so pawned.

The second section refers to movable property, exclusive of the species mentioned in the first section, and provides that pledges of movable property are to be made by private writing, accompanied by actual delivery. It explains only as to one class of movables the manner of delivery, declaring the delivery of property or deposit in a warehouse, shall pass by the private assignment of the warehouse receipt.

This section only requires a private writing or act under private signature, according to the French text, and the delivery for the perfection of the formalities of a pawn.

The third section relates to credits not negotiable; it only requires for the perfection of the formalities of the pledge of this kind of property, that notice of its being pledged must be given to the debtor.

The property averred to be pledged in this case is gunny bags. The second section of these Acts then is applicable to their pledge.

This section requires that the pledge be made by private writing.

In order to determine what is necessary to put into the private act, we must refer to the Articles of the Civil Code, defining a pledge, for the Articles already quoted and the Statutes of 1852 and 1855, do not explain the nature of pledge, but merely state the property that may be pledged, and the necessary formalities.

Articles 3100, 3102 and 3103 declare, that the pledge is a *contract* by which one debtor gives something to his creditor as a security for his debt, that a thing is said to be pawned, when a movable thing is given as security, and that every lawful obligation may be enforced by the auxiliary obligation of pledge.

CATER
v.
MERRICK.

. The meaning then of the declaration in the second section of these Acts, that a pledge may be made by private writing is, that the parties may make a written contract in which it shall be specified that the debtor gives a certain thing which must be mentioned to his creditor, as a security for a debt which must also be specified.

The object of the law in requiring it to be in writing, is that the whole contract should be manifested.

If this were not the object, then there would have been no necessity of declaring that the contract of pledge should be in writing.

Besides, if it be not necessary to mention the debt which was to be secured by the pledge, then, by parity of reasoning, there would be no use to insert in the private act, the nature and amount of the property pledged.

The word pledge is used in the Statutes of 1852 and 1855, in the sense of the definition of Article 3100 of the Civil Code, which defines the contract of pledge, and as the second section of these Acts require the contract to be in writing, the private act between parties must contain what is declared to be essential by this Article, to constitute a pledge, that is a declaration of the thing given in pledge, and of the particular debt for which the thing is pledged.

In the present case, there is no particular debt specified in the act of pledge. It merely says, "for value received I hereby pledge," &c. The words "value received," do not explain the particular debt for which the gunny bags were pledged, and, therefore, this act of pledge does not create a pawn within the definition of Article 3100 of the Civil Code.

I, therefore, concur in the decree.

MERRICK, C. J., dissenting. I cannot think that the mention of the amount of the debt in the act, is of the essence of the contract of pledge. It appears to me to be nothing more than a formality.

Under the general provisions of the Code in regard to contracts, it is not necessary to specify the consideration or cause of an agreement. In the language of the Code, "an agreement is not the less valid, though the cause be not expressed." C. C. 1888, 1894.

This being the general law, any provision in regard to certain special contracts, which required the consideration to be specified or expressed in them, prescribed nothing more nor less than an additional formality or form. Such was the special law of the Code, requiring the amount of the debt to be expressed in the contracts of pledge and mortgage, which they secured.

The formalities required by the Code for the act of pledge, had come to be considered a burden and impediment to commercial transactions, when the Statute of 1852 was passed.

The Article 3125 required the pledge to be executed in notarial form, or by act under private signature, registered with a notary, in order to protect the pledgee against third persons, and whatever the form of the act, these further formalities, viz, that it should mention the *amount* of the debt, the species and nature of the thing given in pledge, or have annexed thereto a statement of its *number, weight and measure*.

And the preceding formalities were required in pledges of obligations, negotiable or not negotiable, as well as of movables.

In addition, if an obligation not negotiable were pledged, the Code required that a copy of the act at large should be duly served on the debtor of the credit pledged. If the obligation were negotiable, the law required it to be endorsed

by the party pledging it. Commercial men are proverbially careless of forms, and these provisions of the Code became a snare to business men and were a fruitful source of litigation. Hence the Act of 1852, reenacted in 1855, ought to be construed so as to advance the remedy.

It provided for two classes of objects susceptible of being pledged, viz, movables and incorporeal rights.

The latter were the subject of the first section, which discards every formality presented by the Code, except delivery. It declares : " That when a debtor wishes to pawn promissory notes, bills of exchange, stocks, obligations, or claims upon other persons, he shall deliver to the creditors, the notes, bills of exchange, certificates of stock, or other evidences of the claims or rights so pawned ; and such pawn so made *without further formalities*, shall be valid as well against third persons as against the pledgors thereof, if made in good faith."

Here then no private act is recorded, or notarial act required—no description of the property pledged ; no statement of the amount of the debt, and no indorsement of the negotiable paper, and no notice except a simple notice in the case of paper not negotiable.

Now, if it were important that the amount of the debt secured by the pledge, should be specified in writing, the lawgiver would certainly have prescribed the formality in this class of pledges which are the most easily concealed from other creditors and third parties, and are the most common mode of securing loans of money.

It cannot be denied, that this section has repealed the formalities of Article 3125 of the Code, as it respects all the objects of pledge mentioned in the first section of the Acts of 1852 and 1855.

If so, can any good reason be given why the same Article is not also repealed by the second section of the Act as to movables ? Is not the reason of the law the same ? Its language is just as forcible. It is as follows :

" Be it enacted, &c., That all pledges of movable property may be made by private writing, accompanied by actual delivery ; and the delivery of property on deposit in a warehouse, shall pass by the private assignment of the warehouse receipt, so as to authorize the owner to pledge such property ; and such pledge so made *WITHOUT FURTHER FORMALITIES*, shall be valid as well against third persons as the pledgor thereof, if made in good faith."

Here again the Act makes no mention of the recording of the private act of pledge ; no mention of a particular and detailed description of the property pledged, or amount of the debt to be secured, but it expressly declares, that *all pledges of movable property may be made by private writing*, accompanied by delivery, and the same shall be valid without further formality.

It has been suggested, that if the amount of the debt is not specified in the private writing, it may give rise to great frauds. But this could not have been the motive of the lawgiver in requiring a private writing. Had it been, he would have required a private writing, specifying the debt in cases of pledges of bills of exchange, promissory notes, obligations and stocks, the most frequent objects of pledges. Moreover, he would have required the private act to be recorded, to prevent its subsequent change or modification, and to give third persons a clew to its contents, instead of trusting it entirely to the secret keeping of the pledgee.

But it is supposed, that it cannot be a private writing in the sense of the Act, unless it specifies the amount of the debt to secure which it is given. The de-

CATER
v
MERRELL

scription of the debt is but an expression of the cause of the contract. The old law expressly made such statement in the act of pledge, an essential formality. The new law appears to me to repeal the formality, and place the contract of pledge on the footing of ordinary contracts in this particular.

I do not think it essential now to describe with absolute precision, the debt or things pledged. It may be done in general terms, or even omitted as to the debt, the cause of the contract. In my opinion, a private writing in these words, "I hereby pledge to A B, all the gunny bags I have this day delivered him, to secure to him the amount I owe him by promissory notes," would be valid under the Act. So too I think the private writing in question sufficient. The Civil Code has (as already observed) declared that an agreement is not the less valid, though the cause be not expressed. C. C. 1888. When, therefore, *Merrell* declares that he pledges to *Eager* the 629 bales of gunny bags, for value received, the Civil Code permits the latter to offer testimonial proof of the cause of the pledge, proof explanatory of "the value received," viz, the nature and amount of the debt secured. C. C. 1894; 3 An. 235 and 281.

But suppose it be held that the formality required by Article 3125 of the Code, to mention the amount of the debt due, has not been repealed by the Act of 1852. Will an erroneous description of the debt vitiate the Act? If the creditor mistakes the amount of his debt, is he, as in case of the registry of the mortgage, to lose the surplus?

Under the old law, there was some reason why the amount of the debt should be specified in act of pledge. It was because, by the registry of the private act, and by the notarial act itself, publicity was given to the act of pledge, and third parties, by diligence, were enabled to know the terms thereof. This reason has ceased, by permitting verbal pledges of obligations, and the delivery of the private writing to the custody of the pledgee or the parties, in case of other movables.

In this instance, the amount of the debt and the contents of the private writing are disclosed by the answers of the garnishee to the interrogatories propounded by the plaintiff. I can see no good reason why the garnishee should be deprived of his pledge.

It will also be observed, that the act of pledge in this instance, (under the fourth section of the Act,) authorizes *Eager* to dispose of the gunny bags without the intervention of justice. This fourth section of the Act also corroborates the views I have taken, inasmuch as it permits the parties to agree to the sale or other disposition of the thing sold by the pledgee, without the formalities of a suit or any intervention of justice. This liberal provision of law is certainly in contrast with the formalities required by the Code, and gives us a further insight into the intention and scope of the Act.

The Act of 1852 was, at the time of its passage, looked upon as removing the vexatious restrictions imposed by the Code, upon this mode of raising money and securing debts, and, as such, was received with great satisfaction by the commercial community, and I am unwilling, by any construction of the Act, to revive any of the formalities prescribed by the Code, and (as I think) repealed by the sweeping provisions of the Acts of 1852 and 1855.

I think the judgment ought to be affirmed.

HELENE BARBET v. ALEXANDER ROTH.

14	381
104	456

Article 1481 C. C., which declares that "donations *inter vivos* or *mortis causa*, cannot exceed two-thirds of the property, if the disposer, having no children, leave a father or mother, or both," would clearly govern in cases where the ascendant, whether father or mother, was the sole heir at law to the inheritance.

Articles 899 and 900 which make the disposable portion three-fourths, apply to cases where the testator leaves other heirs who would be entitled to a share in the inheritance, in the absence of a will.

APPEAL from the Sixth District Court of the Parish of Iberville, *Beale, J. S. Matthews*, for plaintiff. *Z. Labauve*, for defendant and appellant.

MERRICK, C. J. The defendant married the daughter of the plaintiff in 1832. The marriage was dissolved by the death of defendant's wife in 1858. Prior to her death she executed a will, wherein she made her husband her universal legatee. The testatrix left no decendants, nor brothers or sisters, and her only surviving ascendant is the plaintiff, who has instituted the present suit, to reduce the legacy to the defendant to the disposable portion. The District Court reduced the disposable portion to two-thirds of the estate, and defendant appeals.

The case involves a construction of Article 1841 C. C. which declares, that "donations *inter vivos* or *mortis causa* cannot exceed two-thirds of the property, if the disposer, having no children, leave a father or mother, or both."

But Articles 899 and 900 of the Code, give to the surviving parent one-fourth of the estate, and Article 1482, says that the heirs named in the two preceding Articles, are called forced heirs, because the donor cannot deprive them of the portion allowed them by law, except in cases where he has just cause to disinherit them.

Under the last Article, in the case of *Cole's Heirs v. Cole's Executors*, 7 N. S. 414, it was held, that in the case where a father or mother only survived, the disposable portion was three-fourths. Plaintiff's counsel question the correctness of the decision, as it appears to annihilate Article 1481 of the Civil Code. But that case must be examined in reference to the facts on which it was decided. The testator left a mother and a brother, or brothers and sisters. His will was in favor of a brother. Now, if he had died intestate, his mother could not have inherited more than one-fourth of the estate. It was, therefore, probably deemed by that court unreasonable to construe the Article in question, so as to give the mother more than one-fourth, simply because the testator had expressed his desire that she should not receive anything, and that his brother should receive the whole estate. But in the case before us, the mother is herself the heir-at-law to the whole inheritance.

The will deprives her of an estate which is given to her by the law. The Article in question presents no difficulty as applied to the present case, and we think it ought to be carried into effect. The law says, that where the testator having no children, leaves a father or mother, or both, the disposable portion shall not exceed two-thirds of the property.

The case provided for has occurred, the mother coming to the estate as sole heir and not in concurrence with brothers or sisters.

Judgment affirmed.

BUCHANAN, J. I concur in the decree in this case; but would prefer not to

BARNET
v.
ROTH.

be understood as recognizing, even by implication, the correctness of the doctrine of the case of *Cole's Heirs v. Cole's Executors*, in 7 N. S., upon the subject of the *legitime* of decendants in a testamentary succession. My impression is, that the doctrine there enunciated by Judge Porter, as the organ of the court, is contrary to Article 1481 of the Code. The language of the learned Judge expresses but little confidence in the correctness of his conclusion. He says: "We cannot untie the knot; we must cut it."

Now, it seems to me, that there is a very simple and obvious way of reconciling Articles 899 and 900, with Article 1481 of the Code, which is, to consider the first as a statute of distributions for intestate successions; the second, a statute of distributions in successions testamentary. One is an allotment made of a man's estate, when he has not chosen to make any allotment of it himself. The other, a restriction upon the disposing power of a man over his own property, by testament.

The doctrine of *Cole v. Cole*, if adhered to, would expunge the Article 1481 from the Code. That doctrine is substantially as follows: The Article 1481 is unreconcilable with Articles 899 and 900; therefore, it must yield to those Articles; and, consequently, the *legitime* of a father or mother of a decedent who leaves a brother or brothers, is, in no case, more than one-fourth of the succession. Now, besides the fundamental error in the premises, which I think I have demonstrated above, to wit, the want of incompatibility of the Articles, the conclusion is erroneous, even if the premises were correct; for it is a rule of interpretation sanctioned on various occasions, that when two Articles of the Code cannot be reconciled, the last in order and highest in number, prevails over the other. *Johnson v. Pilster*, 4 Rob. 71.

ALFRED VIENNE v. M. HARRIS, JR., et al.

Where a slave has been purchased with warranty, and is afterwards sequestered while in the possession of a lessee, against whom suit is brought for his recovery, and immediate notice is given by the lessee to the vendee, who likewise gives immediate notice to the vendor, of the institution of said suit, with a request that he defend it, or furnish the vendee the necessary means for maintaining his title to the slave, and the vendor promises to defend the action himself, which he fails to do, and the suit goes by default against the lessee, if neither the vendee nor the vendor is a party to the suit, it is the fault of the latter, and as against his vendee he cannot protect himself by claiming, "that an eviction of property can only be on final judgment, where the vendor or vendee is a party to the suit, and where the title to the property is directly drawn in question."

In order to establish that a commercial partnership is not bound by the act of one of the partners, in any particular matter, it is necessary *expressly to deny his authority*, and to disclose by evidence, the nature of their commercial business.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
W. D. Hennen, for plaintiff. *J. T. Ellison*, and *Race & Foster*, for defendant and appellant.

LAND, J. On the 5th of January, 1857, the plaintiff purchased from *M. Harris, Jr.*, a negro man, for the price of one thousand dollars in cash.

In this act of sale, *Micajah Harris, Sr.*, intervened in his capacity as member of the commercial firm of *Harris & Levi*, and declared that he obligated his said

firm to guarantee the title to the slave sold, and promised and bound said firm to reimburse unto the purchaser any and all loss that he might sustain in consequence of a defect in title, character, or by eviction, or otherwise.

The plaintiff hired the slave to *C. Johnson*, master of the steamboat *Lecompte*, running in the Red River and Texas trade, and the slave was sequestered on the 16th of March, 1857, in the county of Cass, in the State of Texas, at the suit of *J. Speake*, administrator of the estate of *C. M. Hunt*, on the ground of ownership and possession by the deceased at the time of her death in June, 1855.

On the return of the boat to this city, *Johnson* gave notice to the plaintiff, of the institution of the suit in Texas, and of his dispossession of the slave by virtue of the sequestration.

The plaintiff thereupon immediately gave notice to the defendant, his vendor, of the institution of the suit, the seizure of the slave, and the danger of eviction, and called upon the defendant to defend the suit, or to furnish him with the necessary means of maintaining his title to the slave.

In reply, the defendant promised to go into Texas, bond the slave, and restore him to plaintiff.

The administrator obtained a judgment for the recovery of the slave, and this suit is brought against the defendants upon their obligations of warranty for the recovery of the price paid, and hire at the rate of thirty dollars per month from the 16th of March 1857, and the further sum of one hundred and fifty dollars.

The defendants are *Micajah Harris, Jr.*, *Micajah Harris, Sr.*, and the commercial firm of *Harris & Levi*, who filed separate answers. *Micajah Harris, Jr.*, admitted in his answer, the sale of the slave, and his sequestration in the State of Texas as alleged, and averred that he had employed an attorney at law to defend the action. This answer was adopted, and made a part of the separate answers of *Micajah Harris, Sr.*, and of the commercial firm of *Harris & Levi*. The latter, however, deny all liability on their part as a commercial firm, allege that they are engaged in business as cotton factors and commission merchants, and that the guarantee of the title of the slave was not in the scope of their partnership business.

On the trial of the cause, the defendants counsel requested the court to charge the jury as follows :

First. That an eviction of property can only be on final judgment, where the vendor or vendee is a party to the suit, and where the title to the property is directly drawn in question.

Second. That if the jury believe from the evidence, that an action of sequestration was brought on the 16th day of March, 1857, against *Johnson*, in possession of the slave *Joe*. *Harris*, the vendor, and *Vienne*, the vendee of said slave, being neither of them parties to said action, and that *Johnson* made default and suffered judgment, dispossessing him of said slave on the 9th day of October, 1857, the jury must find for the defendant.

The charge thus asked was refused, and the defendants took their bill of exceptions, and insist in this court, that the Judge below erred in refusing the charge.

From the transcript of the suit in Texas offered in evidence, it appears that the action for the recovery of the slave was not defended, and that the cause was tried on default by a jury, and that in pursuance of the verdict, a judgment was rendered in favor of the administrator. Nor does it appear from the transcript, that either the plaintiff or defendant ever made themselves parties to the suit.

It was in reference to this state of facts, that defendants counsel asked the

VIENNE
v.
HARRIS.

charge to the jury. We think that the charge was properly refused, under the *peculiar facts of the case*.

Johnson, the lessee of the slave, was sued for his recovery—he gave immediate notice to his lessor—who likewise gave immediate notice to his vendor, the defendant, *who promised to defend the action*, but failed to do so.

And, if neither the vendor nor vendee of the slave was a party to the suit, it *was the fault of the former*, and he cannot be permitted, as against his vendee, whose title and possession he was bound to defend—to *take advantage of his own neglect or laches*. The plaintiff has been evicted by a final judgment of a court of competent jurisdiction, after notice to, and refusal, on the part of his vendor to defend the action, and his right to sue on the obligations of warranty is perfect.

The commercial firm of *Harris & Levi*, do not, in their answer, *expressly deny the authority of M. Harris, Sr.*, to bind the firm in the matter of the guarantee of the title of the slave; nor does the record *disclose the nature of their commercial business*, beyond their own averment.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.

BENJAMIN E. EDWARDS v. SUCCESSION OF E. M. DALEY et al.

The decision in the case of *Gray v. Trafton*, 12 M. 702, reaffirmed—to the effect that an order given on an attorney at law for the amount of a claim placed in his hands for collection, is sufficient evidence of a transfer.

Where an administrator contests the consideration of such an order, the burden of proof is certainly upon him to establish want of consideration.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
B. E. Edwards, in *pro. per.* and *Carleton Hunt*, for plaintiffs. *Durant & Horner*, for defendants and appellants.

BUCHANAN, J. The deceased, *E. M. Daley*, gave an order on plaintiff, an attorney at law, to pay over to *Elias M. Green*, the amount of a claim against one *Giddings*, which *Daley* had placed in plaintiff's hands for collection.

The question to be decided in this case is, whether this order is evidence of a transfer to *Green*. This question must be solved in the affirmative, on the authority of *Gray v. Trafton*, 12th Martin, 702.

In that case, it was so held in opposition to an attaching creditor of the party who had given the order,—a stronger case than the present, where nobody, except the administrator of *Daley*, contests the right of the party in whose favor *Daley* made the order.

The administrator contests the consideration of the order. His right to do so is not very clear; but if admissible, the burden of proof is certainly upon him, to establish want of consideration. 5 Rob. 276.

Judgment affirmed, with costs.

STATE OF LOUISIANA v. Slave JACK.

Under the 11th section of the Act of 1806, which embraces every species of criminal homicide known at common law, and the subsequent legislation on the subject, a slave may be found guilty of manslaughter.

The Act of 1857 notices only the crime of willful murder committed by a slave, but is silent as to any other species of homicide. It cannot, however, be supposed, that it was intended to do away with the prosecution of criminal homicides short of willful murder.

The 35th section of the Act of 1857 provides, "That in all cases where a slave is charged with a crime punishable with death, or imprisonment at hard labor for life, the jury shall have a discretionary power to commute the penalty and inflict a lesser punishment."

Section 29th, Act of 1857, declares that, "Whenever the punishment is left by law to the discretion of the court, it shall in no case extend to the privation of life or limb."

APPEAL from the First District Court of New Orleans, *Hunt, J.*
E. W. Moise, Attorney General, for the State, appellant. *Race & Foster*, for appellee.

VOORHIES, J. The prisoner, prosecuted for the murder of the slave *Joe*, was found guilty of manslaughter by the jury, who thereupon decreed his punishment by five years imprisonment with hard labor, and the infliction of the whip at stated periods during the incarceration.

The verdict of the jury was set aside, and judgment arrested by the District Judge, on the ground, that a slave cannot, under our laws, be found guilty of the crime of manslaughter, and because the commutation of punishment in the case at bar, apart from the cruelty of the substituted penalty, is unwarranted in law.

The Attorney General appealed.

By the Act of 1806, all homicides committed by slaves, except such as are the result of accident, or take place in the defence of their masters or employers, are punished capitally. Vide Act 1806, p. 202, sec. 11. This section stands unrepealed up to the present time; for the subsequent statutes passed by the Legislature for the purpose of punishing the willful murders committed by slaves, were but the re-enactment, to that extent, of the 11th section of the Act of 1806, which embraced every species of criminal homicide known at common law. As the law stood prior to the Act of 1857, a slave might be found guilty of the crime of manslaughter; and we have abundant authority to that effect. 11 An. 736, *State v. Adeline*; 3 An. 398, *State v. Lewis*; 6 An. 595, *State v. Jackson*; 10 An. 461, *State v. Dick*.

The Act of 1857 notices only the crime of willful murder, committed by a slave, but is silent as to any other species of homicide; it cannot, therefore, be seriously contended, that its repealing clause has done away with all prosecutions for criminal homicide short of willful murder, as were provided for by anterior legislation. A different construction would, besides, lead to the absurdity, that the slave, unlike the freeman, is at liberty to perpetrate any homicide, except willful murder: a state of things which, it will be admitted at once, never was contemplated by the Legislature.

The verdict found by the jury against the prisoner, *Jack*, was manslaughter, a species of criminal homicide punishable capitally, when committed by a slave. The action of the jury, so far, was in accordance with the statute; but, had they the right to substitute for the death penalty, the punishment by incarceration in the State Prison, coupled with the lash?

STATE
v.
JACK.

The 35th section of the Act of 1857, (p. 233,) provides, "That in all cases where a slave is charged with a crime punishable with death, or imprisonment at hard labor for life, the jury shall have a discretionary power to commute the penalty, and inflict a lesser punishment."

The statute leaves it to the sound discretion of the jury to *substitute* the lesser for the greater penalty: that is the meaning of the commutation of punishment there provided for. And as regards the limits imposed by law in the exercise of the discretionary power of punishment, vested in the special tribunal for the trial of slaves, the 29th section of the Act of 1857, p. 232, is explicit:—"Whenever the punishment is left by law to the discretion of the court, it shall in no case extend to the privation of life or limb."

By the former laws, now repealed, as being upon the same subject matter, the rule was: "That in all cases where capital punishment, or imprisonment at hard labor for life, is inflicted for any crime committed by a slave, the jury trying the same shall, in its discretion, pronounce sentence of death, imprisonment at hard labor for life, or for a shorter term in prison, or in irons in the service of his master, or order that corporeal punishment be inflicted." Act 1843, sec. 7. As the matter now stands, the jury may apply any lesser punishment, provided it "does not extend to the privation of life or limb." Had the discretion of the jury, in the case at bar, been subject to be regulated by the provisions of the Act of 1843, we would have had to consider the question raised by the prisoner's counsel, as to whether both corporeal punishment and imprisonment at hard labor could be inflicted. But as the law now stands, this question cannot arise, and we think, that the infliction of both, as stated in the verdict of the jury, was a lesser punishment in comparison with the death penalty, and that the District Judge should have passed sentence accordingly.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed; that this case be remanded; that the verdict of the jury be reinstated, and that the District Judge pass sentence in accordance with said verdict.

MERRICK, C. J., took no part in this case.

ESTELLE BIENVENU, Wife of JULES BUISSON, v. HER HUSBAND.

It is impossible to give a defamatory intention and effect to epithets applied by a husband to his wife, when no one was present but the spouses themselves, although such epithets would have had much gravity had they been uttered in the presence of any third person.

Facts which might have given ground for a separation from bed and board, are extinguished by a reconciliation. C. C. Art. 149.

It is only where a subsequent cause is proved to have arisen, sufficient for the basis of the action of separation, that Article 150 C. C. will entitle the plaintiff to urge a cause precedent to the reconciliation.

A reconventional demand on the part of defendant for a separation on the ground of abandonment, is not admissible. A particular form of procedure is required by the Code for obtaining a decree of separation on this ground, and to that form the defendant must have recourse for relief.

APPEAL from the Third District Court of New Orleans, *Duvignaud, J.*
P. Soule and *C. Bienvenu*, for plaintiff. *H. Dugué*, for defendant and appellant.

BUCHANAN, J. The plaintiff sues for separation of bed and board, upon the allegations that her husband has on various occasions exhibited a violent and quarrelsome disposition; that he has cursed, insulted, outraged and defamed plaintiff; that he has cruelly and inhumanly abused, insulted and threatened her children, by a former marriage; that the conduct of her husband has rendered their living together entirely insupportable; and that she has taken refuge at the house of her father, where she now resides.

The proof is very far short of these grave allegations. It may be summed up in three facts:

1. *Mrs. Buisson* complained to her mother, that her husband, in a quarrel which had occurred between themselves, when nobody was present, had permitted himself to apply to her three epithets, which are certainly among the worst and the most defamatory, that the French language affords. When plaintiff made this complaint to her mother, she had abandoned the conjugal domicile, and was at the house of a married sister. Plaintiff's mother, thereupon sought an interview with her son-in-law, whom she reprimanded for the gross and insulting language addressed to his wife. Defendant confessed that he had used the words attributed to him by his wife, excused himself on the ground of having been in a passion when he spoke them; professed repentance, and begged forgiveness. The parties were reconciled, and plaintiff returned to her husband's house.

2. Subsequently to the occurrence just related, and five months before the institution of this suit, the defendant, in the presence of the mother and the sister of his wife, declared that he had given his wife money to buy trifles. Plaintiff denied that he had done so. Whereupon defendant became furious, shook his fist in his wife's face, caught himself by the hair with both hands, and left the room. The witness of this scene remarks, that it was true defendant had given his wife the money, as alleged by him, and that her denial of the fact was a joke—(une plaisanterie.)

3. The third fact, which goes to make up plaintiff's case, we will give in the words of her sister and witness:

"Witness asked defendant, if it was true that he had said, that he would not have his well enclosed, in order that he might see the children of his wife drowned therein, and swollen like toads. Defendant confessed to her that he had said so, but that it was in a moment of anger."

We do not find, in the facts recapitulated, any sufficient foundation for a judgment of separation of bed and board. The parties are both very young; are proved by their own witnesses to be of hasty temper, although of good hearts, and their quarrels are the quarrels of children. The epithets applied by the defendant to the plaintiff on one occasion, would have had much gravity, had they been uttered in the presence of third persons. But spoken, as they were, when no one was present but the spouses themselves, it is impossible to give them a defamatory intention and effect. And if the impression which they produced upon the plaintiff, was so painful, as to make her quit the conjugal roof—a circumstance natural enough in a lady of refined manners and education—yet a reconciliation followed, almost immediately, upon acknowledgment of his error, made by the husband. He solicited the forgiveness of his wife, according to the witnesses, in a manner which displayed, most unequivocally, his profound contrition; and that forgiveness was graciously accorded him. This first and most serious ground of plaintiff's action was, therefore, extinguished by the reconciliation. C. C. 149.

BREWER
v.
BUISSON.

BERRYMAN
v.
BURNSON.

And as no subsequent cause, which we can regard as at all sufficient for a basis of the action, is proved to have arisen, the Article 150, which otherwise would have availed to entitle the plaintiff to urge the precedent cause at this late date, has no application to the present case. The doctrine of *Marcadé*, on this point, vol. 1, p. 606, No. 767, paragraph 2, and No. 768, paragraph 2, appears to us contrary to the intention of the lawgiver, as manifested in the Articles of the Code.

Defendant demands a separation for abandonment, by way of reconvention. A particular form of proceeding is required by the Code, for obtaining a decree of separation on this ground. To that procedure, the defendant must have recourse for relief.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed; that the demands of plaintiff and defendant be rejected, without prejudice to the right of defendant to proceed against plaintiff, in legal form, for abandonment of the conjugal domicile. And it is lastly ordered, that the costs of suit be equally borne by plaintiff and defendant, with the exception of those of appeal, which are to be paid by plaintiff.

GEORGE MOORE v. ESTATE OF ALEXANDER GORDON, (W. G. BAKEWELL,
Executor,) and JOHN M. BELL.

An appeal will not lie from an interlocutory decree overruling the exception that petition discloses no ground of action.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
V. F. Cotton, for plaintiff. *Gaither & McPheeters*, for defendants and appellants.

VOORHIES, J. The plaintiff sued the Sheriff of the parish of Orleans and the legal representative of the estate of *Alexander Gordon*, deceased, for damages for the illegal seizure and sale of his property, by virtue of an execution issued in the case of *W. E. Bakewell, Executor, v. Schofield & Wilkerson*.

The executor of the estate of *Alexander Gordon*, deceased, excepted to the plaintiff's demand, on the grounds that the petition discloses no cause of action, and that the cause of action therein set forth has already been decided on a former occasion between these parties. The District Judge overruled this exception, and the defendant appealed.

We are not called upon to examine into the merits of these somewhat inconsistent exceptions, relied upon by the defendant; for the decree of the lower court being interlocutory, and not liable to cause an irreparable injury, the plaintiff's motion to dismiss must prevail. C. P. 566.

It is, therefore, ordered and decreed, that this appeal be dismissed, at appellants' cost.

EDWARD KING V. CITY OF NEW ORLEANS.

Where plaintiff received warrants for money due him on a contract, without objecting, or taking them under protest that they were not for the whole sum due, his endorsing the warrants will preclude his claiming afterwards that they were not drawn for a sufficient amount.

A PPEAL from the Third District Court of New Orleans, *Duvignaud, J.*
Collens & Woolridge, for plaintiff and appellant. *J. J. Michel*, for defendant.

COLL, J. Plaintiff represents, that on the 19th July, 1850, he entered into a contract with Municipality No. 2, whereby he bound himself to repair, during the term of two years, from the 8th July, 1850, the streets and sidewalks then made, within the Third District of the Municipality; that the city of New Orleans, now representing the Second Municipality, is indebted to him for the seven months ending on the 8th December, 1851, and for the month ending on the 8th of July, 1852, at the rate of \$625 per month, according to contract.

The defence is a plea of payment for seven months, and a general denial as to the last, or eighth month.

There was judgment for defendant, and plaintiff has appealed.

Whatever rights plaintiff might have had, the warrants endorsed by him show that he submitted to the correctness of the reductions. These warrants specify the amounts due plaintiff for the seven months. If plaintiff wished to object to the deductions made by the Surveyor and Comptroller, his duty was to have made objections thereto. But, instead of receiving the amounts allowed, under the protest that they should not be deemed the whole due him, he endorses the warrants, and thus recognises that nothing more is coming to him but that certified to be due to him therein. The letters written by him to the corporation cannot rebut the effect of his endorsement, as he does not therein speak of or allude to the warrants.

The evidence satisfies us that the plaintiff is not entitled to recover upon any part of his claim.

Judgment affirmed, with costs.

LOUIS EMMERLING V. JAMES GRAHAM.

A party cannot recover from a Notary Public, for having neglected to protest a note legally, when, by his own laches, he has put it out of his power to subrogate the Notary to his rights as they existed at the date of protest.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
G. & C. E. Schmidt, for plaintiff and appellant. *Durant & Hornor*, for defendant and appellee.

COLL, J. Plaintiff alleges that the defendant, who is a Notary Public, is liable to him in the amount of the note sued upon, &c., for having neglected to give proper and due notice of protest thereof to the endorser, *Kelly*, whereby he failed in a suit against *Kelly*, to recover from him the amount of the note.

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EMMERLING
v.
GRAHAM.

There was judgment in favor of defendant, and plaintiff has appealed.

The defendant has plead the prescription of one, three and five years.

Plaintiff cannot maintain this action, because he cannot now subrogate defendant to his rights at the date of the protest, or indeed to any rights whatever; for at the date of the service of the citation in the suit against the endorser, and also at that of the present suit, more than five years had elapsed from the maturity of the note, and it was prescribed.

If plaintiff should be paid by defendant in place of the endorser, the defendant ought to have his recourse against the maker, but plaintiff, by his *laches*, has permitted the prescription to accrue in favor of the maker, and it would not be just to allow plaintiff to recover from the defendant for his negligence, when by his own he has rendered it possible for the maker to defeat the claim of the defendant.

Judgment affirmed, with costs.

MERRICK, C. J., concurring. A Notary is a public officer, and is commissioned as such. I think the plea of prescription of one year may be maintained, and I prefer to concur on this ground. C. C. 2295, 3501.

JNO. M. E. SHARP v. G. Y. BRIGHT et als.—WM. BEATTY, Surety.

A surety on a sequestration bond cannot be proceeded against by rule or on motion. The failure on the part of a surety, against whom a rule has been taken, to answer the rule, cannot be construed as a waiver of his right to except to such proceedings.

APPEAL from the Fourth District Court of New Orleans, *Price, J.*
Mott & Fraser, for plaintiff. *E. Hiestand*, for defendants and appellants.

VOORHIES, J. The only question presented for adjudication in this case is, whether the surety on a sequestration bond can be proceeded against by rule or on motion. As this surety is not a party to the suit, in the progress of which the bond is taken, he cannot, in the absence of express legislation to that effect, be sued in the summary way.

It has already been held, "that the right to proceed by rule, or on motion, implies the pendency of a suit between the parties, and is confined to incidental matters, which may arise in the progress of the contestation, except in certain cases where a summary proceeding is expressly allowed by law." Vide 3 An. 434, *Baker et als. v Doane et als.*; 6 R. 437, *Thomas, Adm'r., v. Bourgeat, Ex'r.*

In cases of attachment, there is express legislation authorizing summary proceedings against the surety (Act 1839, p. 162); but there is no such provision for sequestration bonds.

The rule taken by the plaintiff against *Wm. Beatty*, the surety on the sequestration bond furnished by the defendants, was unauthorized; and the judgment of the District Court, making him responsible summarily for the amount of the judgment obtained against his principal, must be reversed; unless, as contended by the plaintiff, the appellant has waived his objection by his failure to file an exception to that effect. Had he joined issue on the merits of this rule, and proceeded to the trial without insisting on his objection to a summary proceeding, then the authorities quoted by the appellee would apply, and the appellant would

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be held to have waived his right to except. But his mere failure to appear to answer the rule cannot preclude him, on the appeal, to avail himself of this radical defect in the proceedings.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed, without prejudice to the right of the plaintiff to proceed *via ordinaria* against the appellant, *Wm. Beatty*, on the sequestration bond.

It is further ordered and decreed, that the plaintiff pay the costs in both courts.

SHARP
v.
BRIGBT

KUENZI & Co. v. ELVERS, BOJÉ & Co.—MANA, MCGREGOR & Co.,
Consolidated.

Bills of exchange drawn in a foreign country, and payable in another foreign country, although drawn against a shipment made to the city of New Orleans, are governed by the laws of the country where they are drawn.

In the absence of proof in a suit brought upon such bills here which have been protested for non-acceptance and payment, the laws of the country where such bills were drawn with regard to bills drawn there upon other foreign countries, must be presumed to be the same as our own, and ten per cent. damages will be allowed

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
Johnson & Denis, for plaintiff. *H. T. Hays*, for defendants and appellants.

MERRICK, C. J. These two cases were commenced by attachment upon bills of exchange to the amount of £10,000, drawn by the defendants in the fall of 1857, at Rio de Janeiro, on a house in London, and protested for non-acceptance and payment. The bills appear to have been drawn against a shipment of coffee to a house in this city. That is, it was expected that the drawers would place themselves in funds by re-drawing on the consignees in New Orleans.

On the trial of these cases, (now argued together by consent) no evidence was offered of the laws of Brazil, where the bills were drawn. The defendants have paid the amounts specified on the face of the bills, and the only question submitted to this court for its determination is, whether or not, the plaintiff can recover damages at the rate of ten per cent., as allowed by our statute on bills of exchange drawn in Louisiana on foreign countries, and there protested for non-payment or non-acceptance.

The bills drawn in Brazil, (although against a shipment of coffee to this city) were payable in London, and are governed by the laws of Brazil, the country where they were drawn. Story on bills, 397. But the record does not furnish us any proof of those laws. In the absence of proof, the laws of that country, in reference to bills drawn there upon other foreign countries, must be presumed to be the same as our own, and the damages claimed must be allowed. See *Anderson & Conn v. Folger*, 11 An. 270.

In the first of these cases, viz: *Kuenzi & Co., v. Elvers, Bojé & Co.*, the judgment must be affirmed with costs; in the second case, viz: *Mana, McGregor & Co.*, against the same defendants, the judgment must be amended so as to allow the plaintiffs the additional sum of \$3433 10, it being ten per cent. damages on the protested bills, the defendants paying the costs of appeal in that case.

THOMAS ORMAN v. JULIAN NEVILLE.

A record of judicial proceedings in another State, is sufficiently authenticated when certified to by a Judge, before whom, it appears from the record itself, all the proceedings in the case were had, and who states in his certificate that he is one of the Judges of the court, and that all the Judges of said court are equal in authority, and each one is authorized to sign such a certificate.

APPEAL from the Second District Court of New Orleans, *Morgan, J. Waples & Eustis*, for plaintiff and appellant. *P. E. Bonford*, for defendant.

VOORHIES, J. The plaintiff obtained a judgment against the defendant in the Court of Common Pleas of Hamilton County, Ohio; and had it revived by *scire facias* on the 12th day of March, 1853. This judgment is the basis of the present demand, to which the defendant opposes the plea of prescription and the general denial.

On the trial below, the plaintiff offered in evidence the transcript of a record from the Court of Common Pleas, to prove the revival of this judgment; but, on motion of the defendant's counsel, the document was rejected, on the ground "that the certificate of the Judge to the said transcript, did not show that the said Judge was sole Judge, or presiding Judge, or Chief Justice."

This ruling is erroneous; it appears by the document itself, that the case was tried, and the judgment of revival signed, by *A. C. W. Carter*, as president Judge; the certificate given by him states, that he is "one of the Judges of the Court of Common Pleas, for the First District, within and for the State of Ohio, the same being a court of law and record, in and for the county of Hamilton, and the said Judges being equal in authority, and each authorized to sign such certificates." 2 La. 338, *Dismuke v. Musgrove*; 2 N. S. 497, *Kirkland v. Smith*; 2 An. 646, *Newman v. Goza*.

With regard to the prescription of judgments, the Statute provides the lapse of ten years. Act of 1855, p. —. As ten years have not elapsed since the revival of the judgment obtained by the plaintiff against the defendant in the State of Ohio, the plea of prescription cannot prevail in this instance.

It is, therefore, ordered, adjudged and decreed, that the plaintiff do have judgment against the defendant, for the sum of two thousand seven hundred and eight dollars and sixty-one cents, with six per cent. per annum interest, from the 6th day of November, 1837, on the sum of two thousand six hundred and ninety-six dollars; and on the balance, from the 12th day of March, 1853, subject to the credit of six hundred and forty-one dollars and twenty cents. It is further decreed, that the judgment of the District Court be avoided and reversed; the defendant and appellee paying costs in both courts.

CANFIELD S. MARTIN v. HIS CREDITORS, and the Creditors of T. J. CASEY & Co.

Alterations in a warehouse receipt after its delivery, are presumptive evidence of fraud; and the authenticity and importance usually attached by the law to those instruments made in good faith, do not attach to such an instrument.

The *bona fide* possession of a warehouse receipt is legal evidence of possession; and where different parties are in possession of such receipts, the earliest must prevail.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
Durant & Hornor, for *Tufts & Hobart* and *Reed & Co.* *Gaither & McPheeters*, for *Parmelee & Bro.* *Emerson & Huntington*, for *H. Hathaway.* *Singleton & Clack*, for *Keep, Bard & Co.* *Benjamin, Bradford & Finney*, for *H. Renshaw*, syndic.

BUCHANAN, J. There are three parties appellant.

1. *William H. Hathaway.*
2. *Tufts & Hobart.*
3. *Reed & Co.*

There was a fourth, *Parmelee & Brother*, but their appeal has been dismissed on appellant's motion.

1. *Hathaway* claims the cargo of the ship *William Sprague*, under a sale made to him by *Tufts & Hobart*, for account of *Thomas J. Casey*, and a warehouse receipt signed by *Casey*, dated 2d January, 1858.

At the time of the trial of the various oppositions in the court below, it was proved that there remained in the salt warehouse of *Casey & Co.*, 12,650 bushels of the cargo of the *William Sprague*.

The judgment of the District Court awarded this salt to *Keep, Bard & Co.*

The evidence shows that the ship *William Sprague* arrived in the port of New Orleans, in December, 1856. Her cargo, consisting of 20,650 bushels of salt, was deposited in the warehouse of *T. J. Casey & Co.*, whose warehouseman, (*Hugh O'Donnell*), delivered to the vessel when she was discharged, or sent to the office of the consignees in town, the following warehouse receipt, written by himself:

"December 26. Received from ship *William Sprague*, in warehouse, 10,325 tubs salt.
 HUGH O'DONNELL, Clerk for Brooklyn Warehouse."

But the receipt as exhibited in evidence, reads as follows:

"Arrived December 26. Received from ship *William Sprague*, in warehouse, for account of *Keep, Bard & Co.*, 10,325 tubs salt. Brooklyn Warehouse No. 3; storage chargeable to *T. J. Casey*.

HUGH O'DONNELL, Clerk for Brooklyn Warehouse.
 T. J. CASEY."

All the words found in the second of the copies above, which are not in the first, are proved to have been interpolated after the receipt was delivered by *O'Donnell*, and to be in the handwriting of *Thomas J. Casey*, the insolvent, with the exception of the words, "for account of *Keep, Bard & Co.*," which are in a handwriting which the witness, *O'Donnell*, does not recognize.

It is further proved by the book-keeper of *Keep, Bard & Co.*, examined as a

MARTIN
v.
CREDITORS.

witness for them, that the cargo of the William Sprague was purchased of the importer, by *Keep, Bard & Co.* and *Thomas J. Casey*, on joint account; the profit or loss on the resale to be equally divided. This witness declares positively in his examination in chief, that the salt was paid for by *Keep, Bard & Co.* But on cross-examination, this fact is left in great doubt; and the broker, through whom the purchase was negotiated, declares that the cargo of the William Sprague, was sold by the consignee of the vessel, on the 22d of December, 1856, to *T. J. Casey*.

Thomas J. Casey, in May, 1857, borrowed of *Tufts & Hobart*, \$11,917 75 on a pledge of this cargo of salt and two other cargoes; and *Tufts & Hobart*, on the 23d December, 1857, sold the cargo of the William Sprague, through the same broker, who had sold it to *Casey*. This sale was made with the knowledge of *Casey*, as proved by the broker; and was ratified by *Casey*, as shown by the warehouse receipt to *Hathaway*, of date the 2d of January, 1858, signed by *Casey* himself.

Under this state of facts, we think the court below erred in awarding the remnant of the William Sprague's cargo, remaining in the warehouse, to *Keep, Bard & Co.*

Casey is an absconding debtor, who has been sued for a forced surrender. His business was that of a salt warehouseman; and this record abounds with proof, that during a year and more previous to his absconding, he was engaged in defrauding the persons who had salt stored in his warehouse. The receipt, without a date, upon which the appellees, *Keep, Bard & Co.*, rely, suspicious as it is from the material alterations made in it after its delivery, becomes doubly so, from the proved dishonesty of the party who made those alterations.

The law attaches a great importance and authenticity to warehouse receipts; but we do not understand this authenticity as attaching to a receipt, which is proved to have been altered after its delivery by the warehouseman. The latter is without power to make such alteration; and the fraudulent intent of *Casey* in making this alteration in this instance, is evident.

Again, it is not correct to say, that the legal title of the salt was in *Keep, Bard & Co.* We have other evidence on this subject than their warehouse receipt, introduced without objection, and, in part, by themselves.

The most favorable view of the case of these appellees, under the somewhat conflicting testimony of their book-keeper and of the broker, is, that *Keep, Bard & Co.* were joint owners with *Casey*, of the cargo of the William Sprague.

The salt was, in this view, as much under the control of *Casey*, as under that of *Keep, Bard & Co.*; perhaps more so, as the storage was chargeable to *Casey*, by the terms of the interpolated receipt.

Casey, as we have seen, first pledged the salt to *Tufts & Hobart*, and then sold it to *Hathaway*, the appellant. He has, in all probability, defrauded his partners, *Keep, Bard & Co.*; but *Hathaway*, was no party to the fraud. His purchase was *bona fide*, and in our opinion *Keep, Bard & Co.* cannot repudiate it.

2. *Tufts & Hobart* claim the cargo of salt of the ship *Bamberg*, stored in *Casey & Co.*'s warehouse. This cargo was sold by the importers, *Harrison & Co.*, to *T. J. Casey*, on the 28th of November, 1857, being then on board ship, or stored in the bonded warehouse kept by *Casey & Co.*

Thomas J. Casey & Co. sold this cargo to *H. Leland & Co.*, on the 9th of December, 1857, and delivered to the purchasers, on the same day, a warehouse receipt for the same, being 7793 bags coarse Liverpool salt. and 1850 bags fine salt.

On the 18th December, 1857, *Casey* (for account of *T. J. Casey & Co.*) sold the same cargo of the *Bamberg* to *Rugely, Blair & Co.*, who sold to *Tufts & Hobart*. The cargo remained in the warehouse during these different sales.

The appellants, *Tufts & Hobart*, argue that their purchase of this salt should prevail over the anterior one of the appellees, *H. Leland & Co.*, because the sale to the latter was unaccompanied by delivery. The *bona fide* possession of a warehouse receipt, is legal evidence of possession; and this is the character of the possession of both parties. The earliest must, therefore, prevail.

3. *Reed & Co.* claim 11,760 sacks salt in the Zinc Warehouse, upon a warehouse receipt. The Judge below was of opinion that the salt was not sufficiently identified to justify him in awarding it to this claimant.

The salt which remains on deposit in the Zinc Warehouse is 20,200 sacks. Of this amount, there was adjudged by the court below :

To <i>P. A. Giraud & Co.</i>	8,650 sacks.
To the State Bank.....	3,470
To <i>Drury A. Harris</i>	1,690
	<hr/>
	13,810
Which deducted from total in store as above.....	20,200
	<hr/>

Leaves amount not identified by any other claimant, in *Zinc Warehouse*..... 6,390

As no opposition is made by any other party to this record, to the recovery, by appellants, of the six thousand three hundred and ninety sacks remaining in the Zinc Warehouse, as above, we think it equitable that the same should be awarded to the appellants, *Reed & Co.*, whom the record shows to have acted in good faith, and to have taken all precautions usual among men in trade who are dealing with those whose probity they do not suspect, to ascertain the existence of the merchandise respecting which they are dealing.

It is, therefore, adjudged and decreed, that the judgment of the District Court upon the claim of *William H. Hathaway*, be reversed; that the syndic deliver to the appellant, *William H. Hathaway*, 12,650 bushels of salt of the cargo of the ship *William Sprague*, or so much thereof as may now remain on storage in Brooklyn Warehouse No. 3, upon said *Hathaway* paying to said syndic all costs and expenses for storage, reserving to said *Hathaway*, the right to contest the storage account for deficiency of salt; that the claim of *Keep, Bard & Co.* to the cargo of the ship *William Sprague*, be dismissed; that as regards the appellants, *Tufts & Hobart*, the judgment of the District Court be affirmed; that as regards the appellants, *Reed & Co.*, the judgment be amended, and that the syndic deliver to said *Reed & Co.*, 6,390 sacks of salt in the Zinc Warehouse, or so much as may be left therein, after satisfying the judgments of the District Court in favor of *P. A. Giraud & Co.*, of the Louisiana State Bank, and of *Drury A. Harris*, upon the same conditions as above expressed with regard to the appellant *Hathaway*.

It is lastly adjudged and decreed, that the costs of the interventions of the appellants and appellees in both courts, follow the judgments rendered upon the said interventions severally.

THOMAS MCKNIGHT v. C. CONNELL and PARKER, Sheriff.

Where a cause has been previously put at issue, and the object of filing interrogatories is simply to procure proof, and not to bring the party into court, the consent to a continuance by defendant, and the declaration of plaintiff's counsel that he will amend his petition and propound interrogatories accordingly, is not an agreement that binds the party to amend, if he subsequently finds that he has sufficient proof without, he is not bound by such consent to propound interrogatories in order to be permitted to obtain judgment.

In such a case the want of service of the interrogatories is not one of those vices of form which give rise to the action of nullity.

A party acting in good faith cannot be deprived of a judgment on such grounds.

A deputy Sheriff who has not made the service of a petition and citation, or other proceeding, has no authority to make the return.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
Benjamin, Bradford & Finney, for plaintiff. *Collens & Woolridge*, for defendants and appellants.

MERRICK, C. J. This suit is brought to annul a judgment obtained by the defendant *Connell v. McKnight*, the plaintiff, and injoin the execution. The judgment of the lower court was in favor of the plaintiff annulling the judgment.

The original action was commenced the 17th of April, 1855, against *Thomas Hunt*, and the plaintiff, *McKnight*, by personal service upon both. On an exception taken by *McKnight*, the suit was dismissed as to *Hunt*.

The defendant, *McKnight*, filed for answer a general denial the 28th of January, 1857.

On the 17th day of June, 1857, the case came up for trial, and some evidence having been taken, the case was continued for further evidence in order that the plaintiff might file the interrogatories propounded to the defendant, and the attorney for the plaintiff then stated that he would file an amended petition and propound interrogatories accordingly.

The attorney for *Connell* two days afterwards filed his interrogatories on facts and articles, and obtained the order of the Judge upon the plaintiff to answer. The interrogatories and citation were placed in the hands of the Sheriff the same day, June 19th, 1857, and they were returned personally served on *McKnight*, the 8th day of July following.

In November, the interrogatories on facts and articles were taken *pro confessis*, and the case, after having been regularly called, fixed for trial, and posted up during two weeks agreeably to the rules of the court, for the 17th day of December, 1857, was tried that day; the names of the counsel for both parties being also posted up, they were sent for on the day of trial.

Connell's counsel was present, the defendant's counsel were absent. Judgment was rendered upon the interrogatories taken as confessed, and the proof in favor of *Connell* for \$337 80 and interest.

The Sheriff's return to the interrogatories, purports to have been made by *Wm. H. Wilson*, deputy Sheriff, who certifies that *McKnight* was personally served.

Another deputy Sheriff was placed upon the stand on the trial as a witness in this case, who testified without objection, that he was the person who made the service of the interrogatories and citation, and that the return was not correct; that he did not make the service upon *Mr. McKnight* personally, but that having been at *McKnight's* house almost daily for about fifteen days, he found a white person on the premises, and delivered the interrogatories to him. A son-in-law

of plaintiff testifies that the plaintiff was absent at the time on official business in Arkansas, and that he, the witness, resided in the house at that time, but he has no recollection of having received the interrogatories, and thinks he should have remembered the fact if he had.

The plaintiff having thus shown the falsity of the Sheriff's return, and that there was no personal service, contends that he has brought his case within the rule laid down in 3 An. p. 647, and "has exhibited matter which makes it against good conscience to execute the judgment,—matter of which the injured party could not have availed himself in the former litigation," having been prevented from availing himself of his just defence by the false return of the Sheriff, inasmuch as by the agreement of *Connell* to propound interrogatories to the plaintiff, the latter had the right to rely upon the service of the same as a further notice of *Connell's* intention to proceed to the trial of the case.

It appears to us, that this position of the present plaintiff cannot be maintained. It is not pretended that *Connell* acted otherwise than in good faith. He had instituted a suit previously against another party, for whom it was pretended *McKnight* acted as agent and had failed in that action, and now, having instituted suit against *McKnight*, as principal, it was supposed the answers of the latter might disclose another party responsible to the plaintiff for the paving, the ground of the indebtedness.

The cause had been put at issue previously, and the object of filing interrogatories was to procure proof, and was not to bring the party into court. The consent to a continuance, and the declaration of counsel that he would amend and propound interrogatories, were not an agreement which bound the party to amend if he subsequently found that he had sufficient proof without, and when, therefore, he propounded his interrogatories, he was not complying with an agreement without which he could not have been permitted to obtain judgment. It was precisely as if he had declared that he would take the deposition of a witness and a continuance had been consented to in order to enable the party to do so. It might not be very honorable to decline afterwards to take the deposition, but such consent could not be considered a binding condition, precedent to the recovery of judgment.

When *Connell*, therefore, procured the order of the court on the 11th day of November, to take the interrogatories as confessed, he was acting in good faith, and in enforcing what appeared to him and the court as an undoubted right.

The case being at issue, it was then properly set for trial, and posted up for two weeks in conformity with the rules of the court. It was the duty of *McKnight*, if he had any objections to make, to appear and make them before or at the trial in December, and not doing so, if he has suffered any detriment, it has been the result of his own negligence. A party acting in good faith cannot be deprived of a judgment on such grounds.

In conclusion, we take occasion to remark, that a deputy Sheriff who has not made the service of a petition and citation or other proceeding, has no authority to make the return, and that the conduct of the two deputy Sheriffs in this instance, is deemed by the court unwarranted in law.

It is, therefore, ordered, adjudged and decreed, by the court, that the judgment of the lower court be avoided and reversed, and we do now order, adjudge and decree, that the injunction sued out in this case be dissolved, and plaintiff's demand be rejected, and that said *Thomas McKnight*, and *Joseph West*, his surety, be condemned, *in solido*, to pay three per cent. interest per annum on the sum of \$337.80

McKNIGHT
v.
McCONNELL.

from the 15th day of February, 1858, until this decree becomes executory, and fifty dollars damages, for the wrongful issuing of the injunction, and that the said plaintiff pay the costs of both courts.

BUCHANAN, J., concurring. I concur in the decree in this cause, being of opinion that the petition and the evidence do not present a case for the action of nullity of a judgment, under Arts. 606 and 607 of the Code of Practice.

There is no allegation, and no proof, of the judgment having been obtained through fraud or ill practices on the part of the party (*Connell*) in whose favor it was rendered. C. P. 607.

The want of service of the interrogatories on *McKnight*, was not one of those vices of form which give rise to the action of nullity; and which are enumerated in Art. 606 of the Code of Practice. None of the cases quoted in plaintiff's brief cover the present. In one, *Norris v. Fristoe*, 3 An., which goes the farthest towards extending the action of nullity, it was held that the party complaining cannot be relieved, if he has been guilty of any laches or negligence. Now, it is admitted in argument, and appears from the record, that the case of *Connell v. McKnight*, was regularly fixed for trial and tried in December, 1857, and that the defendant therein, plaintiff here, was not present in person or by counsel.

This is certainly imputable to him as *laches*,—moreover, it does not appear that the interrogatories, which had been taken *pro confessis*, by an order of court, rendered a month previously to the trial, were offered in evidence by *Connell*; and, indeed, if they had been, it is doubtful, as suggested by one of plaintiff's counsel, whether the implied confession of their truth would not have been favorable to *McKnight's* cause, instead of prejudicial to it. The other evidence taken on the previous trial, and copied in the record, appears to me amply sufficient to justify the judgment of *Connell v. McKnight*, without taking the interrogatories into account. Be that as it may, plaintiff's remedy was by appeal alone, at least as far as *Connell* is concerned.

I see no reason for questioning the entire fairness and correctness of the conduct of *Connell* and of his counsel. It is, therefore, not against good conscience to execute the judgment.

COLE, J., concurs in this opinion.

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SUCCESSION OF JOHN McLAUGHLIN.

Where a pass-book has been kept by a party with a merchant, although every entry of items bought has been made by the merchant or his clerk, yet the book is the property of such party, who is presumed to have examined it, and if he has made no objection to its contents, may be compelled to produce the same, and it may be offered in evidence against him.

APPEAL from the Second District Court of New Orleans, *Morgan, J. G. Legardeur* and *L. Castera*, for appellees. *T. Gilmore* and *P. E. Bonford*, for appellants.

MERRICK, C. J. Two appeals have been taken in the present case from the judgment upon the account filed by the executor and opposition thereto. The testamentary executor and the universal legatee appeal from the allowance of \$250 to the counsel of *Davis*, (who had been appointed curator of the estate,) and \$200 allowed to the attorney for absent heirs.

Davis appeals from the refusal of the District Judge to allow him commissions.

The inventories of the of the succession amount to the sum of \$23,506 80, and \$20,823 in assets have been delivered the legatees.

The counsel employed for *Davis*, curator, conducted the mortuary proceedings until the testamentary executor was appointed, and the universal legatee put in possession.

These services were beneficial to the estate, and the District Judge did not err in allowing \$250 under the proof in this case.

The appointment of an attorney to represent the absent heirs was a necessary proceeding. The Judge did not err in making the appointment, as is manifest from the silence of the testamentary executor and universal legatee, when it was in their power to have opposed the appointment, or at least to have moved the court to rescind the order.

As the absent heirs do not receive any portion of the estate, and as the legatees obtain what otherwise would be in part coming to the absent heirs, and as the action of the attorney for the absent heirs has thus been useful to the legatees, we think the District Judge did not err in ordering the executor to pay the amount allowed the attorney for absent heirs out of the estate, there being no other fund out of which he could be paid.

The District Court did not err in permitting the "pass-book" kept with *Davis* to be offered in evidence. It was the testator's book, notwithstanding the entries of the items bought at the store of *Davis* by the testator were made by *Davis* or his clerks. The pass-book was examined (we must presume) by *McLaughlin*, and not having been objected to by him, *Davis* had the right to compel the production of the same, and to offer it in evidence when so produced. *Pratt v. McHatton*, 11 An. 264.

Davis was appointed curator, gave bond, and obtained his letters of curatorship on the estate. It is true he did not obtain possession of the property because he was prevented by the universal legatee. But having caused the seal to be affixed, and the inventory to be taken, and being recognized by the decree of the court as curator of the succession, his rights to some compensation were fixed by such decree. See succession of *Elizabeth Chaney*, Opinion Book 27, p. 483, not reported.

We think *Davis* should be allowed one-fourth of 2½ per cent. commissions on the inventory which he caused to be taken. But the one-fourth commissions ought to be deducted from those allowed the testamentary executor, and as the amount for both commissions and account do not equal *Davis's* liability to the estate, he must be left to oppose the same in compensation when a demand is made upon him on account of such indebtedness.

It is, therefore, ordered, adjudged and decreed, by the court, that the judgment of the lower court be amended so as to reduce the amount of commissions allowed the testamentary executor *Boyce*, and increase the sum allowed the universal legatee, by the sum of one hundred and thirty-one 77-100 dollars, and that said *Davis's* right to plead the amount of said one-fourth commission, viz: \$131 77, and said account for \$35 85 and interest, in compensation *pro tanto* of any sum due by him to the succession be recognized and reserved to him, and that the judgment of the lower court so amended be affirmed; the costs of the appeal to be paid by the said succession.

E. WOOD PERRY v. ALFRED KEARNEY.

Where the execution of a judgment has been enjoined, and defendant admits, upon being interrogated, a partial payment of such judgment, the injunction should be perpetuated for the amount admitted to have been paid, and dissolved for the remainder still due. The plaintiff and his surety on the injunction bond are bound *in solido* to defendant for damages only on the amount for which the injunction is dissolved.

APPEAL from the Second District Court of New Orleans, *Morgan, J. F. Perrin*, for plaintiff and appellant. *G. L. Bright*, for defendant.

LAND, J. The plaintiff enjoined the execution of a judgment against him, and in favor of the defendant for the sum of eight hundred and fifty-one dollars and thirty-four cents, on the ground of payment and satisfaction, with an order on the New Orleans Oil Manufacturing Company. To prove the grounds alleged in the petition for an injunction, the plaintiff propounded interrogatories to the defendant, who answered as follows:

"I received on said judgment \$525 60 in merchandise after the judgment was rendered, and have always been ready and willing to credit the defendant with said amount. On the day the execution issued in the suit of *Alfred Kearney v. E. Wood Perry*, my attorney instructed the Sheriff in writing to credit *Mr. Perry* on said *fi. fa.*, with the aforesaid sum of \$525 60. I have received nothing more from *E. Wood Perry* since the rendition of the judgment. But before the rendition of the judgment, *Mr. E. Wood Perry* gave me on account of the notes sued upon by me, his note for \$100, which was paid. I have always been ready and willing to credit him with the amount, though legally, he could not claim it after the rendition of the judgment."

The defendant, in his answer to the petition, admitted the facts above stated to be true.

There was judgment dissolving the injunction, and condemning the plaintiff, and his surety on the injunction bond, to pay twenty per cent. damages on the sum of \$225, and costs of suit.

This judgment is erroneous in not perpetuating the injunction, for the amounts admitted by the defendant to have been paid, and in condemning the plaintiff to pay the costs of suit.

It is, therefore, ordered, adjudged and decreed, that the judgment be reversed, and that the injunction issued in this case be perpetuated for the sum of six hundred and twenty-five dollars and sixty cents of the judgment in favor of defendant against the plaintiff, and dissolved for the balance of said judgment, to-wit: the sum of two hundred and twenty-five dollars and seventy-four cents, and that the plaintiff, and *Henry Perry*, his security on the injunction bond, be condemned *in solido* to pay to defendant twenty per cent. damages on the said sum of two hundred and twenty-five dollars and seventy-four cents, the balance due on said judgment. It is further ordered and decreed, that the defendant pay the costs of the lower court, and also the costs of this appeal.

WILLIAM LEWIS v. RICHARD S. MORGAN.

In a redhibitory action for disease in a slave, it is necessary that there be an allegation and proof of a tender in order to recover ; and that such tender should be made if practicable, before the institution of the suit.

There are two exceptions to this rule. First, when an actual tender is not possible ; and second, where defendant has done some act, or made some declaration which demonstrates that a formal offer to return the thing sold would have been fruitless.

It is not a sufficient excuse for want of tender, that it was impracticable at the time of instituting the suit, if it was practicable at any time between the discovery of the vice and the institution of the suit, or even before the trial.

APPPEAL from the District Court of the Parish of St. Helena, *Wilson, J.*
Penn & Martin, for plaintiff. *E. P. & T. C. W. Ellis*, for defendant and appellant.

BUCHANAN, J. This is a redhibitory action for a disease in a slave, sold by defendant to plaintiff. The appellant asks for the reversal of a judgment, on the ground, among others, that no tender of the slave is either alleged or proved.

It is the well settled doctrine, that allegation and proof of a tender are indispensable to recovery in an action of this kind ; and that the tender should be made, if practicable, before the institution of the suit. 2 N. S. 466 ; 4 La. 193 ; 19 La. 283 ; 9 Rob. 306 ; 1 An. 389 ; 2 An. 955 ; 4 An. 562 ; 10 An. 127 ; 11 An. 209.

Two exceptions to this general rule, are recognized by the decisions :

First—When an actual tender is not possible ; and

Second—Where defendant has done some act, or made some declaration, which demonstrates that a formal offer to return the thing sold, would have been fruitless. 1 An. 44 ; 4 An. 344.

It is contended by appellee, that this case comes within the first of these exceptions—that defendant was an absentee from the State when this suit was instituted.

The evidence shows that the sale took place on the 25th of March, 1858, defendant being then a resident of Amite city, and plaintiff residing within six miles of Amite city, which was his post-office ; that the disease of the slave was discovered by plaintiff within three or four days after the sale ; that a physician was immediately called in, who pronounced the disease to be of several months standing ; that defendant continued to reside in Amite until the latter end of May, or beginning of June, being two months or more after the sale ; that on his departure, defendant left an agent in the parish, who, it is reasonable to believe, was known to plaintiff, since the fact was notorious in Amite city, and that agent was made garnishee in this action.

It is, therefore, perfectly evident that there was no impossibility or even inconvenience, in making the amicable demand to rescind the sale, accompanied with an offer to return the slave. This suit was brought in September, 1858, and no tender appears to have been made, either before or since suit brought. We note this latter fact, although Judge Martin held, in *Barrett v. Bullard*, 19 La. 283, that the offer to return must always *precede* the institution of a suit. The same doctrine was held in *Fisk v. Proctor*, 4 An. 562.

We are of opinion that this suit must fail, for want of allegation and proof of a tender of the slave.

LEWIS
v.
MORGAN.

The vendee has one year to institute the action of redhibition, and, as a consequence, may at any time previous to the institution, make a tender to the vendor. But if he brings his action at once, and does not wait until the twelfth month is about expiring, he cannot, on the trial of the case, give as a reason for not alleging and proving a tender, that he has the whole year for that purpose. The tender, if it can be made, must precede, if not the institution of the suit, at all events the trial.

The question upon which this case turns is this : Was it practicable for the plaintiff at any time, since the discovery of the redhibitory vice, and before the trial, to make a tender ? The test is not the practicability of the offer of tender at the time of instituting the suit, but at any time since the discovery of the redhibitory vice or defect. It may be very easy for a vendee to do so during nearly the whole period of time previous to the institution of his action, and the matter become impracticable at the time, but it could hardly be said that in such a case, the exception of impracticability would prevail. The law dispenses with a tender, in such contingencies, because it requires nothing to be done in vain ; and, applying this principle to the case at bar, it will appear, that since the discovery made by the plaintiff of the redhibitory defect of the slave purchased by him of the defendant, over two months elapsed, during which it was practicable and easy to make a tender. Having failed to do so, his suit should be dismissed.

This conclusion is not at variance with our decision in the case of *Dixon v. Chadwick*, reported in 11 An. 215. That case was decided upon its peculiar circumstances, which brought it within one, if not both, of the exceptions to the general rule, mentioned above. Judge Lea, the organ of the majority of the court says : "*Under the circumstances, as disclosed by the evidence, we think a tender of the slaves by plaintiffs, was unnecessary, if not impracticable.*"

The circumstances, alluded to by the Judge, are not detailed in the opinion, but appear from the record, which is before us, to be as follows :

Plaintiff bought of defendant, two women slaves, and paid for them, without any writing passed at the time. It was, however, understood and agreed, that an act of sale should be made, expressing a full warranty of the soundness of the slaves, except an obstruction of the monthly discharge in one of them. Defendant, subsequently, caused an act of sale to be drawn up by a notary, declaring that there was *no warranty of the health of the slaves sold, it being understood between the parties that they were constitutionally unsound.*

He tendered this deed to the plaintiffs, who refused to accept it, as being contrary to their verbal conventions ; the parol proof of which was received, without objection on the trial. Defendant, upon this refusal, threw the deed on the floor at plaintiff's feet, and left the house.

It was considered by the majority of the court, that the act of defendant, in tendering a false bill of sale to plaintiffs, and in insisting upon their receiving it, indicated a determination, on his part, not to rescind the sale ; which rendered a formal tender unnecessary, because it would have been fruitless. We also considered, that the feeble and bedridden condition of the slaves, at the time of this conduct of defendant, (they being both sick of pulmonary consumption, of which they shortly afterwards died,) rendered their removal from plaintiff's house impracticable, without inhumanity. Hence the language of Judge Lea, in the opinion, as quoted above.

Judge Spofford dissented from that decision, as the report of the case shows, because a tender was alleged in the petition, and denied in the answer ; and be-

LEWIS
v.
MORGAN.

cause the learned Judge thought that the facts of the case disclosed no impracticability nor inconvenience in the return of the slaves. There is surely nothing in either of the opinions delivered in *Dixon v. Chadwick*, that militates against the well established doctrine of tender, as a prerequisite to recovery in the redhibitory action. We entertain no doubt of the correctness of the decision in that case. It was, in fact, a case within the recognized *exceptions* to the general rule.

To use the language of Judge Martin, upon this very subject, in *Barrett v. Bullard*, *exceptio probat regulam*.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed; and that there be judgment for defendant, as in case of non-suit, with costs of both courts.

MERRICK, C. J., dissenting. The main question presented in this case, is whether, under the circumstances, an actual tender of the slave, and demand of a rescission of the sale previous to the institution of this action of redhibition, were necessary to the maintenance of the action.

In my opinion, the present case does not come within the general rule.

The proof shows that the defendant is a practicing physician; that he carried the slave in a carriage to the house of the plaintiff, six miles from Amite City, in the parish of St. Helena, at the time he negotiated the trade, and returned with her the same day; that he represented her a strong, healthy, field hand, capable of doing as much work as a negro man belonging to plaintiff, named *George*; that he desired that the bargain should not be spoken of. That within three or four days after the delivery of the slave and completion of the contract, it was discovered that the woman was afflicted with some disease, and a physician was called to treat her complaint; the disease proved to be what the physician calls *procedentia uteri*, and is of a character to render the slave utterly valueless. The sale was made the 25th of March, 1858, and the defendant left the parish and State in May or the first of June following. The suit was commenced by attachment the 18th day of September. It appears that defendant had an agent at Amite City, for some collections; but there was no publication of the agency, and it is not shown, nor pretended, that the agent had any authority to rescind the sale or receive the negro, nor that plaintiff had any knowledge of the agency, although it was supposed to have been notorious in Amite City, which, a witness thinks, is the place of plaintiff's post-office.

It is not shown that plaintiff knew the slave was utterly worthless when defendant left the State.

An exception was taken to the petition, that it did not allege the slave to be afflicted with any disease known to the laws of Louisiana.

It was not objected, that a previous tender had not been made.

The petition was amended to cure the defect, and thereupon a general denial was filed as an answer.

The testimony was received without objection, and the case must be disposed of upon the evidence, under the uniform decisions of this court.

If there were any law requiring the vendee to tender the slave, and demand a rescission, as soon as he had fully ascertained that the slave was affected with a redhibitory disease, I should be of the opinion that the defendant was exempt from its operation in this instance; because it does not appear, that he had fully ascertained the character of the disease before the suit was brought, and the law gave him the right to elect whether he would sue for a reduction of the price, or bring a simple action of redhibition. C. C. 2519, 2522.

LEWIS
v.
MORGAN.

If the demand for rescission be an amicable demand, as assumed in the opinion of the majority of the court, then no amicable demand was needed in this case, because the defendant was an absentee, and in such cases it is lawful to attach when you can find property. *Millaudon v. Beazley*, 2 An. 916.

But I maintain, that the tender and demand of a rescission are something more; they are, in the nature of a putting *in mora*, and although not within the provisions of Article 1905 of the Civil Code, have been adopted by our courts as within its spirit.

Now, the right to put the opposite party in default, or to make an amicable demand, exists as long as the action exists, which they perfect. In the case of *Hall v. Lorente* it was held, that a condition might be performed and a party put in default *sixteen* years after the party had acquired the right to demand a performance. See 3 An. 275.

The lawgiver has declared, that the vendee shall have the right to bring his action of redhibition at any time within one year after the sale, and in some cases, within one year after he has discovered the vice. C. C. 2512, 2524. Now, when the lawgiver has conceded the action, he has conceded the right to make all demands and tenders necessary to make the action available. *Qui concedit aliquid, concedit omne sine quo, concessio est irrita.*

The lawgiver has not said that the vendee shall have an action if he makes a tender and demand as soon as he discovers the vice which gives rise to his action; but has declared that he may bring his action at any time within the year. The courts cannot distinguish where the lawgiver has not distinguished. Where, then, is the text of law, or the well considered authority, which adds this new condition to this otherwise clear principle of law? I am aware of none. That the lawgiver never intended such a condition, is evident, I think, from the two Articles already cited.

One provides that, where the seller, not being domiciled in the State, absents himself *before the expiration of the year* following the sale, the prescription remains suspended during his absence. Now, the cause of action is declared to exist without any putting *in mora* previous to his departure.

The other Article declares, that if the seller knew the vice, the action of redhibition may be commenced at any time, provided a year has not elapsed since the discovery of the vice. C. C. 2524. Here again, the action continues a year after the vice has been discovered, and the lawgiver has annexed no *proviso* that the vendee shall make a demand and tender the first opportunity, or within a reasonable time. He has the entire year after the discovery, to make the demand and bring his suit.

So of the case before us. The plaintiff had the entire year in which to make the tender, and demand the rescission. The defendant could not deprive him of that right by absenting himself from the State. If the tender and demand became impossible by the act of the defendant, his act cannot be permitted to prejudice the plaintiff's right.

In the case of *Smith v. Taylor*, 10 Rob. 133, it was held that the vendee could not be deprived of any part of the year, even by a casualty, and that although he had had eleven months and twenty-nine days in which he might have brought his action, he was entitled to the last day of the twelfth month, and as it was not possible, owing to the absence of the clerk, to file his suit that day, his right should be suspended until the impediment was removed. The court said "The plaintiff had until the last day of the year to commence proceedings, and was not obliged to procure process of citation before."

LEWIS
v.
MORGAN.

So in the case of *Dixon v. Chadwick*, 11 An., the plaintiff had at first sufficient time to have tendered the slaves to the defendant; but as they died before the expiration of the year, their delivery became impossible before plaintiff's right had become barred by prescription.

The proof of the contract of sale by parol did not vary the rights of the parties in that case. The question which we now have under consideration was discussed, and the opinion of the majority of the court received my unhesitating concurrence on this question alone, and met with Mr. Justice Spofford's dissent. What other considerations may have operated upon the minds of other judges, I do not pretend to know. I know no provision of law requiring a tender *after suit brought*. The decree could produce the effect intended by the tender.

I am of the opinion that the defendant, in this case, must have known of the redhibitory defect, and I can see no reason why he should be permitted to defraud the plaintiff out of the price of the slave. The District Judge, who saw and heard the witnesses testify, has found for the plaintiff, and I do not think his judgment ought to be disturbed.

LEWIS SNAPP & Co. v. WILLIAM PORTERFIELD.

The record of a suit brought by attachment against a supposed owner, in which the thing seized was released upon bond by such supposed owner, is not admissible as evidence of real ownership in an action between other parties, where the question relates to title,—but a judgment changing the ownership of the property would be admissible, in the same manner as a private writing, although the plaintiff in the suit pending had no connection with the former action.

APPPEAL from the Sixth District Court of New Orleans, *Howell, J.*
J. M. Chilton, for plaintiff. *B. Egan*, for defendant and appellant.

MERRICK, C. J. This suit was commenced by attachment. The steamboat John Strader was seized as *Porterfield's* property. *H. Devine* intervened and claimed to be owner of the boat. His pretensions being sustained, plaintiff appealed.

Plaintiffs complain of the ruling of the District Court, and they have taken two bills of exception.

It seems, in a case instituted by another party against *Porterfield* and owners of the Strader by attachment, *Porterfield* released the boat upon bond. This suit was *res inter alios acta*, as to *H. Devine*, and was properly excluded.

The steamboat was under seizure at Vicksburg, Miss., in the suit of *Shaw & Zunts v. A. C. Brown et al.* It was there ordered to be sold, and *H. Devine* became the purchaser, *Porterfield* and two others signing his bond as sureties for the price.

The court did not err in receiving the record to show title in *Devine*. It is true, that the plaintiff was no party to the suit, but then he had no interest in the matters in controversy in that suit, and if he was not bound by the admissions and judgment, still the change of the ownership of the steamboat Strader from *Brown* to *Devine* operated through the agency of that suit, was a result and fact which was admissible in evidence in the same manner as would have been the transfer by private writing from *Brown* to the same party.

As plaintiff does not claim title to the steamboat through *Brown* but through

SNAPP
v.
PORTERFIELD.

Porterfield, the want of registry of *Devine's* title cannot avail plaintiff. If the boat were to be considered the property of *Brown*, it would be equally fatal to plaintiff's case.

The fact that *Porterfield* was captain of the boat, and on some occasions called the boat his, cannot defeat *H. Devine's* title.

Judgment affirmed.

R. W. RAYNE v. DAVID TAYLOR.

14 406
104 505
14 406
c116 298

In an action of damages for libel and slander, the truth of the words written or spoken, may be given in evidence as a defence to the action under such a plea.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*
A Singleton & Bonford, for plaintiff. *Durant & Hornor* and *A. N. Ogden & Stansbury*, for defendant and appellant.

BUCHANAN, J. This is a suit for damages for libel and slander, laid at thirty thousand dollars. The libel charged, is the answer filed by defendant, on the 15th November, 1855, in a suit instituted by plaintiff against him; in which answer the defendant alleged that he had been defrauded by plaintiff. The slander charged, is the reiteration of the defamatory statements of defendant's answer in that suit, alleged to have been spoken by defendant's counsel and by defendant himself, in the presence and hearing of divers persons, and on numerous occasions.

On the trial of the cause, and after argument concluded, the Judge was requested by defendant's counsel to charge the jury—that if the jury find, from the evidence, that the facts stated by the defendant in his answer were substantially true, there can be no verdict of damages against him. This charge was refused by the court.

We think the court erred. The Act of 15th March, 1855, relative to slander and libel, (session Acts, page 394,) provides, "that whenever any civil suit for slander, defamation or libel, shall be instituted in any court of this State, it shall be lawful for the defendant to plead in justification the truth of the slanderous defamatory or libelous words or matter, for the uttering or publishing of which he may be sued, and in the trial of the issue in such suit, to maintain and prove his said plea by all legal evidence."

In the present action, defendant pleaded "that at the time he ordered the said answer to be filed, he did, and does now believe, that the said answer contained the truth, and that all its statements were true; and that he had, and still has reasonable and sufficient grounds for believing all of the said allegations to be true, &c."

We understand this statute as constituting the truth of the words spoken or written, a defence to the civil action for slander or libel, and conclude that the jury should have been charged, as requested.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed; that the verdict of the jury be set aside and annulled; that this cause be remanded for a new trial, according to law, and that plaintiff and appellee pay costs of appeal.

VOORHIES, J., absent.

B. BACAS v. PETER KLEIN.

As attorneys-at-law are sworn officers of court, and as their services, though essential to the safe prosecution of a suit, cannot be obtained without compensation, there is no valid reason why the debtor and creditor may not make a law for themselves, by which the debtor shall charge himself with the costs of attorney's fees, as he is by law charged with the taxed costs of the suit to recover the debt.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
G. Legardeur, for plaintiff. *F. Haynes*, for defendant and appellant.

MERRICK, C. J. This suit is brought to collect a note for \$1,500, with eight per cent. interest, secured by mortgage. The mortgage contains a stipulation that in the event it shall be necessary to institute a suit to recover the amount of the note, the defendant will pay an additional sum, not to exceed five per cent. attorney's fees. The defendant appeals.

He contends that the judgment is erroneous in condemning him to pay seventy-five dollars attorney's fees, as that is equivalent to giving usurious interest.

He relies upon Article 1929 of the Civil Code, and 6 Rob. 216 and 3 An. 618, as grounds for the reversal of the judgment. The Article reads as follows :

Art. 1929. "The damages due for delay in the performance of an obligation to pay money, are called interest. The creditor is entitled to these damages without proving any loss, and *whatever loss he may have suffered, he can recover no more.*"

The Article cited, fixes the basis of indemnity for the *delay* in the payment of the creditor, and however detrimental the want of the use of the money may be to the creditor or his business, he can recover no more than eight per cent. interest. He is not to be permitted to prove that such *delay* has occasioned him special damage. But the Article in question does not pretend to regulate anything more than the rate of damages for the delay in paying money. It leaves the question of costs for the *recovery* of it, untouched. Hence, in an ordinary case, the courts, notwithstanding Article 1929, condemn the debtor to pay not only the interest, but the costs, including costs of copies.

Now, as attorneys-at-law are sworn officers of court, and as their services, though essential to the safe prosecution of a suit, cannot be obtained without compensation, we cannot see any valid reason why the debtor and creditor may not make a law for themselves, by which the debtor shall charge himself with the costs of the attorney's fees, as he is by law charged with the taxed costs.

The creditor then does not receive any compensation beyond the interest for the *delay*, but is reimbursed for the costs occasioned by the suit, whether the same be speedily determined, or be disposed of after much litigation. The covenant to pay the attorney's fees is then only an indemnity for the costs expended in *recovering and securing the capital itself*.

The cases contained in 6 Rob. and 5 An. add nothing to the force of the Article cited. We, therefore, see no reason to overrule the cases of *Race & Foster v. Bruen*, 11 An. 34 ; and we announce this as the settled doctrine of the court.

The plaintiff recovers seventy-five dollars attorney's fees, and we do not feel disposed to award damages as in case of a frivolous appeal, particularly as the defendant presents new authorities which he may have supposed would occasion a modification of the rule we have heretofore adopted.

Judgment affirmed.

PEET, SIMMS & Co. v. G. S. WHITMORE—MCKLERoy & BRADFORD,
Garnishees.

14	408
106	626
14	408
116	881

Where the judgment does not liquidate the sum due by the party against whom it is rendered, it wants an essential requisite of a judgment final.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
T. J. & A. J. Semmes, for plaintiffs. *Clark & Bayne*, for defendants and appellants.

LAND, J. This suit was commenced by attachment for the recovery of \$3,471 54. *McKleroy & Bradford*, were made parties garnishees, to whom interrogatories were propounded, in answer to which they admit they have in their hands \$1,661 22 in cash, and forty-three bales of cotton, the property of the defendant.

The plaintiffs obtained judgment against the defendant, and afterwards judgment against the garnishees, in these words :

"It is ordered, adjudged and decreed, that *McKleroy & Bradford*, garnishees herein, be condemned to pay to these plaintiffs, *Peet, Simms & Co.*, \$1,661 22, together with such further amount as may be due to the defendant, *G. S. Whitmore*, from the net proceeds of the said forty-three bales of cotton, when ascertained, and which shall comprehend and include all of said net proceeds, or such part thereof as together with the said sum of \$1,661 22, shall pay in full the amount of said judgment, interest and costs, rendered in this case on the 3d of May, 1858."

The record discloses the facts, that the execution which issued on this judgment against the garnishees, has been enjoined, and that a contest is going on between *C. Yale, Jr. & Co.*, *Smith & Brother*, and the plaintiffs, *Peet, Simms & Co.*, for a priority of privilege upon the money, and the proceeds of the cotton which were in the hands of the garnishees.

These proceedings, however, are not before us, and the only question for our decision is, whether the judgment against the garnishees can be maintained.

The judgment does not liquidate the amount due from the garnishees, for the forty-three bales of cotton, and is, therefore, wanting in finality, which is an essential requisite of all judgments final. C. P. 539.

The judgment should have fixed contradictorily with *McKleroy & Bradford*, the amount due from them on account of the proceeds of the cotton, and for this error it must be reversed.

It is, therefore, ordered, adjudged and decreed, that the judgment against the garnishees, *McKleroy & Bradford*, be reversed, and that the cause be remanded to the lower court for further proceedings against them, according to law. It is further ordered and decreed, that the plaintiffs pay the costs of this appeal.

THOMAS P. SMITH v. R. W. ADAMS & Co. et al.

The 9th section of the Act of 1855, relative to District Courts for the parish and city of New Orleans, declaring that all successions shall be opened and administered in the Second District Court, the other District Courts of New Orleans have no jurisdiction over suits instituted against a succession.

The acceptor of a bill has no right to inquire into the consideration between the drawer and payee and between the latter and a subsequent indorsee.

Not even accommodation acceptors, and that to the knowledge of payee, have a right to plead in compensation or reconvention a debt due by payee to the drawer of a draft.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
Whitaker & Fellows, for plaintiff. *Singleton & Clack,* for defendants and appellants.

COLE, J. Plaintiff sues *R. W. Adams & Co.*, and *W. C. Templeton*, the administrator of the succession of *J. J. Kercheval*, on a draft drawn by *Kercheval* in his lifetime on *R. W. Adams & Co.*, and accepted by them, payable to the order of petitioner.

The administrator of *Kercheval* excepted to the jurisdiction of the Fourth District Court, where the suit was brought, on the ground that the Second District Court of New Orleans, in which the succession had been opened, alone had jurisdiction.

The exception was properly sustained.

Art. 164 of the Code of Practice, provides, that in matters relative to successions, the defendants, though domiciliated elsewhere, must be cited to appear before the court of the place where the succession has been opened, in all suits brought by the creditors of the deceased, previous to the partition.

The 9th section of the Act of 1855, relative to District Courts for the parish and city of New Orleans, declares, that all successions shall be opened and administered in the Second District Court.

The 11th section of this Act merely gives concurrent jurisdiction to the District Courts of New Orleans of civil cases, which are not referred to the jurisdiction of a special court, except, however, the First District Court, which is confined exclusively to criminal cases. Sess. Acts 1855, p. 315.

As, therefore, the administration of estates is referred specially to the Second District Court, the other District Courts of New Orleans have no jurisdiction over suits instituted against them.

Upon the merits, there was judgment for plaintiff against *R. W. Adams & Co.*, and they have appealed.

The only question is, whether appellants, as accommodation acceptors to the knowledge of plaintiff, can plead in compensation a debt due by plaintiff to *Kercheval*, the drawer of the draft.

It is well settled that an acceptor of a bill has no right to inquire into the consideration between the drawer and payee, or between the latter and a subsequent indorsee. *Davidson v. Keyes*, 2 Rob. p. 256. *Debuys v. Longer & Johnson*, 4 M. N. S. p. 288.

The total or partial want or failure of consideration, or the illegality of consideration, as a general rule, may be insisted upon as a defence or a bar between any of the immediate or original parties to the contract, as by the drawer against

SMITH
v
ADAMS.

the payee, by the payee against his indorsee, and by the acceptor against the drawer. Story on Bills, §187.

Defendant insists that this defence fails only against *bona fide* holders, or those claiming through them, and that original parties can set up such defence as well as others, where the facts are fully disclosed. He refers to Story on Bills, §§188, 191.

It is unnecessary to express any opinion upon this point on account of the view we have taken of the defence.

It appears that plaintiff sold his one-fourth interest in the steamboat *Selma* to *Kercheval*, for which he drew in payment the draft in contestation on *R. W. Adams & Co.*, the defendants. That previous to the sale of the steamboat, some bales of cotton had been shipped upon her, which had not been called for on her arrival at her port of destination, and they were sold by the boat, and their proceeds were placed upon the suspense account of the books of the boat.

When the owner of the cotton called for its proceeds and was paid, the suspense account was credited with it.

It also is shown that plaintiff obligated himself in writing to pay his proportion of the cotton, provided *Capt. Perry* paid his proportion of the same.

The proceeds of the cotton were used for the expenses of the boat, until the owner demanded them.

The boat was sold before the proprietor of the cotton called for its proceeds, and consequently before it was known that the owner would ever be discovered. It is contended that plaintiff owes to *Kercheval*, the maker of the draft, and purchaser of plaintiff's fourth interest, the one-fourth of the proceeds of the cotton, used to defray the expenses of the boat whilst plaintiff was part owner, and which the boat was obliged to refund to the owner of the cotton, and that defendants, as accommodation acceptors, are entitled to have deducted from the draft one-fourth of the proceeds of the cotton, on the ground that plaintiff knew defendants to be accommodation acceptors at the time they accepted the same.

The evidence in the record does not establish that defendants were accommodation acceptors, or that plaintiff knew such to be the fact.

The only testimony on this point is that of *Perry*, who testifies, he "thinks *Smith* told witness that *Kercheval* had drawn on *Adams* for a part of the price, does not know for what amount."

Even supposing, however, it should be admitted that defendants were accommodation acceptors, and that plaintiff knew such to be the fact, still defendants cannot plead in compensation and reconvention the one-fourth of the proceeds of the cotton, because this can only be considered as a debt due by plaintiff, if at all, to *Kercheval*, the purchaser of his fourth interest in the boat. It is a claim personal to *Kercheval*, which his administrator may demand. It may be, that in a contest between defendants and the succession of *Kercheval*, that the latter might show that they had secured defendants subsequently to their acceptance. It was only after the sale of the interest of plaintiff in the boat, that it became known that the proceeds of the cotton would have to be refunded by the boat, and it was only then that plaintiff became in reality indebted, if he is so, for one-fourth thereof, and this was after the acceptance.

It is clear that the acceptors cannot plead in compensation this debt of plaintiff to the drawer of the draft. It may be in a contest between plaintiff and the succession of *Kercheval*, that the former could offset the debt with claims against the estate, or show he was released.

SMITH
v.
ADAMS.

Besides, there was no failure of consideration between plaintiff and *Kercheval*; the latter received the fourth interest of the boat which he had bought of the former, and for which the draft was given. The subsequent liability of *Kercheval* for a debt of the boat originating indeed before the sale may make plaintiff liable to him for the same, but does not prove that the fourth interest was not worth the amount given for it at the time of the purchase. As *Kercheval* was willing to give the draft and incur the risk of the owner of the cotton calling for the proceeds, and depend on the good faith of plaintiff to pay his proportion of the debt, the acceptor cannot compensate his acceptance with a debt of *Kercheval*, which does not belong to him. The fourth interest was a good consideration for the draft, and the good faith and ability to pay, if plaintiff were deemed a sufficient guaranty for the eventual liability of the boat, for his share of the debt for the cotton.

Judgment affirmed, with costs of appeal.

JOHN GAUCHE v. C. A. STORER, Captain of Ship *Martha J. Ward*, and
J. P. WHITNEY.

The clause, "The freight payable after receipt of the whole in good order," contained in a bill of lading, has reference to the levee as the place of delivery and receipt, while the words "in good order" relate to the external appearance of the things received.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*

G. & C. E. Schmidt, for plaintiff and appellant. *Benjamin, Bradford & Finney*, and *T. J. Durant*, for defendants.

COLL, J. The petitioner represents, that he is a merchant, and *J. P. Whitney & Co.* are ship brokers and commission merchants, to whom a large number of domestic and foreign vessels are consigned, of which they take charge for the purpose of delivering the cargo, collecting the freight due thereon, &c.

That about October, 1855, the ship *Martha J. Ward* arrived at the port of New Orleans, from Liverpool, in England, laden with merchandise and having on board thirty-eight casks and seven crates of earthenware belonging to petitioner, shipped in good order at the port of Liverpool, and to be delivered in like good order, at the port of New Orleans, to petitioner; the freight payable after receipt of the whole in good order.

That *Storer*, the captain of the ship, and *Whitney & Co.*, the agents thereof, combining for the purpose of injuring petitioner, refused to deliver the goods unless the freight for their transportation was previously paid to them on the levee.

That the said refusal, by impeding him in obtaining his merchandise, loss of sales resulting from the non-delivery, &c., have caused him damage to the amount of five hundred dollars.

Further, that the illegal and malicious conduct of defendants, in thus refusing to deliver the merchandise without payment of the freight thereof, has, by injuring his credit at home and abroad, &c., caused him damage to the amount of \$4,500.

This cause was tried before a jury, who rendered a verdict in favor of the defendant, and from the judgment of the court thereupon plaintiff has appealed.

GAUCHER
v.
STORER

Our opinion of this case renders it unnecessary to express any opinion upon the bills of exception. A careful perusal of the record satisfies us that plaintiff is not entitled to any damages.

The conduct of the defendants does not appear to have been actuated by any malice, but merely with a natural desire to be paid the reward of their labor upon the delivery of the merchandise, fearing that plaintiff might make objections to the payment of the freight, if he received the goods before settling therefor.

It is established that it is unusual to put in a bill of lading the clause "The freight payable after receipt of the whole in good order." In fact, none of the witnesses ever saw such a clause inserted in a bill of lading.

The whole case of plaintiff rests upon this clause. He contends that he was not bound to pay the freight until he should have received the goods at his store, and there to be satisfied that they were in good order, whilst the defendants insist that it was the duty of plaintiff to have opened the casks and crates upon the levee, and there to have examined them, in the event he was not satisfied with their external appearance as to their being in good order.

It is shown that it is not usual to deliver merchandise arriving from domestic or foreign ports, without the previous payment of freight, when it is consigned to those with whom the owners or agents of the ship have had antecedent difficulties in collecting their freight, or with whom they anticipate such impediments.

It is also established, that the agent of several ships had experienced difficulties with plaintiff in collecting his freight, and had been obliged to make several deductions, which he preferred losing rather than to institute legal proceedings for the same.

That the place of delivery of merchandise is the levee, and that in most cases the freight is exacted in from one to five days after the hauling away of the goods, according to the volition of the collector of the freight.

That in some cases, consignees examine crockery ware on the levee, when it is thought to be injured, unpacking the crates at the levee. This is insisted upon by the agents of ships, because the crockery ware is often more injured by being hauled through the streets of New Orleans than by the voyage; that the crates can be judged by their external appearance, whether they have received injury upon the voyage, for if sea water has entered, it discolors the straw; that the judgment of their arriving in good order is based upon their external appearance.

We are of opinion that the clause "The freight payable after receipt of the whole in good order" does not signify that the consignee is entitled to take the freight from the levee, the place of delivery, without the payment of the freight. It is shown that crockery ware, of which species of goods the merchandise of plaintiff consisted, is often injured by hauling from the levee to the store of the consignee, and also that it is very often broken in unpacking at the store. It would, therefore, be unjust to construe this clause to mean that the "good order" therein mentioned referred to the condition of the goods at the store and not at the levee.

The universal way of judging whether goods are in "good order" when they are received by steamboats, vessels, or other modes of carriage, is by their external appearance. If that appears to be good, the bill of lading is given, that they are received in "good order."

All the casks and crates of plaintiff are shown to have been in good order, so far as to external appearance.

The condition of the clause was, therefore, satisfied, and the defendants had the

right to insist upon the payment of the freight before the goods were taken away.

If, upon unpacking them at the store, plaintiff had found them to have been injured upon the voyage, he would have had his action against the defendants, notwithstanding he had given his receipt for them as being in "good order," inasmuch as this related merely to their external appearance.

It is established, that plaintiff could have taken the whole of his casks and crates after they were put upon the levee, if he had wished, by paying the freight; that they were taken from the vessel in a reasonable time after her arrival, and were placed together, and separately from others, for the convenience of plaintiff; that plaintiff received and took away, paying the freight therefor, all his casks and crates except one, which he refused to haul away. He does not complain that any of the merchandise received was broken or injured, and the crate that remained appeared to be in as good order as those that he took away.

Upon the refusal of plaintiff to take the one crate that remained, it was sent by the defendants to a warehouse, to be stored.

If plaintiff had wished to examine the internal condition of the crates, he could have done so upon the levee. No reason appears why he declined taking the one crate, except that he did not wish to pay the freight until he had received it at his store.

If plaintiff suffered any damage from not receiving the goods in time to supply his customers, it was his own fault, for he could have taken them sooner, if he had desired to pay the freight. Besides, the damages suffered by plaintiff in being prevented from selling the goods, is not clearly established. One of the witnesses supposes it was a certain sum, but he states no proper data upon which his opinion is based. As to the injury to the reputation of plaintiff, it does not appear that it could be injured, as he alleges, at home and abroad, by making him pay his freight upon the delivery of the goods, as it is customary to make every one almost pay within a few days, or within twenty-four hours, as the collector thinks proper, after the goods are taken away.

Judgment affirmed, with costs.

E. DELESPARE, Wife of J. VEZIN, Tutrix, &c., v. D. WARNER et al.

Where a petitory action has been brought to recover land sold under an execution, defendants should offer in evidence the record and judgment in the suit under which the execution issued.

But where it is shown by the execution, and Sheriff's return, and the notices served, that the property in controversy has been sold, and the defendant put in possession as owner, and that a part of the price has been applied to the credit of plaintiff, he cannot bring a petitory action and ignore the existence of the sale, and treat the proceedings as having no existence; he must resort to an action of nullity to set aside the sale, if it be irregular or illegal.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
V. F. Cotton, for plaintiff and appellant. *L. U. Gaiennie and Hunt & De-nègre*, for defendants.

MERRICK, C. J. This is a petitory action to recover a lot of ground in the

DELESTANG
v.
WARNER.

Fourth District of New Orleans. The petition alleges that *E. T. Parker* (the Sheriff) and *David Warner*, threw the plaintiffs out of the premises, and took illegal possession of the same. Plaintiffs allege that the property belongs to the succession of *J. M. Duberry*, of which they are the representatives.

The defendants and warrantors claim that the property was regularly sold under an execution, issued on a judgment of *G. Dauduc*, against the plaintiff, to said *Dauduc*.

The defendants have offered in evidence the execution and notices served upon plaintiff, and Sheriff's return showing the sale to *Dauduc*, but not the judgment.

Plaintiff contends, that there was a misdescription of the property sold, and also that there is no evidence that there was any legal judgment rendered in the suit of *Dauduc* against the plaintiff, on which the execution issued.

In the absence of the plan of *C. A. Hedin*, and parol testimony explanatory of the contiguous lots and streets, we are not able to say that the variance in the description contained in the notices served by the Sheriff on plaintiff, from the description contained in plaintiff's petition and the inventory, is material. The maxim, *Falsa demonstratio non nocet, cum de corpore constat*, may perhaps apply. *Greenleaf Ev.*, No. 301.

It would have been more regular, if defendant had offered in evidence the record and judgment against the plaintiff. But, as it has been shown by the execution and Sheriff's return, and the notices served upon the plaintiff, that the property in controversy has been sold and the defendant put in possession by the Sheriff as owner, and that some portion of the price has been applied to the credit of plaintiff, we are of the opinion that the plaintiff cannot bring a petitory action and ignore the existence of the sale, and treat the proceedings as having no existence. The District Judge did not, therefore, err in concluding that plaintiff must resort to an action of nullity, in order to set aside the sale, if it be irregular or illegal. *D'Orgenoy v. Droz*, 13 L. R. 395; *Anderson v. Cede*, 10 An. 269; *Haydel v. Roussel*, 1 An. 38; 6 Rob. 102.

We understand the judgment of the lower court to reserve to the plaintiff the right to attack the sale for any cause whatever.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be affirmed, the plaintiff and appellant paying the costs of the appeal.

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JOSEPH MOORE v. AUG. W. JOURDAN.

Possession under an act of sale not recorded, is not sufficient notice to creditors and subsequent purchasers, to defeat the operation of the registry laws.

A preemption right on a tract of land cannot be transferred until it be paid for, and a receipt obtained from the receiver.

A PPEAL from the District Court of the Parish of Point Coupee, *Haralson, J. John Yoist and U. B. & E. Phillips*, for plaintiff. *Provosty & Jourdan*, for defendant and appellant.

COLE, J. This suit was instituted by *Joseph Moore*, to recover from the defendant, *A. W. Jourdan*, a tract of land fronting on Bayou Lafouche, known as

subdivision No. 1, of lot 4 of sec. 31, of township 2, range 8, and subdivision No. 1, of lot 4, of sec. 73, township 2, range 7 east.

This land was purchased by plaintiff by public act of sale from *J. W. Mills*, on the 19th of February, 1856, duly recorded on the 21st of the same month and year.

Mills acquired the land from the United States on the 1st of April, 1854.

Plaintiff also claims five dollars per acre for hire of the land since defendant has had it in his possession.

The defendant claims to be the owner of the land, from having bought it from *Ira E. McGehee*, of Arkansas, who purchased it from *Mills*, the plaintiff's vendor, by private act, on the 2d of March, 1847, and alleges that *Mills* had then acquired a title to the same from the United States, and he specially denies that *Mills* purchased it in 1854. That if he obtained a receipt for it in 1854, the receipt was granted in error, and obtained fraudulently by *Mills* and plaintiff. That the second receipt was obtained for the purpose of conferring a title to the land to plaintiff. But, that should the second receipt be legal, it enures to the benefit of respondent.

Defendant also alleges that plaintiff knew of the sale of the land by *Mills* to defendant's vendor, *McGehee*; that he assisted *Mills* to deceive the Register to obtain a receipt in order to secure the land to himself; that he acquired the land from *Mills* fraudulently, and with a full knowledge of the transfer of the same to *McGehee*, and that he paid no consideration for it. He also claims compensation for improvements in case of eviction in his amended answer, and reiterates the statement that *Mills* acquired no new title to the land by virtue of the receipt of 1854, but had already acquired the land from the government, on the 17th of December, 1844.

There was judgment for plaintiff, and defendant has appealed.

The sale from *Mills* to *Moore* is by authentic act, and was duly recorded on the 21st of February, 1856, two days after it was executed.

The title under which defendant claims, is a bond executed on the 2d of March, 1847, given by *Mills* to *McGehee*, for the sum of one thousand dollars, the condition of which is :

"That whereas, the above bound *James Mills* has this day, by bargain and sale, relinquished all his rights and title to a certain tract of land lying on the Bayou Latanache, State and parish aforesaid, being the same on which the said *James Mills* and family now reside, and adjoining lands which the said *I. E. McGehee* recently purchased from *Asa Brown*, and for and in consideration of the said bargain and sale above named, the said *I. E. McGehee* has this day paid to the said *James Mills*, the receipt of which is hereby acknowledged, the sum of two hundred dollars in money, and the further sum of three hundred dollars in a draft on the mercantile house of *Moon, Titus & Co.*, of New Orleans, payable at sight, which said draft, the said *Mills* binds himself to present for payment before the expiration of twenty days from the date hereof, and if payment of the three hundred dollars be made, then the said *Mills* binds himself by these presents to abandon the foregoing described lands within twenty days from the date hereof, and give to the said *I. E. McGehee* full, quiet, and peaceable possession of the aforesaid land, together with all the buildings thereon. Now, if the said *Mills* shall strictly comply with the foregoing stipulations, then this obligation to be null and void, otherwise to remain in full force, virtue and effect."

This document is certified to be a true copy from the original on file, and of

MOORE
v.
JOURDAN.

record in the Recorder's office. The certificate is dated 18th July, 1856, which is the day, we presume, that it was recorded, as we have no other evidence of its registry.

Moore's title was recorded on the 21st of February, 1856, about five months previous.

The Act of 1855, p. 335, provides, that no notarial act concerning immovable property, shall have any effect against third persons, until the same shall have been recorded in the office of the Parish Recorder, or Register of Conveyances of the parish where such immovable property is situated.

Even if *Moore*, at the time of his purchase, knew that the land had been sold to *McGehee*, still this would not benefit the defendant.

It cannot be admitted that possession under an act of sale not recorded, is sufficient notice to creditors and subsequent purchasers to defeat the operation of the registry laws. *Poydras v. Laurans*, 6 An. 772; *Tulane v. Levison*, 2 An. 789.

It does not, however, appear that *Moore* knew, or could have known, that *Mills* had sold the land to *McGehee*, because *Mills* only agreed upon certain conditions to give him possession of it.

But even if the bond had been recorded anterior to the sale to *Moore*, it would not appear to be valid as a sale, because by its terms the obligation was to be null if *Mills* complied with its conditions, and it appears that he did. It might be viewed as an agreement to sell, which would have authorized an action by *McGehee* to compel *Moore* to have passed a sale of the land to him.

In the sale from *McGehee* to defendant, only the right, title and interest of *McGehee* to this land is conveyed.

Plaintiff offered to prove that this bond was obtained by *McGehee* from *Mills*, by fraud and misrepresentation, and that it was given by *Mills* in error, which was produced by the fraudulent misrepresentations of *McGehee*.

This testimony was ruled out by the District Judge, for the purposes for which it was offered, but was received for the purpose only of rebutting the charge of fraud set up by defendant.

The evidence also shows that *Mills* had entered the first lot; but his entry had been cancelled in 1846, on the ground that the front portion could not be entered separately from the back part, and the Register was instructed to notify *Mr. Mills* to come forward and enter the whole tract if he chose to do so, as his proof was regarded as sufficient, and if not, to return to him the money paid for the front lot. But it was not until the first of April, 1854, that he went to the land office and paid for, and received a new certificate for the whole tract.

Mills had, in 1847, at the time of the execution of the bond, only a preëmption right on the whole tract, which could not be transferred until he paid for it, and obtained a receipt from the Receiver, which he did not do till 1854. *Arbour v. Nettles*, 12 An. 217; *Penn v. Ott*, 12 An. 233.

Judgment affirmed with costs.

Re-hearing refused.

W. W. GILKINSON v. STEAMBOAT SCOTLAND AND OWNERS.

A witness is properly excluded on account of interest, where he has a hope of gain, although it be uncertain whether any advantage can arise to him, even if the decision be favorable.

Where the owners of a steamboat acknowledge to have received into their custody property which they agreed to deliver to a particular house, and they failed to do this, but delivered it to another house, the burden of proof rests on them, to show that they made this delivery for the account of the shippers.

APPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
Durant & Hornor, for plaintiff and appellant. *P. E. Bonford*, for defendants.

COLE, J. On the eighth of September, 1857, plaintiff shipped on board the steamboat Scotland, whereof *H. G. McComas* was master, then lying at New Orleans, and bound for St. Louis, sixty thousand feet of pine lumber, consigned unto *Holmes & Dukey*, or assigns, at St. Louis, at ten dollars per thousand feet for the freight thereof from the port of New Orleans to St. Louis.

There was judgment for defendants, and plaintiff has appealed.

It is the duty of defendants to explain what they did with the lumber, but they have not attempted to do this.

In their answer, they aver that the consignees of the lumber refused to receive the same, or to pay the freight due thereon; that defendants then placed it in the care of *A. Giraldin & Co.*, a commercial firm of St. Louis, with directions to dispose of it to the best advantage for the owner.

They have, however, failed to show that they put the lumber under the care of *Giraldin & Co.* for the benefit of plaintiff.

On the contrary, they objected to testimony which might have elucidated their action with that house.

Our view of this case renders it unnecessary to decide upon the admissibility of the testimony of *Moore*.

The testimony of *Sharpless* was also objected to by defendants, on the ground of interest, and was properly excluded.

He was to have a part of the profits that should be made by the sale of the lumber in St. Louis.

It is contended that he is a good witness, because it is clear that there will be no profits, even if the highest market price at St. Louis should be received by the plaintiff; but the hopes of the witness, that perhaps there would be a profit, might have influenced his mind, for until the suit be finally decided, it cannot well be known if any profit will result from the speculation, or not.

Independantly, however, of the evidence of *Sharpless*, the defendants must be held responsible. They acknowledge to have received the property of plaintiff, and to have agreed to carry it and deliver it to a particular house. They acknowledge not to have done this, but to have given the lumber to another house. The *onus probandi* was on them to prove that they did deliver it to this other house for the account of plaintiff; but they have entirely failed to make any such proof.

It is established by a witness, that a lot of pine lumber was sold at St. Louis for \$28 per thousand, on four months credit, whilst defendants were there with

GILKINSON
v.
Sgt. Sootland.

that of plaintiff, and that the purchaser said he would rather have given \$30 for lumber like that of plaintiff.

The testimony indeed shows, that a panic existed at that time, and that the price of lumber had generally fallen; but every thing is to be presumed against the unfaithful agent, and it is reasonable to suppose that defendants could have got the same price as that which was obtained for lumber then on the wharf, which was considered by the purchaser as inferior to that of the plaintiff.

Sixty thousand feet at \$28 per thousand is \$1680. From this must be deducted \$600 for the freight, at \$10 per thousand feet.

There is no evidence as to the commissions and charges, except that of *Sharpless*. His testimony having been excluded, the right of action of defendant for the charges at St. Louis, such as commissions for selling the lumber, or wharfage, which the plaintiff would have been obliged to pay if the lumber had been sold for his account, must be reserved, if such right he has.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; that plaintiff recover *in solido* from the defendants one thousand and eighty dollars, with five per cent. interest thereon, from judicial demand; that the privilege of plaintiff be recognised for the amount of this judgment, upon the property sequestered in this suit, that it be seized and sold to satisfy this judgment; that the right of action of defendants for charges upon the lumber, such as commissions for selling it, or wharfage, be reserved against plaintiff, to be urged in another suit, if any such he has; and that defendants pay the costs of both courts.

T. S. DUGAN & Co. v. EDWARD FULTON.

Prescription will bar an action, unless a case of inability to sue be fully made out.

APPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
Hunton & Miller, for plaintiffs and appellants. *Geo. L. Bright*, for defendant.

BUCHANAN, J. This is a suit upon an open account, and the defence is prescription. Plaintiffs endeavor to escape the effect of this plea, by arguing that the defendant had put it out of their power to sue him, by removing from the State in which both parties resided, Ohio.

But it is proved by two witnesses, that plaintiffs were informed that defendant resided in San Francisco, California. And in corroboration of this fact, the petition states, that in the year 1850, or thereabouts, the defendant left the State of Ohio for California.

Under these circumstances, a case of inability to sue, is not made out, and the plea of prescription must prevail, under the doctrine of *Suydam v. Kinney*, 9 An. 316. See also 4 An. 418, and 10 An. 553.

Judgment affirmed, with costs.

MRS. C. B. BOWERS v. THOMAS HALE.

Sections second and third of Act of 1855, require for the validity of acts of mortgage by married women, that the wife should be examined at chambers, by the Judge of the district or parish where she resides, separate and apart from her husband, touching the objects for which the debt is contracted, and that the Judge, upon being satisfied that the debt is solely for her separate advantage or for the benefit of her separate or dotal property, should furnish her with a certificate to that effect, which shall be annexed to the notarial act.

A party interrogated as to whether there was not a balance due him at a certain time, has a right to add to his acknowledgement of such balance, that it no longer exists, having been discharged by payment.

A natural obligation is a valid consideration for payment, and bars a demand for repetition.

Art 2409 C. C. declares that "the wife who has obtained a separation of property must contribute in proportion to her fortune and that of her husband, both to the household expenses, and to those of the education of their children. *She is bound to support those expenses alone if there remains nothing to her husband,*" Art. 2412 C. C. means that the married woman shall not bind herself above and beyond the obligations imposed upon her by Art. 2409.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
W. D. Hennen, for plaintiff and appellant. *P. E. Bonford*, for defendant.

BUCHANAN, J., The plaintiff is a married woman, separated in property from her husband, who is proved to be insolvent.

She leased, in her own name, from defendant, a house belonging to the latter, by notarial act before *Graham*, notary public in New Orleans, from the 1st November, 1855, to the 1st of November, 1856, for the yearly rent of twelve hundred dollars, payable monthly, in the manner and by the installments expressed in the Act.

In the same act, the plaintiff acknowledged herself to be indebted to defendant in the sum of three hundred and thirty-eight dollars, for rent to him due and remaining unpaid: and in liquidation of said year's rent, (says the act,) and of the said debt of three hundred and thirty-eight dollars, making together the sum of fifteen hundred and thirty-eight dollars, the said mistress Bowers has given her twelve promissory notes, drawn to the order of and endorsed by herself, countersigned by her husband, and made payable, six for the sum of one hundred and fifty dollars each, in one, two, three, four, five and six months respectively, after date; one for the sum of one hundred and thirty-eight dollars in seven months after date, and five, each for the sum of one hundred dollars, in eight, nine, ten, eleven and twelve months after date." To secure the payment of these notes, the plaintiff, by the same Act, mortgaged to defendant, a negro woman slave named *Violette*, the separate property of plaintiff. The parties afterwards agreed that the lease should terminate on the 1st October, instead of the 1st November, 1856, and the note for the rent of the month of October (\$100), was given up by defendant to plaintiff. The sixth note, \$150; the tenth, \$100, and the eleventh, \$100, were protested at maturity for non-payment.

On the 16th October, 1856, *Mrs. Bowers* brought this suit, to annul the mortgage granted by her to defendant, on the ground that it was not clothed with the formalities required by the Act of 1855, (page 255,) to enable married women to bind their separate or dotal property; and on the further ground, that she was not indebted to defendant in the sum of three hundred and thirty-eight dollars, as alleged in the act of mortgage, but that the same was a debt of her husband, for which plaintiff was not bound. Upon this latter ground, she also demanded restitution of the unpaid notes No.'s 6, 10 and 11, from defendant. De.

BOWERS
v.
HALE.

fendant pleaded a general denial, and that the plaintiff was separate in property from her husband, who was in insolvent circumstances; and that the premises leased were occupied by herself and family. Also claimed in reconvention the amount of the unpaid notes of plaintiff.

The second and third section of the Act of 1855, referred to in the petition, require, for the validity of acts of mortgage of this kind, that the wife must be examined at chambers by the Judge of the district or parish where she resides, separate and apart from her husband, touching the objects for which the debt is contracted, and that the Judge, upon being satisfied that the debt is solely for her separate advantage, or for the benefit of her separate or dotal property, shall furnish her with a certificate to that effect, which shall be annexed to the notarial act. This formality was omitted in the present case. Whether the Act of 15th March, 1855, governs mortgages made by a married woman *separated by property*, is not necessary for us to decide in this case, inasmuch as the appellee has not prayed for an amendment of the judgment appealed from.

The plaintiff, by a supplemental petition, propounded to defendant interrogatories on facts and articles. The fourth was as follows: "was there not a balance due you on the 1st November, 1855, for the rent accruing before that date? Was not that balance three hundred and thirty-eight dollars, or thereabout? If it was not that sum, then state its amount? And was not that balance a balance due on the lease of the premises made by you to *George P. Bowers*, which lease is referred to in the first and second interrogatory?"

To this interrogatory, the defendant answered: "There was a balance due me for about the amount mentioned in the interrogatory, but that amount (with the exception of fifty dollars) has since been paid. I was about to make a seizure of the furniture for the amount due, when at the special request and instance of *Mrs. Bowers*, I agreed to include the amount in the mortgage referred to in the petition. She promised, in case I would not carry my threat into execution, to pay the balance at the rate of fifty dollars per month, and accordingly some of the notes were given for one hundred and fifty dollars each, so as to include the extra fifty dollars per month to be paid by her on account of the balance. The balance has been paid by the payment of five of the one hundred and fifty dollar notes, in which it was included."

On trial, plaintiff's counsel moved to strike out all that portion of this answer, commencing with the words "but that." The motion was refused, and a bill of exceptions taken.

The question propounded was, whether a balance was due on the 1st November, 1855, upon *George P. Bowers'* lease of the premises in question for the year preceding the 1st November, 1855. The response to this question was, that there was such a balance due at the date mentioned, but that the said balance had been paid, with the exception of fifty dollars. The remainder of the answer is an explanation of the manner in which payment had been made.

We think the party interrogated had the right to add to his acknowledgement of a balance due at a certain time, his declaration that the balance no longer existed, having been discharged by payment. Civil Code, Art. 2270; Code of Practice, Art. 353; 5th Martin, 667; 11 Martin, 222; 3 A. 648, and the cases there cited.

No attempt was made to rebut the answers of the defendant to interrogatories. It is, therefore, proved, that there was a balance due on the rent of the house occupied by plaintiff and her family, for the year ending the 1st November, 1855,

and that the said balance was nearly all paid by plaintiff previous to the institution of this suit. This is not an action to recover back money paid in error. It was upon that ground the District Judge rejected the greater part of the plaintiff's money demand. But as some members of the court are of a different opinion, (there being a prayer for general relief,) we will consider the case as if the plaintiff had demanded a restitution of the money paid, as well as the cancellation of her unpaid notes. And we think that both demands should be rejected, upon the matters pleaded in the answer, which being established by the proof and admissions, show, first, a natural obligation on the part of plaintiff, which is a valid consideration for the payment and bars the demand in repetition; and secondly, a legal obligation, under Art. 2409 of the Civil Code, for the rent of the premises occupied by plaintiff and her family in the year 1855 and 1856. The plaintiff's obligation to pay the rent of 1856, is indeed not disputed. But that for the previous year's rent is equally clear.

In fact, this record presents the very case of the Art. 2409 of the Code. That Article says: "The wife who has obtained the separation of property, must contribute, in proportion to her fortune, and to that of her husband, both to the household expenses, and to those of the education of their children. *She is bound to support those expenses alone, if there remains nothing to her husband.*" The plaintiff declares herself, in the notarial act of the 1st November, 1855, to be separated in property from her husband. The record of the suit of plaintiff against her husband for separation of property is in evidence. It was admitted on trial, that during the years 1855 and 1856, and up to the present time, there were numerous judgments unsatisfied, to a considerable amount, against her husband. She stated, therefore, nothing but the truth, when she declared herself in the notarial act, to be justly and truly indebted to defendant in the sum of three hundred and thirty-eight dollars for rent unpaid upon the previous year; for that rent came most clearly under the denomination of household expenses, and the balance due was about one-fourth of the year's rent. The insolvency of plaintiff's husband being admitted, and the possession of property in herself being proved, she was bound, under the law, to pay, not merely the fourth, but the whole of the rent. The Article 2412 of the Code, is therefore applicable to this case. For we have here an obligation which existed anterior to, and independently of her contract; an obligation imposed by the law, and which might have been enforced against her, had she never given her notes to plaintiff. The juxtaposition of the two Articles 2409 and 2412, forbids the idea of their inconsistency. The latter of the two, is to be taken to mean, that the married woman shall not bind *herself* above and beyond the obligations imposed upon her by the former.

It is a rule in the interpretation of statutes, universally recognised, that effect must be given to every part of the statute. And it may be safely asserted, that it is impossible to imagine a case to which the Art. 2409 will apply, if not to the case now under consideration. Reject its application here, and you expunge it from the statute book.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed; and it is further decreed, that the costs of appeal be paid by plaintiff and appellant.

MERRICK, C. J., dissenting. The case is correctly stated by the District Judge. He says:

"Plaintiff sues for the annulment and erasure of a mortgage given by her to defendant to secure the payment of certain notes for rent, and for the cancellation

BOWERS
v.
HALE.

of, and delivering of three of said notes yet unpaid by her, on the grounds that said act of mortgage was not executed in accordance with the provisions of the Act of 15th March, 1855, and that the notes thus given and secured, included the sum of \$338, the amount of a debt due by her husband to defendant, which she was induced to assume, and for which she contends she is not liable."

The act of lease and mortgage shew that the sum of \$338 was added to, and included in the notes given for the rent, and the answers of defendant admit that plaintiff's husband owed him a balance of \$338, which, at the request of plaintiff, he agreed to include in the mortgage, and which she agreed to pay at the rate of \$50 per month, but he states that this balance, except \$50, has been paid, and the question is whether or not plaintiff is to pay the \$300 which defendant alleges is yet due on her contract of lease. She admits owing a balance of \$12."

"The sum of \$338, from which plaintiff seeks to be released as the debt of her husband, was added to the yearly rent and twelve notes given for the total, secured by mortgage on certain slaves of the plaintiff, but the defendant contends, and so states in his answers to interrogatories on facts and articles, that the said sum of \$338 was distributed in among the seven first notes, all of which have been paid except the sixth, and that consequently he is not bound under the pleadings to refund, but is entitled to judgment for the notes yet unpaid."

"Plaintiff contends that having assumed an obligation illegal and prohibited, she should be relieved from the amount thereof out of any portion not yet paid and asks that these notes be declared null."

The District Judge came to the conclusion, that as the \$338 was apportioned among the first seven notes, and all of them had been paid except one, that he could only relieve the plaintiff for the fifty dollars of the husband's debt, supposed to be contained in that note, and he rendered a personal judgment against the plaintiff for the residue of the three notes remaining unpaid upon the plaintiff's reconventional demand.

The contract entered into between plaintiff and defendant, was a single act containing several stipulations securing certain promissory notes in favor of defendant. Among others, it contains a stipulation reprobated by our law, viz: that the wife should pay a debt of her husband for \$338, C. C. 2412.

The defendant says, true it is, that the wife was not bound for this debt, but as I distributed this amount among the first notes, and she has paid all but one, she cannot recover the money back, and as to the other notes, I am entitled to your judgment in my favor, as they relate to other portions of the contract. This reasoning appears to me to be falacious. The defendant admits, by this reasoning, that by the contract which he now asks us to enforce, he has committed a wrong to the plaintiff, and equity requires that courts of justice should not permit him to obtain an unjust advantage by a contract which he seeks to enforce. The legal or equitable maxims that "no man shall be permitted to take advantage of his own wrong," and "he that asks equity must do equity," ought to control this case. See also *Theriet & Baron v. Voorhies*, 12 A. 852. I do not understand that it was contested that the wife was bound for the rent prior to the act of mortgage.

The prayer for general relief, and the oral general denial to the reconventional demand, enable the court to render justice upon the merits.

I think the judgment ought to be reversed, and that there should be judgment in favor of defendant on the reconventional demand for \$12.

See case of *Provost v. Provost*, 5 An. 572.

LAND, J., concurred in this opinion.

MARY E. LYONS, Tutrix, v. R. W. McRAE—T. C. DIAL, Third Opponent.

Where a third opposition has been notified to the Sheriff, only after property has been seized, sold and the proceeds distributed among the judgment creditors, the third opponent's privilege will not entitle him to be paid out of the proceeds of the sale thus judicially made.

APPEAL from the District Court of the Parish of Pointe Coupée, *Ratliff, J. U. B. & E. Phillips*, for third opponent. *T. J. & W. H. Cooley*, for *Procosty*, and *P. H. Ray*, for defendant and appellant.

MERRICK, C. J. *Thomas C. Dial* claims a privilege for overseer's wages, upon the proceeds of the sugar referred to in the case of the same parties, on the opposition of *Claycomb*.

This case differs from *Claycomb's* case in this, that the opposition in that case was filed before the sugar was sold, and the seizing creditors might have seized other property. In this case, the opponent, who had aided the insolvent in sending off a portion of the crop to pay other debts, waited until after the Sheriff's sale and the surrender, and had his opposition notified to the Sheriff, for the first time, after the Sheriff had settled with the attorneys of the seizing creditors for the proceeds of the sale subject to be refunded in case the claim of *Claycomb* should be sustained.

It is clear that *Dial* cannot avail himself of *Claycomb's* opposition, and the parties had the right to settle for the proceeds in the hands of the Sheriff in their own way. It was a matter between the seizing creditors, whether they would receive of the Sheriff drafts on his merchants, or other equivalents, for the proceeds of the sale, nor did it concern *Dial* whether the creditors had fully guaranteed the Sheriff against *Claycomb's* demand or not. He could not claim the benefit of that guaranty for the purpose of sustaining his opposition.

As this opponent has aided other privileged creditors to obtain the proceeds of a portion of the crop, we think, in view of his tardy opposition, he should be left to assert his privilege upon such remainder of the crop as may be in the hands of the syndic, and that he should not be permitted to avail himself of the diligence of others after a distribution of the proceeds among themselves.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed as to the seizing creditors, and that the third opposition of *Thomas C. Dial* be dismissed as to them, as in case of a nonsuit, he paying the costs of both courts.

COLE, J., concurring. I concur in the conclusion of Mr. C. J. Merrick, on the ground that the money made by the sale of the property seized was paid over to the seizing creditors before the opposition of *Dial* was served upon the Sheriff.

W. A. HANNEY v. JOHN HEALY.

Where a judgment has been rendered, accepting a surrender made by an insolvent debtor, and granting a stay of proceedings, according to the provisions of the 6th and 7th sections of the Act of 1855, and the Articles of the Civil Code 3051 et seq., the notice given to creditors in compliance with the above mentioned law, cannot, in case of informality in the return of the officer, as to the mode of making the service, prejudice or affect the stay of proceedings granted by the court.

If a creditor wishes to question the legality of such proceedings, he cannot do so unless by a direct action to that effect.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
G. L. Bright, for plaintiff and appellant. *Collens & Woolridge*, for defendant.

VOORHIES, J. The plaintiffs have appealed from a judgment maintaining an exception, filed by the defendant, to their right to institute this suit. The ground upon which this exception is based is, that there had been a surrender made by the defendant, and accepted by the court, before this action was brought.

It is not necessary to inquire into the bill of exceptions on file in this case, and into the requisites of a return of the Sheriff as to the mode or manner in which the creditors of the insolvent have been notified. Suffice it to say, that in this instance, the defendant had filed his bilan, on which the plaintiffs were placed as creditors, and obtained from the court a stay of proceedings before the institution of the present action.

The 6th section of the Act of 1855, p. 433, provides: "That whenever the judge shall be convinced that the debtor who wants to surrender his property has complied with all the formalities prescribed, he shall endorse on the schedule that the cession of all the property of the insolvent is accepted for the benefit of all his creditors, and shall order a meeting of the creditors, to be called in the manner and within the time prescribed for respites. Civil Code, Article 3051 et seq."

The 7th section reads: "When issuing the order for the meeting of the creditors, the judge shall order that all the proceedings, as well against the person as against the property of the debtor, be stayed." C. C. 3054.

The notice given to the creditors, in compliance with the above provisions of the law, cannot, in case of informality in the return of the officers, as to the mode of making the service, prejudice or affect the stay of proceedings granted to the insolvent by the court. If a creditor wishes to question the legality of such proceedings, he cannot do so unless by a direct action to that effect; and, in no event will he be permitted to disregard, and treat as an absolute nullity, a judgment accepting a surrender made by his debtor, and granting a stay of proceedings.

The exception was properly maintained, and the plaintiff's action dismissed, with costs.

Judgment affirmed.

SUCCESSION OF R. W. POWELL—Oppositions of R. A. BOURKE, Administrator, and HOPKINS.

The administrator is entitled to commissions only on the amount which comes into his hands, and for which he is responsible.

The surviving partner who liquidates the concern, is not entitled to a judgment for any apparent balance in his favor, until he shows a full and entire settlement of the partnership affairs.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
Lea & Marr, for Hopkins. J. Magne, for G. F. Weisse. Benjamin, Bradford & Finney, for Waterhouse. Chilton & Harrison, for administrator and appellant.

BUCHANAN, J. The administrator, and the late partner of the deceased, are appellants from a judgment rendered upon oppositions to the account of administration.

The following are the reasons given by the District Judge, for his judgment upon the claims of the appellants, rejected by him :

“The opposition to the claim of \$6,442 16, on the part of the administrator, must be maintained.

“He claims this sum as a commission of two and a half per cent. upon \$165,759 87, which he avers were paid and received by *Hopkins*, the surviving partner. It is clear, in my judgment, that he is not entitled to this allowance. The value of the succession, as appears from the inventory, is \$7,731 97. This is the amount which came into the administrator's hands. This is the amount for which he gave bond—and this is the amount which he has to account for. To the charge of two and a half per cent. upon this amount, no objection is made; but I think the opposition to the other claim is well founded. The commission is allowed for the care, trouble, and responsibility of the administrator, with regard to the funds and property which came under his hands. This large amount was never in his keeping; he was never responsible for it; his bond did not cover it; and I think it impossible to admit, that under these circumstances, the administrator should receive, as a commission, nearly, if not quite, the whole proceeds of the succession.

“I am also of opinion, that the opposition to the claim of *Hopkins*, is well taken. *Powell & Hopkins* were partners. The partnership was to continue after *Powell's* death. *Hopkins*, as he had the right to do, continued the business. He has been liquidating the affairs of the partnership. They are not yet settled. By the accounts furnished, it would appear that *Hopkins* had paid the sums which he claims, and that these sums were paid by *Hopkins*, over and above the assets of the partnership. But the liquidation is not complete. There is no evidence of bad debts. The assets have not been disposed of, so far as the record discloses, and until the final settlement of the whole affairs, it will be impossible to say whether the succession of *Powell* will be indebted to *Hopkins*, or whether *Hopkins* will be indebted to the succession of *Powell*.

“In this condition of the affairs of the parties, it seems to me it would be manifestly improper to give a judgment in favor of the liquidating partner, which would absorb the greatest portion of the small amount of assets in the hands of the administrator, when it might turn out that the liquidator, upon a final settlement of accounts, would be indebted to the succession.

SUCCESSION OF
POWELL.

"The same reasons apply to the opposition of *Hopkins*, claiming more than was allowed him. His opposition, in this regard, must be dismissed."

The facts are correctly stated in this extract from the reasons for judgment of the District Judge, and we concur in his legal conclusions from those facts.

Judgment affirmed, with costs; and without prejudice to the claim of *A. M. Hopkins*, if any he shall be found to have, upon final liquidation of the partnership of *Powell & Hopkins*.

JAMES TODD v. JAMES H. SHOUSE.

Accommodation acceptors are not creditors of the drawer of a draft accepted by them, until after it has matured, and they have been obliged to pay it, and an attachment issued by them before maturity is not rendered valid by subsequent payment of the draft, which makes them creditors of the drawer. An attachment must stand or fall according to the state of facts existing at the date of its issuing, and cannot be cured by a subsequent event.

APPEAL from the Third District Court of New Orleans, *Duvigneaud, J.*
C. Roselius and *A. Phillips*, for plaintiff and appellant. *T. H. Kennedy*,
J. M. Chilton, and *Waples & Eustis*, for defendants and appellants.

LAND, J. This suit was commenced by attachment on the 18th of July, 1857, for the recovery of \$2,100, alleged to be due for money "*advanced and lent to the defendant.*" On the same day, the Sheriff states that he attached in the hands of *Whitehead & Chambers*, all the goods and chattels, rights, credits, monies and effects, in their possession or under their control, belonging to defendant, from which seizure nothing came into his hands.

On the 17th of November, 1857, the plaintiff filed a supplemental petition, making *Whitehead & Chambers* garnishees to the action, and propounding interrogatories to them, in answer to which, they say they have in their possession three hundred and one pieces of Kentucky bagging, which they believe belongs to the defendant.

On the 28th of November, 1858, the plaintiff filed a second supplemental petition, in which he alleged that the *loan alluded to in his original petition*, and constituting the basis of his action against the defendant, was made in the form of an acceptance of defendant's draft for \$2,100, dated July the 3d, 1857, and payable four months after date, and that at its maturity he was obliged to pay the same.

On the 11th of December, 1857, *J. A. Twyman*, *J. R. Goodloe* and *J. E. Haskins*, intervened in the suit, and claimed the property attached, by virtue of an assignment made by the defendant to them, in the State of Kentucky, of all his property, for the benefit of his creditors.

On the 9th of January, 1858, a rule was taken on the plaintiff, by the attorney appointed to represent the defendant, to show cause why the attachment issued in this case, should not be dissolved, and the suit dismissed on the following grounds:

First—That the debt claimed of defendant was not due at the date of the attachment, and of the filing of the original petition, and that the affidavit for attachment is not such as the law requires, when the debt is not actually due.

Second—That nothing was attached under the original process.

TODD
v.
SHOUSE

Third—That the supplemental petition filed on the 17th November, 1857, and attempted attachment under the same, are not accompanied by an affidavit as the law requires. And,

Fourthly—That the cause of action set out in the original petition was abandoned by the filing of the supplemental petition, filed 28th November, 1857.

It is only necessary to notice the first of these grounds, for the dissolution of the attachment. In the case of *Read et al. v. Ware*, almost identical with this, the court say :

"It cannot be said that, at the date of the attachment, the plaintiffs were creditors of the defendant for the amount of this accommodation acceptance. The holder was the creditor ; as between the plaintiffs and defendant, there was not an existing indebtedness payable at a future day. The subsequent payment of the bill by the plaintiffs, which made them the defendant's creditor, could not retroact so as to give validity to the attachment. An attachment must stand or fall according to the state of facts existing at the date of its issuing, and cannot be cured by a subsequent event. To say otherwise, would be to say that the defendant was liable to a double attachment at the same time, one by the bill holder and one by the accommodation acceptor."

There is no error in the judgment of the lower court, making the rule absolute and dissolving the attachment. As there was no personal citation of the defendant, nor appearance by him, the judgment on the rule terminates the suit for want of jurisdiction.

With the main action, the demand in intervention, which is but an accessory, also ends.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed with costs. And it is further ordered and decreed, that the intervenors pay the costs of intervention in the lower court.

COLL, J., absent.

DUBOIS & MISH v. A. XIQUES, Syndic.

A resolatory condition is implied in all commutative contracts, to take effect in case either of the parties do not comply with their engagements.

The dissolution of the contract for non-compliance with its obligations, may be demanded by suit or by exception.

The rights of property of an insolvent are vested by law in the syndic of his creditors.

There is nothing inconsistent in a demand for the dissolution of a lease, being coupled with a demand for the rent up to the time that possession is delivered to the lessor.

In a suit brought by a lessor against the syndic of an insolvent lessee, although the lessor's privilege can only be regularly considered upon a tableau of distribution, yet a prayer for general relief in the petition, will enable the court to reserve the rights of all parties interested in the matter.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*

P. Childress and Lacy & Upton, for plaintiff and appellant. *Durant & Hornor*, for defendant.

BUCHANAN, J. Plaintiff leased to *Hernandez* certain premises to be used as a cigar store, and for no other purpose, for the term of three years, beginning the 1st of September, 1856, at the rate of twelve hundred dollars per annum, payable in installments of one hundred dollars, on the first day of every month.

DUBOIS
v.
Xiques.

It was a condition of the lease, that the lessee should not sub lease the premises, without the consent of the lessor in writing.

The rent was paid punctually up to the 1st of March, 1858 ; but the lessee failed to pay the rent for the month of March, 1858, although demand was made for the same ; neither has any rent been paid since that time.

Hernandez, the lessee, having made a cession of his property, the defendant, *Xiques*, was appointed syndic of his creditors, and caused the aforesaid right of lease to be advertised for sale, at public auction, for account of *Hernandez's* creditors.

On the 6th July, 1858, there being then four full month's rent due and unpaid, the plaintiffs filed their petition in this case, setting forth the facts aforesaid, and prayed that the syndic and the Sheriff be enjoined from selling the lease aforesaid ; that the same be annulled, and possession of the leased premises delivered to plaintiffs ; and for judgment recognizing their claim as a privilege, to be paid out of the proceeds of the sale of the fixtures on the premises leased, to the amount of four hundred dollars, due at the date of filing petition.

The legal formalities being complied with, a writ of injunction issued as prayed for. The syndic excepted to the petition, as containing no cause of action ; that the action to avoid the lease was a personal action against the lessee, and was lost by his cession of property ; that the prayers for rent, and for the annulling the lease, are inconsistent ; and that no action lies against the syndic for a monied demand.

A rule to quash the injunction upon the same ground, pleaded in the exception, was subsequently taken by defendant upon plaintiffs.

The exceptions and rule were sustained by the District Court, and the injunction dissolved ; from which judgment the plaintiffs prosecute this appeal.

The contract between plaintiffs and *Hernandez* is a commutative contract ; and a resolutive condition is implied in all commutative contracts, to take effect, in case either of the parties do not comply with his engagements. C. C. 2041.

The dissolution of the contract for non-compliance with its obligations, may be demanded by suit or by exception. C. C. 2042.

In this case, the action was properly brought against the syndic of *Hernandez's* creditors, in whom were vested by law, the rights of property of the insolvent. Acts of 1855, page 433.

The petition presents a case for the dissolution of the contract of lease. Apart from the general provision of law, conferring the right of action, upon the facts stated, we find it alleged, that the resolutive condition was expressed in the contract between the parties ; and that allegation is confirmed by the copy of the lease annexed to the petition.

There appears nothing inconsistent in a demand for the dissolution of the lease, being coupled with a demand for the rent up to the time that possession is delivered to the lessor. The former implies that a contract exists, which it is the purpose of the plaintiff to put an end to, by judgment of court. The latter requires that by the same judgment, it be decreed that the party in default shall pay the amount due under his contract, at the moment of its dissolution, and to the time of execution of the other branch of the action.

But there is no demand for a money judgment against the syndic of *Hernandez*. There is only a prayer for the recognition of a privilege, and if it be objected, as it may be, under our jurisprudence, that such a privilege can only be regularly considered upon a tableau of distribution, the prayer for general re-

lief, in the petition contained, will enable the court to reserve the rights of all parties interested in this matter.

DUBOIS
v.
Xiques.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed; that the exceptions of defendant be overruled, and the rule to quash the injunction dismissed; that the defendant, *Xiques*, in his capacity of syndic of the creditors of *A. Hernandez*, pay the costs of said exception and rule, and of this appeal; and that the cause be remanded to the District Court for further proceedings according to law.

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JULES TARDOS v. SHIP TOULON AND OWNERS.

Where goods are delivered into the possession of a common carrier, it is for him to show that he used due care for their preservation, for the shipper is not supposed to be present during their transportation, and the goods are in the custody of the owners of the vessel and their agents.

Article 3204 of the Civil Code gives a privilege on the ship for damages due to freighters for the failure in delivery of goods which they have shipped, or for the reimbursement of damages sustained by goods through the fault of the captain or crew.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
Clark & Bayne, for plaintiff and appellant. *Singleton & Clack*, for defendants.

COLL, J. This suit is to recover the value of two large looking-glasses and frames, placed by plaintiff on board the ship *Toulon*, to be transported from New York to New Orleans.

When the vessel arrived, and before the boxes were taken out, it was discovered that the glasses were broken.

The testimony establishes that the boxes containing the glasses were sufficiently strong; the planks of the boxes were of the thickness of an inch; the nails were very large, and such as are often used for boxes of this character. Forty-four boxes, received about the same time by the ship *Philadelphia*, were received from plaintiff in good order. They were put up in the same kind of boxes as those by the *Toulon*, and were put up by the same persons about the same time; the boxes on the *Toulon* were marked "glass" in two places in large letters.

Mr. Hillard, the agent of the vessel, admitted to one of the witnesses, that the captain of the ship had acknowledged that the boxes had been broken "on board ship," and that the captain claimed that the boxes were not of sufficient strength.

There is testimony to show that the boxes were not adequately strong for glasses of the size of those shipped by the *Toulon*; but the witnesses of defendant, who contradict those of the plaintiff, appear to have formed their opinion principally from their external appearance.

Hypothetical testimony as to the insufficiency of the strength of the boxes cannot outweigh the positive testimony, that boxes of a similar kind, and put up in the same way, arrived about the same time upon another ship, without being injured.

The bill of lading admitted the receipt of the boxes in good order, but had a stamp on the face, "Not accountable for rust, breakage, or leakage, unless improperly stowed or handled; contents unknown."

TARDOS
v.
SHIP TOULON.

"Unless improperly stowed" signifies that the ship shall not be liable if the merchandise be properly stowed. The proof of the character of the stowage is more within the power of the owners of the ship than of the shipper.

The goods are delivered into the possession of the common carrier, and it is for him to show that he used due care; for the shipper is not supposed to be present during their transportation, and the goods are in the custody of the owners of the vessel and their agents.

Even conceding that the common carrier would not be liable for the destruction of the glasses under the exception of breakage, still, in order to exonerate him, it would be necessary to show that the boxes had been properly stowed.

The only evidence upon this point, is that of a stevedore, who discharged the Toulon. He says they were stowed on their edges, and were properly stowed for glass; he was the first one that came to the boxes, and found that the contents were broken.

The defendant has not sufficiently established that the boxes were so stowed as to prevent them from rubbing against other articles; they may have been upon their edges, and yet might have been in motion more or less during the voyage and the appearance of the boxes shows such to have been probably the case.

Defendant received the glasses in good order; it is his duty to explain satisfactorily the cause of their destruction. This he has not done. The evidence of the stevedore is more than counterbalanced by that of the testimony which shows the boxes to have been sufficiently strong, and that many other boxes similar to those shipped by the Toulon, and containing glasses, arrived uninjured; that several parts of the boxes appeared to have been rubbed by some hard substance, that they appeared to have moved about and to have been rubbed and worn by a part of the cargo near them.

It is also shown that broken glasses have no value at all, and that the frames would be but of small value except to a person dealing in such articles.

There is no evidence to show that the frames without the glasses would have been of sufficient value to have paid the expenses of their public sale.

It is established that the glasses and frames were worth \$350.

The judgment of the District Court rejected the demand of plaintiff, and rendered judgment against him upon the reconventional demand of \$15 99, the amount demanded for the freight of the boxes.

Plaintiff is entitled to a privilege upon the ship for the amount due him. C. C. 3204, § 11. This court has no jurisdiction, on account of its amount, over the demand in reconvention.

It is, therefore, ordered, adjudged and decreed, that the judgment upon the demand of plaintiff be avoided and reversed; that plaintiff recover of defendants *in solido* three hundred and fifty dollars, with five per cent. interest thereupon, from the 29th April, 1857, and the costs of both courts; that the privilege of plaintiff upon the ship Toulon for the payment of this judgment be recognised, and that she be seized and sold to pay this judgment.

E. ROCHEREAU & Co. v. BARK HAUSA, CAPTAIN AND OWNERS.

The captain and owners of a vessel are liable for the acts of the stevedores employed by them to load their vessels.

A PPEAL from the Third District Court of New Orleans, *Duvigneaud, J.*
J. Magne, for plaintiffs. *W. D. Hennen*, for defendant and appellant.

LAND, J. The consignors of the plaintiffs shipped from Bordeaux some sixty-eight casks of wine, on board the bark *Hausa*, to be delivered in good order to the consignees at the port of New Orleans. On the arrival of the vessel at the latter port, eight casks were damaged *and empty*, or *nearly so*, and the small quantity of wine remaining was sour and worthless.

For the recovery of the value of the wine lost on the voyage, and of that deteriorated at the time of delivery, this suit was instituted.

The bills of lading contained the clause, "*free from breakage and leakage*," and it is contended that this clause limits the liability of the defendants as common carriers, and that they are not responsible, unless the plaintiffs prove that the damage or loss of wine, was the result of their fault or negligence in the transportation of the casks.

In this case, it is unnecessary to decide the question of law as to the burden of proof, for the reason, that proof has been made by the plaintiffs.

The evidence, *in this case*, shows, that according to the custom in Bordeaux, stevedores are usually selected by the captain or owners of a vessel, and that the latter are always responsible for the acts of the former in the matter of stowage.

The District Judge came to the conclusion upon the evidence before him, that the loss of wine was the result of damage done to the casks, whilst in the hands or under the control of the stevedores employed by the captain in loading the bark in the port of Bordeaux.

He says: "On the other hand, the plaintiffs have proved by several competent witnesses, among them there were coopers, that the casks were perfectly well made, of the best materials, especially those which contained the best quality of wine. That according to their long experience in shipping casks of wine, the pressure, spoken of by defendants' witnesses, could not have produced the leakage of the casks. Their opinion is, that the damage to the casks must have been done by the stevedores at the time they stowed the bark in Bordeaux, because the casks were staved, or *dépointés*, as they term it, and this could not be done but by a fall of the casks during the stowage. The court has arrived at the same opinion; if the bark was well stowed, if the pressure of the freight could not have occasioned the leakage, whatever heavy seas the bark may have encountered during her passage, *the only cause must be ascribed to the stevedores while stowing the bark in Bordeaux.*"

That the defendants are liable for the acts of the stevedores employed by them to load their vessel, is not questioned, and we have not been satisfied that the District Judge erred upon the facts of the case.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.

SUPREME COURT OF LOUISIANA.

MRS. KRON v. JOHN WATSON.

The payment of rent in pursuance of the terms of the contract of lease, is an *essential engagement* on the part of the lessee, and his non-compliance with it, gives to the lessor a right to sue for the dissolution of the contract.

APPEAL from the Third District Court of New Orleans, *Durigneaud, J.*
P. Soulé, for plaintiff. *Elliott and Clark & Bayne*, for defendant and appellant.

LAND, J. This is a suit to dissolve a contract of lease, on the ground of non-payment of rent, and for the recovery of rent alleged to be due, and to become due, during the pendency of this suit. It is the duty of the lessee to pay the rent at the terms agreed on, and if he fail to pay the rent, when it becomes due, he may be expelled from the premises. C. C. 2680, 2682.

The payment of rent, in pursuance of the terms of the contract of lease, is an *essential engagement* on the part of the lessee, and his non-compliance with it, gives to the lessor a right to sue for the dissolution of the contract. Civil Code, 2041.

In this case there was judgment for the plaintiff, and the defendant has appealed.

The answer is a general denial, and a plea of tender of the rent alleged to be due to plaintiff, before the institution of this suit.

The non-payment of the rent as alleged in the petition, was proved. The plea of tender is not sustained by the evidence.

Following the plea of tender in the answer, is an allegation, that the amount of rent due to plaintiff is deposited—but in support of this averment, there is no proof.

The judgment condemns the defendant to pay three hundred dollars for four month's rent of the premises. The rent was at the rate of sixty dollars per month, and payable monthly, and the judgment is erroneous in this respect; it should have been for two hundred and forty dollars.

It is, therefore, ordered, adjudged and decreed, that the judgment, so far as it condemns the defendant to pay three hundred dollars for four months rent, be amended, and instead thereof: It is ordered, adjudged and decreed, that the plaintiff recover of defendant the sum of two hundred and forty dollars for four months rent, from the 20th of November, 1857, to the 20th of March, 1858, and that said judgment be in all other respects affirmed, with costs in the lower court. And it is further ordered and decreed, that plaintiff pay the costs of this appeal.

H. H. ZACHARIE v. G. H. & R. S. KIRK—W. L. MILLER, Intervenor.

Where the master of a boat contracts a debt on account of the boat, the creditor has a right to sue either him or the owners of the boat, or both simultaneously.

In a suit brought against the drawer of a bill of exchange, it is not necessary to constitute a waiver of want of notice, that an express promise be made to pay the bill absolutely,—it is sufficient, if by reasonable intendment the language imports or implies a promise to pay it; as a promise to pay if the costs are thrown out.

A boat which has been sold is liable to seizure at the suit of the vendor's creditors as long as it remains in the possession of vendor.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
Durant & Hornor, for plaintiff. *Lea & Marr*, for defendants and appellants.

LAND, J. This suit was instituted on a bill of exchange for the sum of \$357 50 drawn by *George H. Kirk*, to the order of plaintiff, on and accepted by *R. S. Kirk & Co.* The bill was drawn on account of the steamboat *Messenger*, and the petition alleges, that it was protested for non-payment, and that due notice was given to the drawer, *George H. Kirk*, who was at the time a part owner with *Robert S. Kirk*, and with him bound *in solido* for the debts of the steamer.

This suit was commenced by attachment, and the steamboat *Messenger* was seized as the property of defendants. *William L. Miller* intervened in the suit, and claimed the boat as his property by virtue of a purchase on the 28th day of June, 1858, from *Robert S. Kirk*, and the recording of his title at the Custom-house, in this city, on the same day.

There was judgment in favor of the plaintiff against the defendants, and also against the intervenor. The defendant, *George H. Kirk*, and the intervenor, *W. L. Miller*, have appealed.

The defendant contends, that his only liability to plaintiff, was that of the drawer of the bill of exchange, and that he was never notified of the protest for non-payment, and that he was thereby discharged.

The evidence does not show that *George H. Kirk* was a part owner of the boat, nor does it show that notice of protest for non-payment, was given to him, but it appears, that he was the master of the boat, and the special agent of *R. S. Kirk*, the admitted owner; that the debt for which the bill was drawn by him, had been contracted on account of the boat, and that since the institution of this suit, he acknowledged his liability to pay it, by saying, in the language of the witness, "*that he would pay the claim, if the costs were thrown out.*"

As master of the boat, he was personally liable for the debt contracted by him, and the plaintiff had the right to sue him, or the owners, or both simultaneously, for its recovery. *Mead v. Buckner*, 2 L. 284. *Henshaw v. Rollins*, 5 L. 335.

Having been sued on a bill of exchange given for a debt for which he was personally and absolutely liable, it is a fair presumption, without any evidence to the contrary, that he had full knowledge of the *laches* of the holder, the plaintiff, when he promised to pay the bill, if the costs were thrown out, which declaration, in our opinion, was a confession of his legal liability, and makes sufficient proof of a waiver of the want of due notice.

It is not necessary that an express promise should be made to pay the bill or note absolutely. It will be sufficient, if by reasonable intendment, the language

ZACHARIE
v.
KIRK

imports, or implies a promise to pay it. Hence, it has been held, that a promise in these words, "*If the acceptor does not pay, I must; but exhaust all your influence with the acceptor first,*" was a waiver of notice. Story on Promissory Notes, §364.

The words "*if the costs were thrown out,*" we understand, to be an expression of unwillingness to pay the costs of suit, and not a condition, or limitation of his admission of liability to pay the bill. We are, therefore, of opinion, that the judgment against the drawer is correct.

The intervenor, *W. L. Miller*, contends that the first Judge erred in refusing to receive in evidence the enrollment of the boat in his name, and a license issued in his name authorizing him to employ the boat in the coasting trade; and also, in refusing to receive the testimony of *R. W. Adams*, to prove, that he, the witness, held a part of the promissory notes given for the price of the boat, as collateral security for a debt due him by the vendor, *R. S. Kirk*.

If this testimony had been received, it would not have benefited the case of the intervenor. He was the bar-keeper of the boat, without, or with very limited means, and became the purchaser at the price of \$17,000, for which he gave his promissory notes without security. There was no change in the officers of the boat, nor actual delivery of possession, or other circumstances indicating a change of property or ownership, save the paper title recorded at the Customhouse.

If the sale to *Miller* was not a pure simulation, the vendor was still in possession of the boat at the date of the plaintiff's attachment, on the 18th day of October, 1858, and the boat was, therefore, under these circumstances, subject to seizure at the suit of the vendor's creditors.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed with costs.

MERRICK, C. J., concurring. I have some doubts in this case, but I yield them to the clearer convictions of my colleagues.

LEWIS SELBY v. THE LEVEE COMMISSIONERS.

An assessment made under the Act of 1857 cannot be aided by the lien or privilege given by the Act of 1858. The Legislature intended to authorize a specific tax by the Act of 1857, a comparison of which Act with the previous Acts shows that the term "*specifically on each and every acre,*" was used in contradistinction to the *ad valorem* tax of former statutes.

It is not necessary that the voters who elect the Levee Commissioners should be equally assessed. Equality of taxation and representation, in inferior jurisdictions, is not essential under the Constitution. A party cannot be relieved from the payment of assessments and taxes on the ground that there might be an outstanding title in some one else; it is sufficient that he claims and possesses as owner. Where lands are not benefited by the levees, they are not within the spirit of the Act of 1857, and should not be taxed to meet them.

A judgment rendered without reasons is unconstitutional.

APPEAL from the District Court of the Parish of Carroll, *Farrar, J. L. Selby*, for plaintiff and appellant. *H. Short*, for defendants.

MERRICK, C. J. The main question in this case has been disposed of in the decision just rendered in the case of *Wallace v. Shelton et al.* The case presents a few other questions.

I. The assessment was made under the Act of 1857, and it cannot be aided by the lien or privilege given by the Act of 1858.

II. The Tax Collector did not err in seizing the land. The plaintiff, it appears from the testimony, gave him permission to seize the land, and furnished him with the titles to obtain a description of them. SMITH
v.
LEVEE COMMISSIONERS.

III. The Levee Commissioners did not err in concluding that the Legislature intended to authorize a specific tax by the Act of 1857. A comparison of the Act of 1857 with the previous Acts, shows that the term "specifically on each and every acre," was used in contradistinction to the *ad valorem* tax of the former statutes.

IV. We are not aware of any provision of law which makes it necessary that the voters who elect the Levee Commissioners should all be equally assessed, or that it is necessary that the voters of Catahoula should be excluded because they do not pay an assessment in this district. They are obliged to build levees upon the Red and Ouachita Rivers. The equality of taxation and representation in inferior jurisdictions, does not appear to have been considered essential by the framers of the Constitution of 1852.

V. It is further contended, that a part of the swamp lands upon which the assessment is made, has not been patented, and plaintiff may yet be deprived of the ownership of the same by the Government of the United States. We do not think that a party can be relieved from the payment of assessments and taxes, on the ground that there may be an outstanding title in some one else. It is sufficient that plaintiff claims and possesses as owner.

VI. The Levee Commissioners have not made any assessments upon the region of country West of the Bayou Maçon hills, nor the islands of the Mississippi. The plaintiff demands (in the event that the assessment should be held legal,) that the defendants be ordered to assess taxes on the lands between the Bayou Maçon and Bœuff River, and on the islands in the Mississippi river. But as the levees of the parishes of Carroll and Madison are of no benefit to these lands, they are not within the spirit of the Act of 1857, and we cannot say that the Levee Commissioners have erroneously exempted them from assessment.

VII. It is also objected, that the judgment of the lower court is unconstitutional in this, that it has been rendered without reasons. The objection is well taken.

It is, therefore, ordered, adjudged and decreed, by the court, that the judgment of the lower court be avoided and reversed, and it is now ordered, adjudged and decreed, by the court, that the injunction be dissolved and plaintiff's demand be dismissed, the plaintiff paying the costs of the lower court, and the defendants the costs of appeal.

BUCHANAN, J., and COLE, J., took no part in this decision.

N. F. RICE, Curator, v. DAVID DAVIS.

14	435
123	387

The holder of a note made payable to the maker's own order, by him indorsed, and secured by a notarial and authentic act of mortgage, may recover without any authentic evidence of transfer further than that contained in the act itself.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Emmerson & Huntington, for plaintiff. *J. Livingston*, for defendant and appellant.

RICK
v.
DAVE.

MERRICK, C. J. This appeal is taken from an order of seizure and sale.

The plaintiff alleges himself to be the curator of the succession of *Gardner Johnson*, deceased, who became in his lifetime the owner and holder of the note annexed to the petition.

It is assigned as error, that there is in the record no authentic proof that *Gardner Johnson* is dead, nor that plaintiff has been appointed curator of his succession.

The note sued on was made payable to the defendant's own order and by him indorsed. This fact appears by the notarial and authentic act of mortgage. In the act of mortgage, the defendant hypothecated the property to secure the party (*John R. Clay*) who lent the money, or any other holder.

The plaintiff is the holder of the note, and his description of himself as curator of *Johnson's* succession may be regarded as a *descriptio personæ*. In this particular, the case cannot be distinguished from the case of *Montgomery, Ex'r., v. Nott*, 2 An. 276.

The right of the holder of a note and mortgage in this form, to recover without authentic evidence of transfer further than that furnished by the act itself, has become a rule for the security of obligations, which, having been acted upon for the last three years, cannot now be disturbed. See *Mothé v. McCrystal*, 11 An. 4; *Race & Foster v. Bruen*, *ibid* 34.

The case of *Landry v. Landry*, 12 An. 167, differs from the present in the form of the mortgage and note.

Judgment affirmed.

MAURICE SCULLY v. LAURENCE KEARNS.

Where a debtor has resorted to a simulated sale, for the purpose of defrauding creditors, it is not necessary that a judgment creditor should proceed by the revocatory action, in order to have the sale annulled; he is entitled to consider the sale as without reality and to seize the property, thus sold, as that of the vendor.

APPEAL from the Sixth District Court of New Orleans, *Cotton, J.*
F. H. Clack, for plaintiff and appellant. *W. S. Stansbury*, for defendant.

COLE, J. On the 10th of February, 1855, judgment was rendered in favor of *Laurence Kearns* against *John Cavanaugh*, for \$225, with legal interest, for work done for the latter, and materials furnished by *Kearns*, in his vocation as a blacksmith, to the said *Cavanaugh*.

An execution issued, and the Sheriff seized a steam engine and boiler, and some other movables, whereupon *Maurice Scully*, the plaintiff enjoined the sale, averring the property seized to be his.

There was judgment for defendant, dissolving the injunction, and plaintiff has appealed.

The testimony clearly establishes the sale of these movables from *Cavanaugh* to *Scully*, to have been simulated.

The price may, indeed, have apparently passed from *Scully* to *Cavanaugh*, but it is evident that the money was either advanced in part by *Cavanaugh* or by other persons, and that *Cavanaugh* returned the price.

It was never intended to be any thing but a sham sale for the purpose of defrauding *Kearns*. The price was never intended to be a real one, and *Cavanaugh* was not to keep the same.

Under such circumstances, the judgment creditor of the pretended vendor in this simulated sale, was not bound to proceed by the revocatory action, in order to have the sale annulled, but was entitled to consider the sale as without reality, and to seize the property as that of the vendor.

Judgment affirmed, with costs.

SCULLY
v.
KEARNS.

WHIPPLE et al. v. D. G. HILL et al.

The *ordinary partnership creditors* of the owners of a steamboat have no right to be paid by preference to the individual creditors, out of the proceeds of the boat, whether these proceeds result from sales or have been received on policies of insurance.

APPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
E. Woolridge, for plaintiffs and appellants. *R. H. Marr* and *T. N. Pierce*, for defendants.

LAND, J. The plaintiff being the judgment creditor of the defendants, the owners of the steamboat *Creole*, for money loaned for the use of the boat, and for wages due him as pilot, caused an execution to issue on his judgment, and garnisheed *Shaw & Zuntz*, under the Act of March 20th, 1839.

Shaw & Zuntz had effected an insurance on the *Creole*, for the owners, the defendants, for eight thousand dollars. The boat was soon after lost, and the proceeds of the policies of insurance were paid to *Shaw & Zuntz*, who applied a part of the same to the payment of a partnership debt due them by the owners of the boat, and another part, to wit, two thousand nine hundred and six dollars and ninety-two cents, they passed to the credit of *Hill's individual account*, and the remainder they paid over to the other owner, *Porter*, and his assignee, *David Wood*, or became bound to the latter so to do.

The plaintiff alleges that he is a *partnership creditor* of the owners of the boat, and that the money received on the policies of insurance by *Shaw & Zuntz*, was a *partnership fund*, on which he has a privilege, and entitled to be paid out of the same in preference to *Shaw & Zuntz*, the *individual creditors* of *Hill*, one of the owners.

The question is, therefore, presented whether the money received on the policies of insurance, was a *partnership asset*, or the *individual property* of the defendants, as part owners of the boat.

In the case of *Violett v. Fairchild*, the court say : " We adhere to the rule laid down in the case of *Byrne v. Harper*, 2 R. R. 229, that when owners of a steamboat use it to carry persons and merchandise, the use of the boat only is brought into the partnership, unless there is an express stipulation to the contrary, and that as it may be enjoyed without being destroyed, the ownership remains in the partners individually, under Art. 2834 of the Civil Code, subject to the privileges which the law allows in such cases to the creditors of the partnership."

In considering the case of *Claiborne et al. v. Their Creditors*, relied on by the appellants in this case, the court said : The question whether the fund in hand

WHITTLE
v.
HILL.

was a partnership fund or the joint property of the partners, was not raised in argument. It was not before the court; and the casual observation of the court, that it was a partnership fund, did not decide the question.

The part owners of a ship or steamboat are tenants in common, and not partners, and each one can only sell his own share therein, and not the entirety of the ship or boat, as he could do in cases of partnership. Story on Partnership, § 419.

As the boat itself is not, therefore, partnership property, the ordinary partnership creditors of the owners, have no right to be paid by preference, to the individual creditors, out of the proceeds of the boat, whether these proceeds result from sales, or have been received on policies of insurance.

Creditors may acquire a privilege which will entitle them to be paid out of the proceeds of the boat, in preference to the individual creditors of the owners; but when this privilege is extinguished, the right to be paid by preference ends with it of course.

In this case, the plaintiff has a personal judgment against the owners, which does not recognise a privilege on the boat, or the money in the hands of the garnishees, and is, therefore, an ordinary creditor of the partnership, and has no right to be paid by preference out of the proceeds of the boat, or the money in the hands of the garnishees, which was the individual fund of the partners.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.

Re-hearing refused.

MARY E. LYONS, Tutrix, et al., v. R. W. McRAE—THOMAS CLAYCOMB,
Third Opponent.

Where property has been seized and sold under a judgment, for the benefit of certain creditors, the money remaining in the hands of the Sheriff, and the debtor takes advantage of the Insolvent Act, before the decision of the claims of the various parties to the thing seized, the money thus held by the Sheriff will become part of the assets of the insolvent, and is subject, like all the rest of his property, to be litigated in *concurso*.

Where a third opposition has been filed, claiming a privilege upon the proceeds of the thing seized, and there is a surrender before judgment in the suit, this litigation must necessarily be referred to be tried with the other insolvent proceedings.

APPEAL from the District Court of the Parish of Pointe Coupée, *Haralson, J.*
T. J. & W. H. Cooley, A. Provosty, and P. H. Ray, for plaintiffs and appellants. U. B. & E. Phillips, for defendant.

COLE, J. The plaintiffs, in the four suits of *Lyons, Castle, Giquel & Jamison* and *Wilson & Funk* against *McRae*, being judgment creditors of *McRae*, issued executions, and caused fifty-five hogsheads of sugar, of the crop of 1857, made by *McRae* on his Glen Mary plantation, to be seized to satisfy their judgments against him.

Before the sugar was sold *Claycomb*, on the 5th of February, 1858, filed his third opposition, claiming a privilege on the proceeds, for the payment of hogsheads and barrels furnished by him to *McRae*, which were used in taking off the crop of 1857.

There was judgment sustaining the opposition for \$1480, with interest, and ordering the Sheriff to pay it, and costs of the opposition, and costs in the four suits aforesaid, by preference, out of the proceeds of the sugar sold by him under the executions aforesaid, in preference to all other claims.

The plaintiffs in the four cases aforesaid appealed.

Upon the trial, *A. Provosty*, provisional syndic of the insolvent *R. W. McRae*, opposed the trial of all the said cases, on the ground that *McRae*, on the 6th of March, 1858, surrendered all his property to his creditors; that the money in the hands of the Sheriff forms a part of the assets of the insolvent, and is subject, like the rest of his property, to the claims of all the creditors, to be litigated *in concurso*.

This opposition ought to have been sustained. *McRae* took the benefit of the Insolvent Act before the decision of the claims of the various parties to the sugar seized. The different suits and the opposition of *Claycomb* ought to have been referred to the court in which the insolvent proceedings were pending, to have the claims of the parties adjudicated upon.

It is true that fifty-five hogsheads of sugar have been seized by the plaintiffs, but this sugar, or its proceeds, does not belong to them by virtue alone of the seizure, if there be persons having privileges superior to those possessed by them.

Claycomb has filed his third opposition, claiming a privilege upon the proceeds of the sugar; and as *McRae* has no legal existence, but is represented by the syndic, this litigation must necessarily be referred to be tried with the other insolvent proceedings.

The sugar does not belong to the seizing creditors absolutely, for if it did, no creditors could contest their claims on the ground of privilege.

In *Elmes v. Estevan*, 1 M. 193, the court said, that when a debtor cedes his goods to his creditors, and a stay of proceedings is granted, the cession operates the civil death of the debtor. He cannot, consequently, remain a party in a suit. The judge's order stops all proceedings against the debtor, whether they be carried on against his person, general estate, or any part of it. His rights pass to other persons, and cannot be affected by legal proceedings to which the new owners are not parties.

In *Syndic of Bermudez v. J. Canez & Milne*, 3 M. 39, the court held, that a cession of property, and the order thereon, operates a stay of all proceedings, even the sale of property encumbered as security for a debt, which a court of competent jurisdiction, by a judgment rendered before the failure, had ordered to be sold. The court say, that the decree ordering a stay of proceedings against the owner of the land ought to have stopped the judicial sale of that land, and that the sale made in contravention to it was illegal and void. The court also ordered, that the said land be surrendered to the syndics of the creditors of *Bermudez*, the owner of the land, to be sold.

In *Canez et al. v. Schooner James M. Kinley et als.*, 2 N. S. 307, where a creditor had levied an attachment upon a vessel, the joint property of his joint debtors, which was sold, and, before payment of the proceeds by the Sheriff, one of the debtors became insolvent, it was held, that his syndics were entitled to receive his portion of the proceeds, but not that of his co-debtor.

The court say, "We are of opinion that the syndics had a right to take into their possession all the property of the insolvent, and of course, that they were authorized to demand and receive any moneys belonging to his estate. Such are the express commands of the law, and without such a right, it would be impossi-

LYONS
v.
McRAE.

LYONS
v.
McRAE.

ble to adjust the conflicting pretensions of creditors, or make a final settlement of the estate."

The decisions of this court establish, that after the acceptance of the *cessio bonorum* by the judge, for the benefit of the creditors, the property surrendered is vested in the latter, so as to be no longer liable to seizure, attachment or execution, but they acquire no real ownership in it; that a judgment is improperly signed, after the debtor has made a cession of his goods; for the suit should be cumulated with the proceedings of the *concurso*; that the object of the law is, that the rights of all the creditors should remain in the state they were in at the time of the insolvency. *Rivas v. Hunstock*, 2 R. 187, 9 R. 219, 3 An. 387, 4 M. 562, 4 An. 490; *Clark v. Oddie*, 4 N. S. 625, 10 M. 178, 5 R. 101, 3 An. 582, 7 R. 61; *Collins v. Duffy*, 7 An. 40; *Succession of Walker*, 14 An.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; that the four suits aforesaid of appellants and the third opposition of *Thomas Claycomb* be cumulated with the proceedings of the *concurso*, in the court where the insolvent proceedings against *R. W. McRae* are being conducted, and that these suits and the opposition of *Claycomb* be remanded to the lower court, to be proceeded with according to law; that the costs of appeal be paid by appellee, and those of the lower court shall abide the final decision upon the rights of the parties.

MERRICK, C. J., dissenting. Sundry judgment creditors of *R. W. McRae*, caused to be seized under execution fifty-five hogshsheads of sugar of the crop of 1857. The seizure and sale of the sugar appear to have been both made prior to the surrender of *R. W. McRae*. *Claycomb*, one month previous to the surrender, filed an opposition wherein he claimed a privilege upon the sugar for barrels and hogshsheads furnished to take off the same.

The creditors excepted to the opposition, alleging that it disclosed no cause of action. The syndic opposed the trial of the opposition and claimed the money in the Sheriff's hands as belonging to the assets surrendered.

The District Judge considered the opposition and rendered judgment in favor of the opponent, *Claycomb*, and the other parties appealed.

By the sale of the property, to-wit: the sugar, previous to the surrender, *McRae's* title to it had been divested. The money made by the sale was no longer under the control of *McRae*, but the judgment creditors had the right to demand the same from the Sheriff, saving the right of the privilege creditors who had set up their claim previous to the sale. The syndic had no greater right to the proceeds than *McRae* himself had, and the proceeds could not be carried into the surrender and become subject to the commissions of the syndic, and the costs and charges of the surrender as well as those of the Sheriff in making the sale.

The surrender is but a mode of execution, and the creditor who has completed the one process and made his debt, cannot be compelled to resort to the other.

See the case of the succession of *J. Walker*, 14 An. *Campbell v. Sidell*, 5 An. 274.

The authorities cited in support of the opposite doctrine do not appear to me applicable. In none of those cases had the money been made on execution prior to the surrender as in the present case. Those cases appear to me to be correctly decided, and in no manner conflicting with the recent decision of this court in the case of the succession of *J. Walker*. Op. Book 30, p. 253.

In the case of *Canex v. Schooner James McKinley*, the sale was made under an order of court, and the property being held in common, the only question was

LYONS
v.
McRAN.

whether the syndics of one of the joint owners of the ship could take into their possession the whole proceeds when one-half belonged to another, and it was held they could not, and they were ordered to pay said one-half into the hands of the Sheriff. 2 N. S. 310, 311.

I can see no reason why a creditor who by his diligence has made his debt upon execution should be deprived of his funds by the surrender. The day that the money has been made by the creditor, on execution, he is entitled to be paid by the Sheriff. This is a right which the law gives him. If he has this right to immediate payment the day the money is made, it is difficult to see in what manner he forfeits the right by any reasonable delay. The right must exist, and the accident of a subsequent surrender cannot deprive the creditor of such right.

The testimony in this case was received without objection, and I think the judgment ought to be affirmed.

LAND, J., concurred in this opinion.

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CHARLES A. GILBERT v. ADAM C. HOLLINGER—JOSEPH KREBS v. the same.

Where the Federal Court was resorted to on a false allegation of the citizenship of the parties, in order to obtain possession of property by attachment, and the proceedings were then dismissed and simultaneously process of attachment sued out from a State Court, on the affidavit that the defendant in the attachment, who was represented in the Federal Court to be a citizen of Louisiana, was a non-resident—*Held*: That the allegation of the non-residence of the defendant being at direct variance with the allegation previously made by the same party in the Federal Court, the attachment could not be maintained.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*Clark & Bayne*, for plaintiff. *R. & H. Marr*, for defendant.

COLE, J. These two cases were tried together in the court below. Two appeals have been taken from the judgments rendered, which have come up in separate transcripts; those numbered 4735, being an appeal of an intervenor and third opponent, *Perrin*, who claims the slaves attached in this case, as his property, and not that of defendant; and the case numbered 4825, being an appeal of the defendant.

Both these suits were commenced by attachment; the affidavit and petition in each case, alledging the defendant to be a non-resident of this State. No personal service of citation was made upon defendant in either case. A curator *ad hoc* was appointed to represent him. He is, therefore, only in court by his property attached; and, as a rule has been taken by the curator *ad hoc* in each case, to dissolve the attachment, it is incumbent upon us, first, to examine the issue made by the rule. For if the attachment be dissolved, the suit with its accessory, the third opposition, must fall.

The rules to dissolve the attachment are based upon several grounds, of which the second has alone been insisted upon in argument in this court. It is identical in both rules, and is as follows:

"Because the negroes attached were illegally and tortiously brought within the jurisdiction of this honorable court, at the instance of the said *Charles A. Gilbert*, and by his contrivance and procurement for the purpose of being attached

GILBERT  
F.  
HOLLINGER.

in the present suit, or in a suit to be instituted in some one of the district courts of New Orleans, by the said *Charles A. Gilbert*, for the same cause. That said negroes were at or near Pass Manchac, in the parish of St. John the Baptist, on the New Orleans, Jackson and Great Western Railroad, where they had been hired for several months past, and where they were attached and seized, and whence they were brought to the city of New Orleans, by a Deputy Marshal of the United States, in virtue of a writ of attachment issued on the 6th day of June, 1854, from the Clerk's office of the Circuit Court of the United States, holding sessions at the city of New Orleans, which said writ was issued at the suit of *Charles A. Gilbert v. Adam C. Hollinger*, in said Circuit Court, filed on the 6th day of June, 1854, and was served at night, at or near Pass Manchac, between the 7th and the 8th day of June, 1854. That said Circuit Court was entirely without jurisdiction in said suit, and had no authority to grant said writ. That said Circuit Court can take jurisdiction in civil matters only where the suit is between citizens of different States, one of them being a citizen of the State in which said Circuit Court is held; and that said *Hollinger* and said *Gilbert* were, at the time said suit was brought in said Circuit Court, and are now citizens of the State of Alabama, residing in Mobile county in said State, which fact was well known to the said *Charles A. Gilbert* and to *James C. Bolling*, who, acting as agent for said *Gilbert*, caused said suit to be instituted, and upon whose affidavit the said attachment was issued. That in his petition, in said suit, it was charged that said *Charles A. Gilbert* was a citizen of the State of Alabama, and that *Adam C. Hollinger* was a citizen of Louisiana, which latter allegation was untrue, and was made for the purpose of giving colorable jurisdiction to said Circuit Court. That the writ of attachment issued from said Circuit Court, on the affidavit that said *Hollinger* concealed himself to avoid being cited and forced to answer said suit, which was also untrue; that all said proceedings in said Circuit Court were illegal and void, for want of truth of the material allegations, and for want of jurisdiction; and that the seizure of said negroes, and the bringing of them to the city of New Orleans, was a trespass."

"That on the 22d of June, 1854, the said *Gilbert* voluntarily discontinued said suit, and dismissed said attachment in said Circuit Court, and immediately brought the present suit in this honorable court, and caused the writ of attachment to issue herein, by virtue of which the said negroes were seized by the Sheriff of the parish of Orleans, while they were still in the custody of the Marshal; all which actings and doings were and are illegal and tortious, and were done for the purpose of giving to this court a jurisdiction which it had not, either by reason of the residence of the said *Hollinger*, or of the *situs* of the said negroes previous to the said illegal attachment and seizure by the said Marshal."

The facts stated in the above ground, separate from what may be considered as argumentative, or declamatory, are proved by documentary and record evidence, by the testimony of witnesses, and by admissions of parties on the trial of the rule.

On the 6th of June, 1854, the plaintiffs, *Charles A. Gilbert* and *Joseph Krebs*, filed their petitions separately in the Circuit Court of the United States for the Eastern District of Louisiana, for attachments of the property of defendant, *Adam C. Hollinger*, for the recovery of the same debts which are the object of the present actions. In the petitions to the United States Court, the plaintiffs allege themselves to be citizens of Alabama, and defendant to be a citizen of the State of Louisiana, and a resident of the said State, and within the jurisdiction

GILBERT  
v.  
HOLLINGER.

of the said United States Court. They further allege, that *Hollinger* conceals himself to avoid being cited, and has property within the jurisdiction of the court. The affidavits at the foot of these petitions are made by *James C. Bolling*, as agent of the plaintiffs, who swears to the debt, in each instance, and also that *Adam C. Hollinger* conceals himself to avoid being cited, and forced to answer the suit intended to be brought against him.

Writs of attachments issued in both cases, which were executed by levying upon certain slaves. These suits were both discontinued on the 22d of June, 1854, on motion of the council of plaintiffs.

On the same day (22d of June, 1854,) the present suits were commenced by the filing of affidavits for attachments in the Second District Court of New Orleans.

The affidavit in *Gilbert's* case is made by the plaintiff himself; and in *Krebs's* case, by *James C. Bolling*, as the agent of *Krebs*. Both affiants swear to the amount of the debt in their respective suits claimed; and that *Adam C. Hollinger* resides out of the State of Louisiana.

The petitions filed the next day in each case also set forth that *Hollinger* resides out of the State of Louisiana.

It is proved that *Hollinger* has been a resident of Mobile county, Alabama, for twenty-two years past; that *James C. Bolling* was the specially authorized agent of *Gilbert & Krebs*, for prosecuting their claims, with power to sign attachment and other bonds; that *Bolling's* father and *Hollinger* are neighbors; that *Bolling* has been raised in Mobile; that *Gilbert & Krebs*, the plaintiffs, were also residents of Mobile county; that the slaves were seized by a Deputy Marshal of the United States in the parish of St. John the Baptist, and brought to New Orleans by that officer.

The following are admissions made upon the trial :

"It is admitted, attachments issued in these cases from the United States Court, under order of Hon. Judge McCaleb; that attachments were executed, and negroes taken into possession of the Marshal; that petition was served on *A. C. Hollinger*; that *Messrs. Marr*, as counsel for *Hollinger*, moved to have the attachments set aside on the grounds that the bonds was insufficient; that *J. C. Bolling* had no authority as agent to sign the bonds for attachment, that the Circuit Court had no jurisdiction.

"There was annexed an affidavit of *A. B. Hollinger* to plea of jurisdiction, that he was a citizen of the State of Alabama.

"That the rule was tried before the court and submitted. A day or two afterwards the suit was discontinued.

"The court refused to try on rule any thing but the question of formality of attachment; that the question of jurisdiction, and all other questions, were reserved for trial on the merits.

"That the Marshal had ordered his keeper to release the negroes immediately after the discontinuance; that after the receipt of the order, before actual delivery to defendant, the negroes were seized by the Sheriff, on the attachment issued from the court."

The evidence, in our opinion, establishes that the slaves attached in these suits, were wrongfully brought within reach of the process of the Second District Court of New Orleans.

The Circuit Courts of the United States, by the Judiciary Act, sec. 11, have a jurisdiction limited to cases, where either the United States are plaintiff, or an

GILBERT  
v.  
HOLLINGER.

alien is a party, or the suit is between a citizen of the State, where the suit is brought, and a citizen of another State.

That court was, therefore, without jurisdiction of a suit brought by a citizen of Alabama against another citizen of Alabama. To give it jurisdiction, it was incorrectly alleged in plaintiff's petitions, addressed to the Circuit Court of the United States, that *Hollinger* was a citizen of Louisiana.

The process of that court ran into the parish of St. John the Baptist, where *Hollinger's* negroes were.

By means of that process, they were levied upon in that parish, and removed to New Orleans, the place where the court is held.

Once there, the suit in the United States Court is discontinued, and simultaneously process issues from the State Court, based upon the truthful allegation of *Hollinger* being a non-resident of Louisiana, but which allegation is at direct variance with the allegations made previously by the same party in the Federal Court.

Seizures of property brought about like those in the present controversy, cannot be maintained by this court. Vide *Powell v. McKee*, 4 An. 108; *McKee v. Amonett*, 6 An. 207; *Paradise v. Farmers' and Merchants' Bank*, 5 An. 710; *Myers v. Myers*, 8 An. 369.

Neither are they maintained in our sister States. Vide 4th *Humpreys' Tenn. Rep.* 149; 24th *Wendall's N. Y. Rep.* 369; 12th *Pickering's Mass. Rep.* 270.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, in the suits of *Charles A. Gilbert v. Adam C. Hollinger*, and *Joseph Krebs v. Adam C. Hollinger*, be reversed; that the writs of attachment issued in those suits be dissolved, and the suits be dismissed at the costs of plaintiffs and appellees in both courts. And it is lastly ordered, that the Clerk of this court certify this, the decree of this court, in each of the two causes of *Charles A. Gilbert v. Adam C. Hollinger*, No. 7925 of the docket of the Second District Court of New Orleans; and *Joseph Krebs v. Adam C. Hollinger*, No. 7927 of the docket of said court, upon the appeals severally taken from the final judgments in those cases by the defendant and by the intervenor, which appeals are docketed numbers 4735 and 4825 in this court.

#### CHARLES PARLANGE v. JEAN EMILE FAURÈS.

Where a broker or agent sells a note, with a forged endorsement upon it, without disclosing the fact of his agency, or the name of his principal, he is responsible for the amount, with legal interest, when he was paid for the note.

**A**PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*W. H. Hunt and L. Castera*, for plaintiff. *H. Griffon*, for defendant and appellant.

MERRICK, C. J. The defendant, a broker, sold to the plaintiff a note for twelve hundred dollars in amount, signed by *H. A. Lee*, containing the forged endorsement of a responsible party, without disclosing the name of his principal, on whose account he procured the discount of the paper. The proceeds were eleven hundred dollars.

The plaintiff, having discovered the forgery after the drawer of the note had absconded and the note had matured, brought this suit against the defendant to recover the amount of the same, with costs of protest and interest.

It is not pretended that defendant had any knowledge of the forgery, or acted otherwise than in good faith.

The defendant cited one *John T. Clay*, from whom he alleged he received the note in warranty, said *Clay* also being, as defendant alleged, a broker, and acting for parties unknown to defendant.

*Clay* answered the call in warranty, and averred that he was a note broker, and that at the time he delivered the note to defendant, the latter was informed and well knew that the warrantor was not the owner of the note, but was trying to sell the same as broker.

The defendant discharged *Clay* as warrantor, and placed him on the stand as a witness at the conclusion of the trial. It appears from his testimony, that he handed the note to *Faurès* to discount, and divided the brokerage with him; that he received the proceeds of the note from defendant, and paid the same over to *Lee*. It thus appears, that it was only after the call in warranty was dismissed, and the last witness examined, on the trial of this cause, that it was disclosed who was the principal of these brokers.

Judgment having been rendered against the defendant, for the note and eight per cent. interest, he prosecutes the appeal.

The defendant relies upon the authority of a case decided in Maine, to the effect that one dealing with a person whom he knows to be a broker, may be presumed to know, from the nature of a broker's business, that he is acting as agent for a third person; and upon Article 2985 of the Code, as decisive of this case. See 29 Maine, (16 Shep.) p. 434.

Plaintiff contends, that inasmuch as defendant did not disclose the name of his principal at the time of the transaction, he is himself bound as principal.

This court, in the case of *Bedford, Breedlove & Robeson v. Jacobs*, (a case against a broker), stated the law in these words, "An agent cannot discharge himself from responsibility, on the ground that he acted for another in making the contract, unless he shows that he communicated to the party with whom he contracts, his situation as agent, and that he acted so as to give a remedy over against his principal." 4 N. S. 530.

In the case of *Nott & Co. v. Papet*, this court made this remark, "We do not mean, however, to say, that at the time of the sale the broker must name the owner of the paper, but it is his duty to make known to the purchaser that he does not sell on his own account." 15 La. 310.

Mr. Parsons says, an agent makes himself liable, by concealing his character as agent. Parsons' Merc. Law, p. 147.

Mr. Justice Story lays down the doctrine as follows: "A person contracting as agent will be personally responsible where, at the time of the contract, he does not disclose the fact of his agency, but he treats with the other party as being principal; for in such case it follows irresistibly, that credit is given to him on account of the contract. Thus, a factor, or broker, or other agent, buying goods in his own name for his principal, will be responsible to the seller therefor in every case where his agency is not disclosed." Story on Agency, § 266 and 267.

In the case before us, the defendant did not disclose, at the time of the sale, the fact that he acted as agent for any one; and, until the last witness was examined in this case, it does not appear that the plaintiff was notified of any other person

PARLANGE  
v.  
FAURES.

against whom he could direct his action. It is, therefore, quite clear, without going further than this court went in the two cases cited from our reports, that the defendant is personally responsible.

We do not find that the Article cited from the Civil Code affects the case. Sec. 2981 C. C.

The District Court has fallen into an error in signing the judgment for the price of the note, and eight per cent. interest thereon. It should have been for the amount paid for the note, and legal interest thereon.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed; and we do now order, adjudge and decree, that the plaintiff do recover and have judgment against the defendant, *Jean Emile Faures*, for the sum of eleven hundred dollars, with five per cent. interest thereon per annum, from the sixth day of October, 1857, until paid; the defendant paying the costs of the lower court, and the plaintiff those of appeal.

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#### STATE v. W. WILSON alias RED BILL—BENJAMIN MASON, Surety.

Where the condition of the bond in a criminal case was that the accused "should personally be and appear before the District Court at its next term to answer certain charges brought against him, and should not depart without the leave of the court until the final trial and conviction or acquittal of the accused; the responsibility of the security on the bond is at an end when a verdict of guilty is found against his principal.

The accused being then present in court is, after the conviction, in the custody of the Sheriff, and the security cannot be made liable on such a bond because the accused afterwards made his escape.

**A**PPEAL from the District Court of the Parish of Jefferson, *Burthe, J.*  
*W. T. Scott*, District Attorney, for plaintiff. *A. N. Ogden & Stansbury*, for defendant and appellant.

**COLE, J.** The following is the statement of facts agreed upon by the District Attorney and the counsel for defendant:

"On the 15th June, 1858, two indictments were filed against *Red Bill*,—one for assault and battery, and the second for violence, &c., at the polls on election day. He was arrested, and on the 13th June was, by order of the court, admitted to bail in the sum of four hundred dollars in each case, and the Sheriff of the parish was authorized to take the bond."

"The Sheriff took one bond for the sum of eight hundred dollars, conditioned for the appearance of the accused for trial on both charges, assault and battery and for violence, &c., at election."

"Both cases were assigned for trial on the 23d of June, 1858, *Wm. Wilson* alias *Red Bill*, was tried upon the indictment for violence at elections, &c., and was found *guilty* by the jury. The other case against the same party was continued over to the next term of the court."

"Shortly after his conviction, the same day, and while the court was engaged in the trial of another case, the convicted party, *Wilson* alias *Red Bill*, made his escape from the court room and left the parish of Jefferson."

"A *capias* was issued for his apprehension, and the bonds regularly forfeited. He has been since arrested and was sentenced August 21st, 1858."

STATE  
v.  
WILSON.

If the duty of the Sheriff was not to have taken two bonds, the taking of only one for the aggregate sum of the two cannot augment the responsibility of the security in either of the cases. If the accused complied with the bond in one of the cases in making his appearance, and did not in the other, the amount of the forfeiture could only be four hundred dollars. The District Court gave judgment for the whole amount of the bond, and *Benjamin Mason* the surety, has alone appealed.

The judgment of forfeiture of the bond is as follows: "Saturday, 26th June, 1858, the court this day ordered the Sheriff to produce into court the accused *Wm. Wilson* alias *Red Bill*, to receive the sentence of the law on the verdict of the jury, finding him guilty of threats and violence at the polls. The Sheriff informed the court that the said accused, *Wm. Wilson*, could not be found, he being a fugitive from justice. Whereupon, on motion of the District Attorney, the bond of *Wm. Wilson* alias *Red Bill*, made returnable on the 23d day of June, 1858, was this day called, when it appearing that the said *Wm. Wilson* has not answered and has failed to appear according to the conditions of his bond, his security *Benjamin Mason*, was thereupon called and ordered to produce *instantly*, in open court, the body of *Wm. Wilson*, as he has bound himself to do, and the said security having failed to comply with this the condition of his bond, it is ordered, adjudged and decreed, that judgment be entered *in solido* against *Wm. Wilson* alias *Red Bill* as principal, and *Benjamin Mason* as surety, in the sum of eight hundred dollars and costs, full amount of the bond entered into by them in conformity with an Act of the Legislature of the State of Louisiana, entitled an Act relative to crimes and offences, and criminal proceedings, approved 14th March, 1855."

It is evident that the object of the court in ordering the accused to be called was to pass sentence upon him in the case in which he had been convicted, and not to take any action in the other case, for that had been continued over to the next term of court on the 23d of June, three days previous to the calling of the security upon the bond. After the continuance the accused was not bound to stay for the case which had been continued. If two separate bonds had been taken by the Sheriff, as one of the cases had been continued until the next term of court, it is clear that the court would have ordered the parties to the bond to be called only upon the bond which had been given for the appearance of the accused in the case in which he had been found guilty.

Even then, if the accused did not comply with the part of the bond which related to his appearance in the case in which a conviction had been obtained, the bond ought only to have been forfeited for one-half thereof.

We are, however, of opinion, that the accused complied with his bond even in the prosecution in which he has been convicted, and that the judgment must be reversed so far as the security is concerned, for the accused cannot be benefited by our judgment, as he has not appealed.

The bond sets forth that *Wilson* alias *Red Bill*, as principal, and *Benj. Mason* as surety, are indebted *in solido* unto the Governor of the State in eight hundred dollars, "upon condition, nevertheless, if the said *Wm. Wilson* shall personally be and appear before the Third Judicial District Court of the State of Louisiana, to be held at the town of Carrollton, on Wednesday, the 23d day of June, A. D. 1858, or if the said court should not be held on the day last aforesaid, then on the first day thereafter that the said court shall be held, then and there to answer unto two charges brought against him for assault and battery, and threats and

STATE  
v.  
WILSON.

violence at the polls, and shall not depart without the leave of the court, *until the final trial and conviction* or acquittal of the said *Wm. Wilson*, and shall keep the peace in the mean time; then this recognisance to be void, otherwise to remain in full force and effect."

The accused was in the custody of his security according to this bond until the verdict of the jury pronounced him guilty, but after that his responsibility ended. The accused was in the court room when he was convicted and did not depart therefrom until a short time after his conviction.

Blackstone says, if the jury find the accused guilty, he is then said to be *convicted* of the crime whereof he stands indicted, which conviction may accrue two ways, either by his confessing the offence and pleading guilty, or by his being found so by the verdict of his country. Blackstone, Book IV, p. 362. After trial and conviction, the judgment of the court regularly follows, unless suspended or arrested by some intervening circumstance. Blackstone, Book IV, p. 365.

Chitty declares, that in order to urge the disability against a witness with effect, it is necessary to *prove* the record of the *judgment*, as well as *conviction*, lest any objection should have defeated it in arrest of judgment; and the admission of the witness himself will not suffice, without a copy both of the *judgment* and *conviction*. Chitty on Criminal Law, vol. 1, p. 601. When the prisoner is convicted by the jury, he is put aside from the bar, to await the delivery of his sentence. Chitty vol. 1, p. 648. When the defendant has been found guilty in the court of King's Bench, it is necessary that four days should elapse between the *conviction* and *judgment*. Chitty vol. 1. p. 653.

It is evident from the authorities, that the conviction was perfectly accomplished, when the jury rendered the verdict of guilty. The obligation of the bond was that the accused should be then present in court. He was there present and did not depart until a short time afterwards. The security is not, therefore, liable upon his bond.

It is, therefore, ordered, adjudged and decreed, that the part of the judgment which condemns *Benjamin Mason* as surety to pay eight hundred dollars and costs *in solido* with *Wm. Wilson* alias *Red Bill* as principal, be avoided and reversed, so far as said *Mason* is concerned, reserving to the State the right of action, if any such she have, for one-half of the bond in the case which was continued, in the event of the default of the accused to comply with the conditions thereof.

MERRICK, C. J., concurring. Without expressing an opinion upon the bond, under the admissions in the record, I prefer to put my concurrence on the case of the *State v. Hammill*, 6 An. 257.

LAND, J., concurring. In my opinion, the judgment of the lower court should have been for four hundred dollars instead of eight hundred.

Upon the grounds of the *arrest*, *sentence*, and *punishment* of the accused, *subsequently* to his escape, I concur in the judgment.

## MRS. LUCINDA PENDARVIS v. IVERSON J. WALL.

At a sale of succession property, a creditor of the succession cannot tender, in payment of the price of property adjudicated to him, the claims which he may have against the succession.

**A** PPEAL from the District Court of the Parish of Livingston, *Beale, J.*  
*G. W. Watterson and H. Duncan*, for plaintiff and appellant. *C. J. Bradley*, for defendant.

**COURT, J.** This is an action brought by plaintiff against the administrator of *Samuel Patterson's* estate and the Sheriff of the parish of Livingston, to injoin them from selling certain property, consisting of a parcel of land and slaves, on the ground that she is the owner of the same under a former adjudication.

After the usual formalities, the administrator obtained an order directing the Sheriff of Livingston to sell certain property of the succession for cash. On the day of sale, the plaintiff was the last and highest bidder for the said land and slaves, and on the same day she tendered to the Sheriff and to the administrator claims against the estate to the amount of eleven hundred and fifty dollars, in part payment of the purchase price of said land and negroes, reserving to herself the right to retain in her hands the balance, one hundred and fifty dollars, until a full and final settlement of the estate of said *Patterson*, her deceased husband, and until her rights were adjudicated upon.

Her claims consisted of three items.

1. One thousand dollars under the homestead law.
2. One hundred dollars, the amount of a donation in cash made to her child, *Samuel*, by one *McLatughlin*, and received by *Patterson* in his lifetime for the use and benefit of said child.
3. Fifty dollars, being the expenses caused by the funeral of *Patterson*.

The Sheriff and administrator refused to receive these claims in payment as cash, and to allow her to retain any part of the price as a creditor of the estate. The Sheriff proceeded to advertise, on a twelve months credit, the property which had been adjudicated to plaintiff, and was about to sell the same, when his further action was arrested by an injunction.

Upon the trial, the District Judge considered the grounds for this injunction insufficient, and dissolved it.

Plaintiff has appealed.

It appears to us immaterial, whether the sale was one to pay debts of the succession, or for any other purpose, so far as the tender of these claims is concerned. Plaintiff had never been recognised as a creditor of the estate, and her rights and those of her children, under the homestead law, had never been adjudicated upon. Even if she had been recognised as a creditor, we are unaware of any law which permits a mere creditor, and not an heir, to retain any portion of the price at a cash sale, to satisfy the claims such creditor may hold against the estate. If, in this case, as was probably the fact, the administrator was proceeding to sell the property, under an order which was given, for the purpose of procuring funds to pay the debts of the estate, plaintiff, even if she had been an heir, could not have tendered these claims in payment, but would have been obliged to pay cash for her purchases. If creditors of an estate had the right of tendering their claims in payment, in a sale like the present, it would be almost impossible to settle an

PENDARVIS  
v.  
WALL.

estate without the greatest delay and cost. The administrator would be obliged, on the day of sale, to determine upon the validity of every claim, where the claims had not been previously presented, and often sales would be obliged to be deferred to enable the administrator to obtain information as to the rights of the creditors.

It is also insisted, that the Sheriff should have tendered plaintiff a title and made a demand upon her for the price of the adjudication.

Such demand and tender were, under the circumstances of this case, unnecessary. The plaintiff did not wait for the Sheriff to demand of her the price, but she herself tendered payment, but not as the law directed. She offered claims that could not be received, and proffered to accept the property on impossible conditions.

After the refusal of the Sheriff to accept her tender of payment in the claims, she did not offer to pay him in cash.

As she herself offered to pay, but only in a certain way, and as the Sheriff refused to take any thing but cash, which she declined giving, it would have been useless in him to have made an express demand upon her. The only effect of the demand on his part would have been, if she had not paid, to have put her in default, and to have authorized him to have proceeded with the sale. When, however, she herself offers to pay, there then is no necessity for a demand, for she then proposes to do voluntarily what is the object of the demand. Her offer showed that she was willing to pay the adjudication in one way and in no other, and an express demand of her of payment, after this, would have been without effect; for she had already shown that she would not pay cash, by declining to offer it when the Sheriff refused to accept anything but cash. Neither was the Sheriff obliged, under the circumstances of this case, to wait any particular time, to see if she would comply with the terms of the sale, for it would have been useless after her refusal upon the day of sale to pay cash.

Judgment affirmed, with costs of appeal.

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### THE STATE OF LOUISIANA v. GEORGE FORNO.

Where the defendant was indicted for *an assault with an attempt to commit a rape*, and after having pleaded to the indictment, was released upon a bond, in which he and his securities bound themselves that he should appear and answer to the charge of *rape*. *Held*: That such a condition under the circumstances of this case vitiated the bond.

**A** PPEAL from the District Court of the Parish of Livingston, *Beale, J.*  
M. F. Carter, District Attorney, for State. H. Duncan, for defendants and appellants.

MERRICK, C. J. The defendant, *Forno*, was indicted for an assault with an attempt to commit a rape.

The District Judge ordered a *capias* to issue for the arrest of the accused.

After the accused had pleaded to the indictment, the court ordered the case to be continued and the prisoner to be enlarged by the Sheriff on his giving bond conditioned according to law in the sum of fifteen hundred dollars. The Sheriff took a bond from the accused subscribed by two sureties, in which there was no reference to the indictment, and the offence is described as that of *rape*. The

condition of the bond is in these words, viz: "Now the above obligation is such, that whereas the above bound *G. W. Forno*, has been arrested by virtue of an order from the honorable Eighth Judicial District Court, State of Louisiana, on the charge of committing a rape. Now, therefore, if the said *G. W. Forno* shall well and truly appear at the next term of the aforesaid court, to be held in the courthouse in the town of Springfield, parish aforesaid, on the first Monday of May, 1858, and shall continue from time to time, and from day to day in term time, to answer said charge, and shall abide the decision of the court, then this obligation to be null and void, otherwise to stand in full force and virtue."

At the May term 1858, the court was in session on Monday, the third day of May. On Thursday the accused and sureties having been called upon the bond, the case was laid over until the following day to enable the sureties to make their objection to the bond. On Friday, the seventh of May, the proof was administered and judgment rendered upon the bond against the principal and sureties *in solido*.

The same day, the jury having been discharged, the accused presented himself, demanded a trial, and that the judgment should be set aside, and that a jury should be summoned for the following week to try him. The motion being refused, the accused and his sureties appeal.

The first question presented by the appellants is, that the bond is void, because there was no such charge pending against the accused as that for which he was bound to appear and answer.

The objection would not be fatal if the bond contained any reference to the indictment, or if the bench warrant referred to in the bond had been produced, and it had there appeared that the accused had been arrested upon a bench warrant issued upon an indictment for an assault with an attempt to commit a rape. *State v. Smith*, 8 An. 471.

The bond would also have been sufficient if it had contained either of the usual conditions, "and not to depart thence without leave of the court first obtained," or "and to answer such matters and things as shall be objected against him on behalf of the State." *State v. Cole*, 12 An. 471. *State v. Martel*, 3 Rob. 22. 1 Chitty, Criminal Law, 105.

But the bond does not refer to the indictment and there is nothing in the record to which the bond refers, from which it can be inferred that the sureties had any reason to suppose that the accused was admitted to bail for any other offence than that specified.

The crime of rape, and an assault with intent to commit rape are essentially different, one is punishable with death, and the other by imprisonment at hard labor not to exceed two years.

The bond therefore, according to its terms, has not been forfeited. The accused has not been called upon to answer, nor the sureties to produce his body to answer a charge of rape. The offence upon which he was called to answer was one for which the sureties had not bound themselves. *State v. Wooten*, 4 An. 515.

It is with reluctance that we allow objections of this kind to prevail, but under authorities the present appears to be well taken.

It is, therefore, ordered, adjudged and decreed, by the court, that the judgment of the lower court be avoided and reversed, and that there be judgment in favor of the defendants, as in case of non-suit.

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| 52  | 1047 |
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| 108 | 588  |

## CERTAIN INHABITANTS OF MELPOMENE STREET v. CITY OF NEW ORLEANS.

The city, as a corporation, has control over the public places and highways within its bounds, and it is the province of the corporation, and not of a judicial tribunal, to determine what improvements shall be made in the streets and canals of the city.

**A** PPEAL from the Sixth District Court of New Orleans, *Howell, J.*  
*C. Roselius*, and *T. H. Howard*, for plaintiffs. *J. G. Michel*, for defendant and appellant.

**COLE, J.** The object of this suit is to procure the abatement of what the plaintiffs consider a nuisance, known as the Melpomene Canal, or drain, by condemning the corporation of New Orleans to construct such works as will secure a walled or cemented side and channel, and an unbroken paved surface.

There was judgment condemning the city to abate the nuisance within a reasonable time.

The city has appealed.

It appears that the Melpomene Canal is a draining canal, and not used for any other purpose; it drains a large part of the upper portion of the First District. The city has it cleaned out every three or four years. The witnesses state, that the canal has existed, to their knowledge, for twenty or thirty years. *Mr. Avery* knew the canal thirty years ago, when its neighborhood was comparatively a field; he states that improvements began in the neighborhood about twenty years ago.

The evidence shows it would increase the value of property fifty per cent. on each side of the canal, if it were covered.

The witnesses consider the canal to be a nuisance.

We are of opinion that the relief demanded cannot be granted by this court.

This canal has for over thirty years been a drain for a part of the city. Those who purchased property in its vicinity, knew that this drain existed. They paid less for the property on account of the existence of this canal, and it does not seem to be very equitable for them to force the city, at its own expense, to construct works for the covering of the canal and for its improvement, which will augment the value of their property fifty per cent.

The city, as a corporation, has control over the public places and highways within its bounds, and it is the province of the corporation, and not of a judicial tribunal, to determine what improvements shall be made in the streets and canals of the city.

If any works be constructed by the corporation at its own cost, it is the taxpayers who furnish the necessary amount of money, and it is not for courts of justice in a case like the present, to force the city to be at a great expense to cover a draining canal which has existed over thirty years, in order to benefit those who bought property near it, with a full knowledge of its existence and its offensive character, as a drain for a part of the city.

The improvement of the city is left to the wisdom and discretion of the municipal authorities, and courts have not the power to usurp their prerogatives and to do what the Legislature has imposed upon them.

If they neglect their obligations, others can be elected in their place, and thus it is in the power of the inhabitants of the city to abate the nuisance, if such it be.

The canal does not, however, appear to be a nuisance in the legal sense of the word. It is intended for a drain, and it is necessary that canals should exist for the purposes of drainage. Offensive things may occasionally be thrown in, but this is inevitable, in a large city, in despite of the prohibitions of ordinances. If plaintiffs considered the canal a nuisance, they ought not to have purchased along its sides, for it has been in its present condition for twenty-one years and more.

It is, therefore, ordered, adjudged and decreed, that the judgment be avoided and reversed; that there be judgment in favor of defendant against the demand of plaintiffs, and that plaintiffs pay the costs of both courts.

INHERITANTS  
v.  
NEW ORLEANS.

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REUBEN SLEADE et al. v. PAYNE & HARRISON.

In order to relieve the owners of vessels from responsibility, there must be a delivery on the wharf to some person authorized to receive the goods, or some act must be done, which is an equivalent to a delivery.

In order to constitute a delivery, there must be a notice given to the consignee, and a reasonable time given him to make the usual and necessary preparations to receive the goods.

The manner of delivering the goods, and consequently the period at which the responsibility of the master and owners will cease, depend upon the customs of particular places, and the usage of particular trades.

**A** PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*  
*Singleton & Clark*, for plaintiffs and appellants. *P. E. Bonford*, for defendants.

COLE, J. Plaintiffs instituted this suit for the recovery of freight on cotton consigned to the defendants, whereupon the latter reconvened, claiming the value of five bales of cotton, which, they allege, plaintiffs failed to deliver to them.

There was judgment in favor of plaintiff for the freight, and against him on the reconventional demand. He has appealed.

In order to relieve the owners of vessels from responsibility, there must be a delivery on the wharf to some person authorized to receive the goods, or some act which is equivalent to, or a substitute for it. 3 La. 226, *Kohn & Bordier v. Packard*; *The Salmon Falls Manufacturing Company v. The Bark Tangier*, American Law Reg., June number, 1858, p. 505; Parsons on Contracts, 1 vol., pp. 670, 671, Note C. and p. 673; *Northern v. Williams, Phillips & Co.*, 6 An. 579.

In order to constitute the delivery, it is not sufficient to unload the vessel and place the goods upon the wharf; there must also be a reasonable notice to the consignee, giving him time to make the usual and necessary preparations to receive the goods. The manner of delivering the goods, and consequently the period at which the responsibility of the master and owners will cease, depend upon the custom of particular places, and the usage of particular trades. Abbott on Shipping, p. 378; Amer. Law Reg. p. 507.

There was not, in the present case, such a delivery as to relieve the boat from liability.

The only notice given, except so far as the consignees were aware of the consignment by the newspapers and their own bills of lading, was to *Mike Hynes*, the receiving clerk of the press, where *Payne & Harrison* store their cotton. It is not shown that the latter saw the notice in the papers of the arrival of the

SHLEIGH  
v.  
PAYNE.

boat and the names of the consignees, or that they received any bill of lading for the cotton now in contestation.

Conceding that notice to *Hynes* would have sufficed, on the ground that he was the agent for such purpose of the consignees, still a reasonably sufficient time did not elapse between the notice and the disappearance of the five bales of cotton, to liberate the common carrier from liability for their loss.

The consignee is not obliged to accept delivery of goods at the moment he is informed they are ready for delivery, but is entitled to a reasonable time for preparing to carry them away. Particularly must such be case in a port like that of New Orleans, with reference to steamboats. Several of these often arrive at once, with large consignments to the same house. If all goods were at their risk at the moment they were informed they were ready for delivery, it would work a serious inconvenience.

On Saturday afternoon, about sundown, *Hynes* went and asked *Hodgson*, who was employed to discharge the steamboat, if he had any cotton for him. It thus appears that the boat had given him no direct notice, until he went to inquire personally.

*Hodgson* showed him the cotton of defendants, and asked him to take it away. He replied, that he had but four drays and could take only twenty bales that evening. *Hynes* took twenty bales away at that time.

From the evidence of the plaintiff's own witness, it was about sundown, when he informed *Hynes* the cotton was ready for delivery.

If *Hynes* had not taken away any of the cotton, the boat could not have complained, because he was notified at the time when the business of the day was about closing.

The next day was Sunday; *Hynes* was not obliged to take them away on that day, for it is considered a day of rest. If this could be considered a delivery, then there would be no safety for the commercial community. The agent of a boat might notify the consignee in the night or on Sunday, that his goods were ready for delivery, but at such times it is almost impossible to procure laborers, and the goods would be exposed to be stolen and to be injured by the weather.

It is true that the boat binds itself to deliver the goods at the port of New Orleans to the consignee, but this contract, like every other, must be supposed to impose upon the boat the obligation of carrying out its contract in such a way, that the spirit of the contract may not be violated.

The obligation of delivering the goods to the consignee, carries with it that of delivering them at such time that the consignee can get laborers to haul them away, and not at midnight, on Sunday, or some other day of public rest. It is the duty of the boat to exercise a watch over the goods, after notice is given at a proper moment, for the time which is reasonably necessary for hauling them away.

After the expiration of this reasonable time, if sickness or any accident prevents the hauling away of the goods, the boat is no longer liable as a common carrier, but as a bailee on deposit.

At eleven o'clock on Monday morning the remainder of the cotton was still upon the wharf. *Hodgson* at that time saw *Hynes* taking away cotton that had arrived by another boat. *Hodgson* went to *Hynes* and asked him to give him a receipt for the cotton, if he did not intend to haul it. He answered, he would be down directly and haul it way. He declined giving a receipt. At two o'clock, upon the same day, (Monday,) *Hynes* was there to carry away the cotton, but could only find one bale, five being missing.

As notice was first given on Saturday night, and a day of rest intervened between them and Monday, the notice may be considered to have been given on early Monday morning, that the cotton was ready for delivery. *Hodgson* testifies, that it is a custom to keep a watch on cotton until it is hauled away. His asking for a receipt shows that he did not consider it as delivered. He says, that he put a watchman over the cotton on Sunday night "*as usual*," and that he always takes a receipt from the receiving clerk for cotton.

*Hynes* testifies it was 12 M., on Monday, when *Hodgson* told him he had the six bales, being the remainder of the shipment, ready for him. *Hodgson* wished him to give him a receipt for them and to take his word they were there; this deponent declined to do, but told him as soon as the drays returned, he would receive them. As soon as the drays returned, deponent sent for the six bales. The discharging clerk, *Hodgson*, then told him there was but one bale to be found; deponent took that bale, and has never received the remaining five bales. At the time deponent received this last bale, there was considerable cotton on the levee, of the cargo of the *Planter*, which had not been delivered.

Deponent says, that the custom which prevails in discharging and delivering cotton in New Orleans, is this: The party to take and haul away the cotton, ascertains from the boat's manifest on her arrival, the number of bales and their marks intended for his press. He commences to haul away the cotton when it is put upon the levee, as soon as practicable. From the numbers and different marks, it is impossible for the draymen to know positively whether he has all his cotton until toward the last.

His cotton very frequently gets mixed up with the piles for other presses: it is not, in consequence, the custom to give a receipt for the cotton, until the drayman is satisfied that he has all which he has to take away. It is on this receipt that the freight is collected. No house would pay the freight without this receipt, unless under certain circumstances, and with the guaranty of the boat.

*Hynes*, in his cross-examination, testifies, that he did not go to the *Planter* early on Monday morning, because he had to go to get cotton from the steamboat *Eclipse*, which had arrived before the *Planter*. He did not put extra drays to haul away the six bales from the *Planter*, because the cotton had not been longer on the levee than usual. He considers the usual time for cotton to remain on the levee, to be forty-eight hours, after it is assorted and the parties notified, and if he does not call for it, he considers it the duty of the boat to have it stored or given to the wharf-master.

*Hynes* further testifies, "I looked at the manifest of the boat, the day she arrived, and saw the cotton consigned to the defendants and took the marks, and asked the clerk if he could give me the cotton that day; he said he could not, as it was not sorted, and on the next day, I hauled away the twenty bales." He further testified, that it was too late on Saturday evening to get drays to haul away more than the twenty which he was enabled to haul away, because he had four drays to spare from the steamer *Eclipse*, for one load that afternoon.

Plaintiffs did not introduce any evidence to controvert the customs of the port New Orleans, as to the delivery of cotton. If it were possible so to have done, there would have been no difficulty in establishing the contrary.

We are, therefore, of opinion, that by the custom and usage of the port of New Orleans, the consignee was not guilty of any laches, and that the responsibility of the boat was not ended, when the cotton was demanded by the consignee.

Judgment affirmed, with costs.

## W. C. BROADWELL v. P. M. KELLY.

An exception taken by a defendant to a petition, on the grounds that his name has been incorrectly stated, will be regarded as frivolous, when his true name is not disclosed.

A frivolous exception cannot prevent a cause from being put at issue, when an answer has been filed with the exception.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*Clark & Bayne*, for plaintiff. *Hyams, Labatt & Jonas*, for defendant and appellant.

COLE, J. The plaintiff is the payee of two promissory notes signed by the defendant, under the name of *P. M. Kelly*.

The defendant excepted to the petition, on the ground that his name is incorrectly given, and that he is not bound to answer until the same be correctly stated, and he further alleged, that in case the exception be overruled and not otherwise, then he pleads a general denial, &c.

The case was fixed for trial, and there was judgment overruling the exception and in favor of plaintiff's demand.

Defendant has appealed, and insists that his exception ought to have been fixed for trial before the fixing of the cause upon its merits.

It appears that the cause was fixed for a certain day. The exception was frivolous, because defendant did not disclose his true name, if an erroneous one had been given by plaintiff.

The District Judge had the right to order the exception to be tried upon the same day with the merits, if he considered it frivolous.

Besides, defendant did not object at the time it was fixed, or apply for a continuance, if he were not ready for trial. A frivolous exception cannot prevent a cause from being at issue, when an answer has been filed with the exception. The latter has no real existence, and may be overruled at the trial.

Judgment affirmed, with costs.

## E. H. DIX v. A. J. TULLY &amp; Co.

A broker to whom a note was given to sell, being in lawful possession of it, has the right to pledge it. The pledgee of the note has the right to demand, and receive the money due on it, and to sue for it in his own name.

**A** PPEAL from the Sixth District Court of New Orleans, *Eggleston, J.*  
*Waples & Eustis*, for plaintiff and appellant, *Simonds & Fenner*, for defendant.

LAND, J. A promissory note drawn by the plaintiff for the sum of \$400, payable to the order of *Joseph Bruneau*, and by him endorsed in blank, was placed in the hands of *Galbraith*, a broker, to be sold. The broker delivered the note to the defendants *in pledge*, for a loan of money. The note was paid at maturity by the plaintiff, who sues to recover back the amount paid, on the ground of error in law and in fact.

There was judgment for the defendants and the plaintiff has appealed.

*Galbraith* was in lawful possession of the note, and had the power of pledging it, as well as of selling it, so as to bind the rights of the owner. Story on Bailments, § 296.

The defendants, the pledgees of the note, had the right to recover and receive the money due on it, and to sue for it in their own name. *Ib.* 321. A payment of the note to defendants was, therefore, valid. C. C. Art. 2136.

The plaintiff was legally bound to pay the note to the defendants, and there consequently could have been no error in making payment to them.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

DIX  
v.  
TULLY.

### SUCCESSION OF J. J. KERCHEVAL.

A draft taken in part payment of the price of property sold, does not novate the debt so as to cause the seller to lose his privilege upon the property sold.

Checks are assimilated to bills of exchange, and the same rules govern both with regard to the necessity of demand, protest, and notice of protest.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J. Singleton & Clack*, for plaintiff and appellant. *Whittaker & Fellows*, for defendants.

VOORHIES, J. The administrator of the estate of *J. J. Kercheval*, is appellant, from a judgment of the District Court, maintaining the oppositions filed to his tableau of distribution by *Thomas R. Smith* and *Joseph H. Harvey*.

1. *Thomas R. Smith*, classed as an ordinary creditor, claims the vendor's privilege over the proceeds of the steamer *Selma*, one undivided fourth of which he sold to the deceased, who, in part consideration or payment of the purchase, executed and delivered to his vendor a draft upon *R. W. Adams & Co.*

The administrator contends that the debt was novated, and the vendor's privilege destroyed in consequence. The evidence, however, does not show on the part of the deceased and of the opponent, the least intention to extinguish one by another obligation; and, in fact, the draft was given in part consideration for the purchase of the steamer. The case of *J. H. Gails v. Schooner Osceola*, does not apply in this instance.

2. *Joseph H. Harvey* claims to be an ordinary creditor for the amount of a check drawn by the deceased, for the sum of \$344 55, in favor of *R. F. Nicholls & Co.*, on the Exchange Bank of *Horace Bean & Co.*; and he alleges that he became the purchaser of the check at the Sheriff's sale of the effects of the insolvent estate of *R. F. Nicholls & Co.*

There is no evidence that the check was presented for payment and protested; nor that the drawer had funds in the hands of the drawee. It was the duty of the holder of the check to prove these facts in order to save his recourse upon the drawer and the indorser.

Greenleaf says: "But in the case of a banker's check, the drawer is treated as in some sort the principal debtor; and he is not discharged by any laches of the holder, in not making due presentment, or in not giving due notice of the dishonor, unless he has suffered some injury or loss thereby; and then only *pro tanto*. And

SUCCESSION OF  
KERCHEVAL.

the burden of proof is upon the holder to show, as part of his case, that no damage has accrued or can accrue to the drawer by his omission of any earlier demand or notice; or, in other words, that his situation, as regarded the drawer, remains as it was at the time of the dishonor." *Vide* Story on Promissory Notes, §§492, 498; 3 Kent Com.

Checks are assimilated to bills of exchange, and the same rules govern both with regard to the necessity of demand, protest, and notice of protest. 5 An. 304, *Barbour v. Bagon*. The claim of *Joseph H. Harvey* was, therefore, erroneously allowed by the court.

It is, therefore, ordered and decreed, that the judgment of the District Court be amended in this respect; that the claim of *Joseph H. Harvey* be disallowed and rejected, as in case of non-suit; that the said *Harvey* pay one-half of the costs of appeal, and the costs of his opposition in the District Court; that the administrator of the estate of *J. J. Kercheval*, deceased, pay the other half of the costs of appeal; and that in all other respects the judgment of the District Court be affirmed.

### MCKLERoy & BRADFORD v. SOUTHERN BANK OF KENTUCKY.

The acceptance of a bill of exchange admits the genuineness of the drawer's signature, and where an acceptor has paid to a *bona fide* holder of a forged draft or bill, having no notice of the forgery, he cannot recover back the money paid.

But where a party becomes the holder of such a draft, before it has been accepted, and when the loss had already attached, it was accepted, and paid, and the acceptors, immediately upon ascertaining the fact of the forgery, gave notice of this fact to the holders—*Held*: That such a case is an exception to the general rule, and the acceptors are not estopped from proving the forgery, and recovering the money they had paid through error.

**A**PPEAL from the Fourth District Court of New Orleans, *Price, J.*  
*Clark & Bayne*, for plaintiffs and appellants. *Thomas Hunton*, for defendants.

**LAND, J.** The evidence in this case establishes the following facts, viz:

The plaintiffs were the factors of *James Smith*, a cotton planter, residing in the State of Arkansas. One *John Zimmer*, who had for a few months been a private tutor in *Smith's* family, assuming the name of *John Belmont*, forged a draft on the plaintiffs, in the name of *Smith*, as follows:

\$986.

"Homestead, November 5th, 1857.

On the 15th December, 1857, pay to the order of *John Belmont* nine hundred and eighty-six dollars, value received, and charge the same to the account of

JAS. SMITH.

To Messrs. *McKleroy & Bradford*, New Orleans, La."

*Zimmer* also forged a letter of introduction, in the name of *Smith*, to *Shotwell & Son*, of Louisville, Kentucky, as follows:

"Homestead, Nov. 5th, 1857.

Messrs. *Shotwell & Son*.

Gentlemen:

I introduce to you *Mr. John Belmont*, a gentleman who resided in my family as our tutor. Having been sick, he is now travelling to improve his health. I gave

*Smith, you were a  
dandy.*

McKLEROY  
S. BANK OF KY.

him a draft on *McKleroy & Bradford*, my commission house in New Orleans, which he is desirous to get cashed in your city. If you can give *Mr. Belmont* any assistance, by perhaps recommending my draft, as *Mr. Belmont* is a stranger in your city, and not yet fully recovered, you will greatly oblige me.

I am, gentlemen, yours respectfully,

JAMES SMITH."

The house of *Shotwell & Son* had been in correspondence with *James Smith* for about twelve years; and being deceived by the forger, endorsed the draft for the purpose of enabling the holder to negotiate it. The draft bearing the endorsements of *John Belmont* and of *Shotwell & Son*, was presented for discount at the Branch of the Southern Bank of Kentucky, and being considered good, was purchased by the bank. The draft was remitted to the Louisiana State Bank, with the following additional endorsement upon it—"Pay to *R. J. Palfrey, cashier, J. B. Alexander, cashier.*" The draft thus endorsed, was presented to plaintiffs for acceptance by the Louisiana State Bank, and was accepted on the last of November, or first of December, and was paid at maturity, on the eighteenth of December, 1857, by the plaintiffs to the agent of the Southern Bank of Kentucky. In January, 1858, *James Smith*, being in the city, made known to the plaintiffs, upon an examination of his account with them, that the draft was a forgery. *Mr. Shotwell*, of the house of *Shotwell & Son*, was in this city at the time, and was immediately sent for, and the fact of forgery communicated to him. On the 9th of January, 1858, the plaintiffs gave formal notice by letter, of the forgery, to *A. L. Shotwell & Son*, to the Southern Bank of Kentucky, and also the Louisiana State Bank.

This suit was instituted by the plaintiffs to recover back the money paid on the draft, on the ground of *payment in error*.

There was judgment for the defendant, and the plaintiffs have appealed.

The District Judge held, that the acceptance of a bill of exchange admits the genuineness of the drawer's signature, and that where an acceptor has paid to a *bona fide* holder of a forged draft or bill, having no notice of the forgery, he cannot recover back the money paid, although the forgery is established by the most conclusive evidence. And where one of two innocent persons must suffer, he who has misled the other, or has omitted his duty, must bear the loss.

These principles of law are well established, and admit, perhaps, of neither doubt nor controversy, and if applicable to this case, must determine the rights of the parties.

The defendant became the holder of the draft, before it was accepted by the plaintiffs, and before they had any knowledge of its existence, and consequently, before the defendant had any right of action against them for its recovery. The plaintiffs, therefore, had done no act which induced the defendant to believe the signature of the drawer to be genuine, at the time the bill was purchased. How, then, can it be said that the defendant purchased the bill on the faith of the plaintiffs' acceptance, or on their guarantee of the genuineness of the drawer's signature? Or how can it be said that the plaintiffs misled the defendant at the time of the purchase of the bill, or was then guilty of the omission of any duty toward the defendant as the purchaser of the bill?

If the defendant had purchased the bill on the faith of the acceptance of plaintiffs, or had sustained any loss in consequence of their negligence, we would have no difficulty in affirming the judgment of the lower court; but such are not the facts made known to us by the record.

McKLEEROY  
v.  
S. BANK OF KY.

The defendant purchased the bill on the faith of the endorsement of *Shotwell & Son*, which was a warranty of the genuineness of the drawer's signature to the bank; and there is no good reason, why the accidental payment made by the plaintiffs should inure to the benefit of the defendant.

Mr. Chitty says on this subject, "if he (the holder) thought fit to rely on the bare representation of the party from whom he took it, (the bill), there is no reason that he should profit by the accidental payment, when the loss had already attached upon himself, and why he should be allowed to retain the money, when, by an immediate notice of the forgery, he is enabled to proceed against all other parties, precisely the same as if the payment had not been made, and consequently, the payment to him has not in the least altered his situation, or occasioned any delay or prejudice. It seems that, of late, upon questions of this nature, these latter considerations have influenced the court in determining whether, or not, the money shall be recoverable back; and it will be found, on examining the older cases, that *there were facts affording a distinction*, and that upon attempting to reconcile them, they are not so contradictory as might on first view have been supposed." Chitty on Bills, 464.

The facts in this case afford the distinction to which Mr. Chitty refers, and takes the case out of the general rule, which prevents the acceptor of a bill of exchange from recovering back the money paid in cases of forgery of the drawer's signature.

*The loss had already attached, before the bill was either accepted or paid*, and the acceptors gave immediate notice to the defendant, and *Shotwell & Son*, after ascertaining for the first time, from *James Smith*, in whose name the bill was drawn, the fact of forgery.

The evidence shows, that plaintiffs accepted the bill, in the language of the witness, "*chiefly through the respectability of the channels through which it came*." It is, therefore, difficult to conceive upon what principle of equity or right the defendant can be permitted to retain the money paid in error by the plaintiffs, upon the facts of this case. No authority applicable to the particular circumstances of this case has been cited by the defendant's counsel, and we have no hesitation in reversing the judgment upon the authority of Mr. Chitty, above quoted.

In a case like the present, the acceptor is not estopped from proving the forgery of the bill.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed; and it is now ordered, adjudged and decreed, that the plaintiffs do have and recover of the defendant the sum of nine hundred and eighty-six dollars, with five per cent. per annum interest, from the 18th day of December, 1857, with costs in both courts.

## STATE v. W. G. BUNGER.

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An opinion formed and expressed by a juror in a criminal case, which is based wholly upon rumor, and when there is no bias or prejudice in the mind of the juror, is not a disqualification.

The jurisdiction of the Supreme Court being limited to questions of law in criminal cases, it must appear clearly by a bill of exceptions to the refusal of the Judge to sustain a challenge of a juror for cause, that no question of fact but one purely of law was presented for decision.

The statutes regulating the arrest and commitment of persons accused of crimes and misdemeanors, do not require the previous examination of a prisoner before a committing magistrate, in order to authorize the Grand Jury to inquire into the matter and find a bill of indictment.

Where the regular session of a court is adjourned over by order of the Judge at chambers, the jurors summoned for the first week of the court, are bound to attend, and serve for the first week of the actual session of the court thus adjourned over.

The accused, in a criminal case, is not entitled to service of the list of talesmen.

Where a juror can be challenged for cause, the right must be exercised before the juror is sworn, and a verdict cures the defect.

Where the jury cannot be completed by talesmen from among the bystanders, recourse may be had to other persons not within the presence of the court.

The objection was stated in the bill of exceptions to the refusal of the Judge to grant a new trial, that such talesmen were summoned during the time the court was adjourned—*Held*: That there was no error in the ruling of the court below, and that if any complaint was made by the accused against the Sheriff for want of impartiality in summoning such talesman, it was a matter of fact to be submitted to the Judge, and rested in his sound discretion.

The Judge may properly refuse to charge the jury as requested by counsel, on the ground that the charge asked for is the same in substance with that already given, with the only difference of being shaped in a manner calculated to mislead the jury.

**A**PPEAL from the District Court of the Parish of Madison, *Farrar, J.*  
*E. W. Moïse*, Attorney General, for the State. *T. S. Crawford*, for defendant and appellant.

**VOORHIES, J.** The defendant was indicted, in the year 1856, for the murder of his wife, found guilty and sentenced to death. Having appealed to the Supreme Court, in session at Munroe, he succeeded in obtaining a reversal of this judgment; and the case was remanded for a new trial. 11 An. 607.

A new indictment for the same offence was preferred against him in the District Court. He then obtained a change of venue, was tried, again found guilty, and was sentenced to death.

We will now consider the questions of law presented by the numerous bills of exception, which the prisoner has taken to the rulings of the court below:

I. There is a complaint with regard to the service of the venire; the bill of exception states, "that no list of the jury, who were to pass on his trial, had been delivered to the accused two entire days before that time."

The record does not show that this party ever complained that an informal and irregular list of jurors were ever served upon him, nor does the District Attorney, in his brief, concede this point.

The Sheriff, in his return, states, that "he served on the prisoner a certified list of the jury for the first week of the VENIRE FACIAS, WHO WERE LIABLE TO SERVICE AS PETIT JURORS." It is true, the same bill of exception sets up as a matter of grievance, that the District Judge admitted the introduction of parol evidence, "to prove that the list of jurors served on the accused, was made out after certain jurors had been excused." Apart from the manifest inconsistency that we find in this bill of exceptions, with regard to the fact of the service of the venire,

STATE  
v.  
BUNGER.

we must confess our inability to see the practical effect of the second objection. There would be some meaning in it, had the prisoner rested his complaint upon the ground, that the list of jurors served upon him, was not such a one as the law contemplates. As he has not done this, we must overrule this bill of exception.

II. A juror by the name of *G. W. Waugh* was challenged for cause by the accused, on the ground that he had formed and expressed an opinion as to the guilt of the accused. The objection was overruled; but it appears that the juror did not sit on the trial of this case.

This juror, being sworn on his *voir dire*, states: That he has formed and expressed an opinion as to the guilt or innocence of the prisoner; that he has heard a good deal said about this case, the evidence of which, however, he has not heard; that, after hearing the evidence, he can give a fair and impartial verdict; that he has heard the accused himself speak of the case; that he is of opinion that the accused is guilty; and, finally, that he has no prejudice or opinion which will prevent him from doing impartial justice after having heard the testimony.

We will not disturb this ruling of the District Judge in this instance, for several reasons. Was the opinion of the juror based wholly upon rumor? Or wholly upon the narrative of the accused himself? Or partly on both? Now an opinion predicated upon rumor, when there is no bias or prejudice in the mind of the juror, is not a disqualification. On the other hand, if this opinion is based on the statement of the prisoner, the objection would seem to come more properly from the District Attorney.

The apparent hardship, in this case, consists in the fact, that the juror stated that he believed the prisoner guilty; but then, he does not say that his opinion is based on the declarations of the prisoner, nor on rumor. And, although from his answers, one or the other, or perhaps both of these elements, must have presided in the formation of his opinion, there was clearly presented for adjudication, a question of fact, which the inferior court alone could decide. Was that opinion based upon rumor? Was it based on the declarations of the prisoner? Or was it the result of both?

This was a matter of fact, which had to be weighed; and it is not made apparent by bill of exceptions, that in so doing, the District Judge violated any known rule of law applicable to the instance, or applied in its solution a ruling of doubtful applicability.

The jurisdiction of this court being limited to questions of law in criminal cases, it is obvious that we cannot review the action of the court below in this matter, without trespassing on the facts; and that is another reason why the ruling of the District Judge in refusing the challenge for cause of the juror, *G. W. Waugh*, should not be disturbed. 13 An. 491.

We may add that, as this juror did not sit in the case, and as it does not appear that the defendant thereby exhausted his peremptory challenges, we are unable to perceive the nature of the injury, which claims redress at our hands.

With regard to the other jurors challenged for cause, to wit, *J. S. Bugg*, *Henry Maddox* and *B. S. Simms*, it appears that their opinion was based wholly upon rumor, and that they were open to conviction. It is true that *J. S. Bugg* stated, in answer to the question: "Would circumstantial evidence, different from what you have heard, change your opinion of the case?" "I think not." But at the same time, he made the statement that "he could judge of this case as of a case about which he had heard nothing, and formed no opinion." The

juror evidently misapprehended the purport of the question propounded to him relative to circumstantial evidence, the nature of which was probably unfamiliar to him.

It was, however, peculiarly within the province of the court below, to determine whether the facts elicited from the juror, on his *voir dire*, were such as to warrant the conclusion that the juror was or was not open to conviction; and, if the accused was under the impression, that in so doing, an error or mistake of law had been committed to his detriment, it was incumbent upon him to present his grievance in a tangible form. As this bill of exception does not point out the error of law complained of, (and this remark applies to the challenge for cause of the other jurors,) we are exposed, in sustaining it, to review an opinion of the District Judge, which possibly may have been the solution of a mere question of fact, conceding the law to be as stated by the defendant's counsel. Let us add that of these four jurors, the only one who sat in the case was *Henry Maddox*, who was clearly qualified to do so.

It is the duty of parties, in a criminal prosecution, to set up their grievances on appeal to this court, so that it can safely exercise its jurisdiction, without being exposed to violate the constitutional provision upon this subject. See the case of *State v. Brunetto*, 13 An. 45, and the authorities there quoted. See opinion of C. J. Merrick, in case of *State v. Henderson*, 13 An. 491.

III. The accused made a motion, in the court below, that the District Attorney be ordered to elect on which of the two indictments for the same offence, he would prosecute. No bill of exception was taken to the ruling of the District Judge, upon the rejection of this application.

Besides, the motion to elect can be exercised only with reference to the improper insertion of different counts in the same indictment. Wharton's Criminal Law, p. 190, ed. 1852.

IV. The regular pannel of jurors having been set aside, on the application of the prisoner, he cannot now be listened to, when he contends that the bill of indictment preferred against him, should have been presented by the Grand Jury thus discharged.

V. The next ground of complaint is, that the prosecution originated before the Grand Jury, without previous preliminary investigation before a committing magistrate.

The statutes regulating the arrest and commitment for crimes and misdemeanors, do not require a previous examination of the prisoner, in order to authorize the Grand Jury to inquire into the matter. Indeed, the discharge of the prisoner by the committing magistrate, would never be seriously opposed as precluding the action of the Grand Jury. Besides, it is the common law practice, and a practice invariably followed in this State, and never before questioned, that prosecutions may originate in the Grand Jury. Chitty Cr. L. p. 163.

VI. The defendant's counsel urge that the reception of illegal evidence by the Grand Jury, vitiates the indictment. But it does not appear by bill of exception how the law has been violated in this respect, in the case at bar; nor in what respect the District Judge has misconstrued or misapplied the law. We have nothing to do with the statement of facts which we find in the record, on this branch of the case.

VII. The regular session of court for the parish of Madison, having been adjourned over for two weeks by the written order of the District Judge at chambers, and the jury of the first week ordered to attend accordingly, the prisoner

STATE  
v.  
BUNGER

challenged the array on the ground, that their term of service had expired by law. The District Court properly overruled this objection.

The court was not in session the first and second weeks. These jurors did not serve, or even attend court during that time; and the District Judge properly held that, in contemplation of law, the first week of the actual session of court, was that during which the jurors first enlisted had to attend court and serve in that capacity.

VIII. The accused was not entitled to service of the list of talesmen; this is not an open question. *State v. Reeves*, 11 An. 686.

IX. The Sheriff having summoned the talesmen out of the presence of the court, and when the court adjourned over from day to day, it is contended that the persons so summoned were not bystanders, and as such not liable to serve as jurors. The counsel states in his brief: "On this point, I am aware that the later American decisions have greatly relaxed the English common rule, but contend that Louisiana has adopted the common law of England as it stood in 1805, and that the late innovations on this well established principle of the common law, do not apply to this State."

The rule is undoubtedly as laid down by the counsel; but it is obvious, that if the jury cannot be completed by summoning bystanders, recourse may be had to other persons not within the presence of the court. The bill of exceptions does not set this matter right before the court, and we are bound to presume, in the absence of proper evidence to the contrary, that the District Judge and the officers of court, did their duty on this occasion. If the Sheriff did not act with impartiality toward the accused, as the latter complains, that was a matter of fact which ought to have been submitted to the District Judge, and which rested in his sound discretion.

X. One of the talesmen, named *S. L. Stone*, a juror in this case, was not challenged for cause, although it appears that he was not qualified to serve. The court overruled the objection filed on that ground, by the defendant, to set aside the verdict of the jury. It is well settled that, when a juror can be challenged for cause, the right must be exercised before the juror is sworn; and that a verdict cures the defect. No distinction is made by law, in that respect, between regular jurors and talesmen. Courts of justice cannot distinguish.

XI. The last bill of exceptions refers to the charge of the court to the jury. The counsel for the defence requested a charge to the effect: "That a confession in a capital case, from the nature of the thing, is a very doubtful species of evidence, and should be received with great caution." The District Judge refused to give this charge, on the ground that he had already given these instructions to the jury in his charge, in a less objectionable form. In this respect, we agree with him in laying down the law, that "a free and voluntary confession by a person accused of a crime, is evidence against him; and it is with the jury to attach to a confession, that weight to which it is entitled."

The District Judge having already charged, that in case the jury were satisfied of the insanity of the accused at the date of the commission of the deed, they must bring in a verdict of acquittal—had the right to decline giving the charge, asked by the prisoner's counsel on the same subject-matter. The charge demanded was the substance of the charge already given, with the only difference that the former was stated in a manner calculated to mislead the jury.

We have had occasion during the progress of this investigation, to notice that this record contains an abundance of parol and documentary evidence; and we

STATE  
v.  
BROWN!

take this opportunity to state, that inasmuch as the facts are not within the province of this court in criminal prosecutions, it is the duty of the Clerks of the District Court to avoid encumbering the transcripts, in such cases, with statements of facts. See *opinion of C. J. Merrick, in the case of State v. Henderson*, p. 491, 13 An., in which the following passage occurs :

" It is apparent that inasmuch as the testimony is never taken down by the Clerk in criminal cases, that the record cannot be certified, as in civil cases, to contain all the evidence. This was known to the framers of the Constitution, when they conferred the appeal, and to the Legislature also when it authorized an appeal in criminal cases without giving bond. The Articles of the Code of Practice which gives either party the right to require the Clerk to take down the testimony in civil cases and to require him to certify the same to the Supreme Court, are not applicable to appeals in criminal cases ; and it seems to us as a consequence that the appeal cannot be dismissed, because the appellant did not do an impossible thing. C. P. 601, 896, 897."

It is, therefore, ordered and decreed, that the judgment of the District Court be affirmed.

MERRICK, C. J., dissenting. This case is of the greatest importance to the accused, as it involves nothing less than his life. As I differ entirely from the majority of the court on some points and concur on others, I shall proceed to consider the questions in the order in which they are presented by defendant's brief.

At the outset it is proper to remark, that I do not think I am bound to be more technical than was the Attorney General in his argument in February last, or the District Attorney in his brief. I shall consider those questions which they have considered, and I shall not deprive the accused of the benefit of the discussion of any question which the State admits to be raised by the bills of exception.

I have had sufficient experience as an advocate to know that it is not possible in the hurry of a criminal trial to draft bills of exception with a certainty which shall exclude all possible inferences, or to use the language of Lord Coke, with a certainty to a certain intent in every particular. In my opinion it is sufficient, if the bill informs the Appellate Court with reasonable certainty of the supposed error. 4 An. 505.

The District Judge very properly, in my opinion, certified the facts needed to the full explanation of the question of law raised before him. Such is the usual mode of raising questions of law, and is the mode pointed out by this court in the case of the *State v. Brown*, just cited. 4 An. 505.

There cannot be such a thing as a question of law pending before a *judicial tribunal* wholly disconnected with facts. The Legislature may so deal with abstract legal propositions ; but courts of justice concern themselves alone in applying legal principles to facts. Without facts they have no jurisdiction. The Court of Error, however, has the facts already found by the inferior jurisdiction, either by a special verdict, a statement of facts, or bills of exceptions, or the proceedings themselves, as shown by the record. The duty of the Court of Error is then, only to consider what law is applicable to a given state of facts already ascertained by the inferior tribunal.

I discover, therefore, nothing improper in the bills of exception which have detailed the facts necessary to understand the ruling of the District Court upon such points. On the contrary, I think the bills of exception would have been

STATE  
v.  
BUNGER

defective without them. The Constitution gives the accused a right of appeal on questions of law, and as a consequence the means of spreading those questions upon the record.

In 1856, the accused having been convicted of the crime of murder upon another indictment, prosecuted an appeal from the District Court for the Parish of Franklin to this court, then sitting at Monroe. The judgment of the lower court was reversed, and the case remanded for a new trial. 11 An. 607.

On the return of the case to the lower court, a new indictment was presented in the Parish of Franklin for the same offence. The venue was subsequently changed to the Parish of Madison. A second trial has also resulted in a judgment sentencing the accused to undergo the penalty of death. Hence the present appeal.

The record presents nine bills of exception taken to the proceedings in the District Court. We will now proceed to consider the questions of law raised in this case.

I. The second indictment was found at the October term, 1856. Thereupon the accused by his counsel, moved the court to compel the State to elect under which indictment it would proceed. This motion was overruled. But it does not appear that any bill of exception was taken to this decision. As the present proceeding and conviction is under the second indictment, it would seem that a bill of exception was required to make the first indictment a part of the second record. However, this may be, the accused in this instance has suffered no embarrassment from the first indictment, for it seems to have been dropped. Moreover, it is said by Mr. Wheaton, "that the pendency of an indictment is no ground for a plea in abatement to another indictment in the same court for the same cause." Wheaton Crim. p. 189, ed. 1852. Butler, justice, in *King v. Shelton*, 1 Douglass, 240. *King v. Wynn*, 2 East. R. 226. 3 Burrows, 1668. 3 Cooke. Charles 147, Whitpole's case.

II. The accused then pleaded several matters in abatement, and caused the District Judge to certify the fact in a bill of exceptions.

FIRST. It was pleaded that the grand jury who found the bill were not legally impanelled, for the reason that a grand jury had been impanelled on the first day of the term, and the prisoner alleges they were improperly discharged and a new grand jury impanelled. But it appears from the bill of exception, that the first venire, including the grand jury, was set aside on the challenge and objection of the accused and some others to the array. He cannot now be permitted to complain of the order of the judgment directing a new venire as it was the consequence of his own act.

SECOND and THIRD. It was objected that the pretended grand jury originated this prosecution without any previous charge before a magistrate, or preliminary examination at which the accused could be heard, or where he could confront the witnesses. On this branch of the so called plea, the Judge *a quo* makes the following statement, viz: "It was also proven that there had been no previous prosecution of the accused or any previous or preliminary investigation of the offence charged in this indictment, prior to the investigation by the grand jury, and that this prosecution originated by the District Attorney, *Wade H. Hough*, preparing the bill of indictment, and indorsing thereon the names of the witnesses on the part of the State, and submitting said bill with the indorsement of the names of said witnesses thereon, and that the testimony given before the jury of inquest at the time the inquest on the body of *Patsy Bunger*, deceased, by *M. C.*

*Jones*, Justice of the Peace, acting as Coroner, which proceedings in holding said inquest and the evidence given before said jury of inquest was before the grand jury when they found this indictment, are annexed hereto and made a part of this bill of exceptions, marked C." The finding of the jury of inquest was, that *Patsy Bunker* came to her death by wounds inflicted by the prisoner with malice aforethought. It does not, therefore, appear to be a case where the proceeding strictly originated with the grand jury. But I have no hesitation in saying that under our law, bills may be originated before the grand jury without any previous proceeding before committing magistrates. This right of the grand jury is not only derived from the common law, but it has been recognized and sanctioned by those numerous statutes, which the lawgiver has required the District Judge at each jury term of the court to be given in charge to the grand jury.

At common law, as well as under the former practice of our own courts, the presentment was a very common mode of originating prosecutions. Chitty in his work on Criminal Law, p. 163, says: "Presentment in its limited sense differs only from an indictment, in being taken in the first instance by the grand jury, of some offence within their own knowledge and into which it is their duty to inquire. After the presentment has been delivered into court by the grand inquest, an indictment is framed upon it by the officer of the court, for it is regarded merely as instructions for an indictment to which the party accused must answer."

At common law there was so little necessity for an examination of the accused previous to the finding of the indictment that a collateral verdict of twelve men was often sufficient to put the party upon his trial without any indictment at all. Thus, the finding of the jury under a Coroner's inquest in the case of a violent death, in which it was found that the deceased came to her death by wounds or injuries inflicted by the accused with malice aforethought, might stand in the place of the indictment, and the party might be arraigned thereon. 1 Chitty, 163. See other cases *verbo* Indictment. 3 Bacon's Abridg. p. 93.

If the grand jury have no power to originate prosecutions, the giving of particular statutes in charge to them is an idle ceremony, and the Legislature has done a vain thing in requiring such charge from the District Judge.

I do not perceive the danger apprehended by counsel in leaving this power with the grand jury. They are drawn from the body of the people, and they cannot act without the assistance of the District Attorney or some officer performing his duties. The accused has, therefore, but little to apprehend from malicious prosecutions in this form, and he is finally shielded by a trial by a petty jury, and further protected by a power to change the venue in cases of popular prejudice.

The Constitution guarantees to the accused that he shall not be prosecuted except upon an indictment or information, and that he shall have a speedy public trial by an impartial jury of the vicinage and the right of meeting the witnesses face to face. But this does not entitle the accused to the right to a cross examination of the witnesses before the grand jury, or to a previous examination of them in the event he be not arrested before they are sent to the grand jury. Under Art. 103 of the Constitution, the prosecution is not formally commenced until the indictment is found or the information is filed. Of course these remarks are not intended to apply to the rights of the accused, at the preliminary examinations, nor of his rights under a writ of *habeas corpus*.

FOURTH. It is urged that the indictment ought to have been quashed because it is said that it was found upon the testimony taken at the Coroner's inquest. We

STATE  
v.  
BURGESS

have copied into this opinion already the facts found by the District Judge on this part of the case. And by a careful examination of them, it will be seen, as I think, that they have relation to the manner in which the prosecution originated. The bill of exception does not show that it was not found upon the testimony of the witnesses whose names were indorsed upon the bill, nor that the Coroner's inquest and testimony taken before him were considered as proof of any fact by the jury when they found the indictment. I am not prepared to say that it vitiated the indictment because the District Attorney laid the inquest and testimony, if such be the case, before the jury, to induce them to send for the witnesses, provided the bill was afterwards found upon the testimony of the witnesses, nor that an indictment ought to be quashed because the foreman of a grand jury should have the testimony of the witnesses taken on a preliminary examination, or even the Coroner's inquest before him to assist him in conducting the examination of the same witnesses before the grand jury. The presumption of law is, that the grand jury have acted properly in the finding of a bill of indictment, and as the law has made no provision for the taking of bills of exception to proceedings before them, it is but reasonable to require the party who objects to their finding, to show that the indictment is found upon illegal and insufficient proof. This is not, as I think, clearly shown by the bill of exception in this case. What is therein stated is not wholly inconsistent with a proper finding by the grand jury upon the testimony of the witnesses.

III. The regular session of the court for the Parish of Madison commenced by law on the 4th Monday, viz: the 25th day of October. The court was adjourned over by a written order from the Judge at chambers for two weeks, viz: to Monday the 8th of November, no other term intervening. The jury summoned for the first and second week of the term, it seems were required to be in attendance. The District Judge being present on the 8th of November, the accused moved the court by way of challenge to the array, that the venire summoned for the first and second weeks of the court should be set aside, because the court had not power to hold over the jurors to a week for which they had not been summoned. The adjournment of the court did not make it an adjourned term. The October term of the court might have continued until the fourth Monday of November. The continuances of the court over for this period did not make two terms. See Phillips Rev. Stat. p. 248, sec. 53. I understand an adjourned term of the court to be one where, at the adjournment of a regular term, the Judge, satisfied of its necessity, orders a term to be held after a term has been held in another parish, and requires the proper notices to be given. A special term may be ordered at chambers, and held also after proper publication at any time not interfering with any legal term. See Phil. Rev. Stat. 284, §§49, 51. It is true, at the adjourned or special terms, if needed, juries ought to be summoned, but this is not required at any adjournment at a regular term. It is also true, that the Statute says that the jury shall be discharged at the end of the week at which they are summoned, and it urged that the District Judge had no power to hold the jurors over to a day after their week for which they were summoned had expired. It was in the power of the District Judge, had he been present on the first day of the term, to compel the attendance of the jurors at the day at which the court adjourned, by causing them to be summoned on a special venire, as this power is expressly reserved to the District Judge by the Act which provides for the attendance of the jurors. See Act 1857, p. 180. And I am not prepared to say, that the jury, from whom some service is required, (and not a mere idle atten-

dance,) may not be held to serve out the term for which they were summoned after the arrival of the Judge, where the court has been adjourned over by a special order to the Sheriff. For this purpose, the day to which the court was adjourned, might be taken as the first day of the term; for on that day the grand jury was to be formed, and it was in fact the first day at which the jury could perform any service.

IV. It is next objected, that the accused was compelled to go to trial before the list of the jury had been served upon him who were to pass upon his trial.

The State relies upon a return of the Sheriff made upon the *venire facias* for the first week of the term, and parol proof to show that a list was really served upon the accused.

But if the whole *venire* had been served, which is not pretended, it would have been illegal. *State v. Howell*, 3 An. 52. *State v. Bunger*, 11 An. 607. Acts 1857, p. 197; 1858, p. 170.

The *venire facias* had its proper return to it previous to this second return improperly entered thereon. The first return was responsive to the command of the writ. The second pretended return had no relation thereto, and was not of a matter contained therein.

Hence, the supposed return of the writ of *venire facias*, which contained the grand jurors, those excused and those not served, must stand precisely as if made upon a blank piece of paper.

In order that it may be better understood I give the second return in full. It is in these words, viz :

“Received on the 8th day of November, 1858, a certified list of the jury for the first week of the within *venire facias*, who are liable to service as petit jurors for the adjourned term of the Tenth Judicial District Court of the State of Louisiana, of the Parish of Madison, commencing on the 8th day of November, 1858, and delivered the same to *William G. Bunger*, in the prison of the Parish of Madison, on the said 8th day of November, 1858. Madison Parish, La., Nov. 11th, 1858. (Signed,) F. M. Dawson, per A. D. Ramsey, deputy.”

Here it is seen, that the Sheriff only served a list of such persons upon the accused as were “liable to service as petit jurors for the adjourned term of the court.” Who they were does not appear of record in this case. We have only of record the opinion of the Sheriff, that they were the proper persons and the right number.

Now, is this sufficient? In my opinion it is clearly defective. The law requires the Sheriff to make service of petition and citation. Will the Sheriff's return supply either? Can a record be made up of Sheriff's returns? Here the accused by a bill of exception in due form excepts to going to trial until the list of jurors are served upon him. We look into the record to see if there is any evidence of such service, and we find nothing but the above Sheriff's return and the parol testimony of the clerk (also excepted to) to prove this important fact. The District Attorney in his brief on this point says: “It does not appear of record that the defendant denied service of a list of the jury which was to pass upon his case. The evidence, (Trans. p. 30), the clerk, *F. M. Couch's* evidence (Trans. p. 31) and the Sheriff's return, (Trans. p. 33), go to show conclusively that there was a list of the jury made out who were to pass upon defendant; that he was served with the same, and in sufficient time for the trial. It is fair to presume that defendant was in possession of said list, although he did not produce the same in court.” He adds, “To say the most of this matter, though it was

STATE  
v.  
BUNGER.

simply one to have brought up the question of continuance; and the Supreme Court has often decided that that was a matter in the discretion of the lower court, and should not be reviewed by this court."

It is not, therefore, pretended by the State, that this record contains any list of jurors served upon the accused. The facts embodied in the bill of exception taken by the accused, appear to have been added for the benefit of the State. This bill in these words:

"Be it remembered, that when this case was called by the court, on Thursday, the 11th day of November, 1858, the accused, by his attorney, objected to the trial being proceeded with, and the jury empanelled at this time, for the reason that there had been no service of the list of the jury which are to pass on his trial, delivered to him two entire days before this time. On the trial of which objection, the *vernire facias*, with the return of the Sheriff of the summoning of some of the jurors, and his failure to summon others, and the return of the Deputy Sheriff of the manner of service of the jury list, endorsed on the *vernire facias* by *A. D. Ramsay*, Deputy Sheriff, on the 11th November, 1858, were offered and received in evidence; said document being marked 'A' and attached hereto and made a part of this bill of exceptions. Also, extract from the minutes of this court, marked 'B' which is annexed hereto, and made a part hereof; also, the evidence of *F. M. Couch*, Clerk of this court, *A. D. Ramsey* and *T. M. Dawson*, taken down at the time by the direction of the honorable the presiding Judge of this court, to serve as a statement of facts, which evidence is annexed hereto and made a part of this bill of exceptions, marked 'C,' and the oath of *A. D. Ramsey*, Deputy Sheriff, marked 'D.'"

The testimony of *Ramsay* and *Dawson* referred to in the bill, relates entirely to the appointment of the Deputy Sheriff, which was verbal only.

The testimony of the Clerk excepted to and referred to in the foregoing bill, was, that "he thinks the copy of jury list was made after the above named (*viz*, six) jurors had been excused; states that the list was made out and delivered to the Sheriff on Monday, the 8th November, 1858."

"Examined by defendant":

"States, according to his best recollection, the list was made after the minutes of the court for Monday had been written up and the jurors excused."

This mode of proving a fact which ought to appear of record, appears to me wholly inadmissible.

The law requires that the accused "shall have a copy of the indictment and a list of the jury which are to pass upon his trial, to be delivered to him at least two entire days before the trial."

Where this formality is not waived, it must appear of record, because required by the statute, and the omission cannot be supplied by parol proof, much less the uncertain evidence in this record.

It is not a question of fact, whether service has or has not been made, to be decided solely by the District Judge, but a requirement of the law which may be examined by the appellate court. Phillips Dig. 162, sec. 18.

V. The entire panel having been exhausted in this case, (two jurors only having been sworn), the accused claimed that the list of talesmen should be served on him, two entire days, in order that he might have time to prepare his challenges. This right being refused, the accused excepted. The court did not err in this. See *State v. Reves*, 11 An. 686.

VI. It appears that the talesman were summoned from the town of Richmond

and other parts of the parish, and not in the presence of the court. They were objected to by the prisoner on the following grounds, viz : 1st, that the court was without power to summon jurors for a particular case ; and, 2d, that the officer acted illegally and partially, having summoned said jurors, during the adjournment and out of the presence of the court.

The objections of the prisoner having been overruled, he excepted.

It is well known, that in the country parishes, where the population is sparse, that it is frequently impossible to form a jury *tales de circumstantibus*. There then must be power to summon jurors beyond the precincts of the court, or there will be a failure of justice. The latter cannot happen. The more regular way would be, (where there were not any bystanders in court from whom the remainder of the panel could be formed,) to enter an order on the minutes, directing the Sheriff to summon a given number of jurors to serve as talesmen in the case named, and that a *venire* issue to him to summon them *instanter*. See Act of 1857, p. 180 ; 3d vol. Black. 364.

But I am not prepared to say that a jury summoned from the parish at large, by the Sheriff, under the oral order of the Judge, would not furnish competent talesmen when once within the precincts of the court. 5 An. 315.

It may be said that the Sheriff or his deputies may act with partiality. This might also happen in the presence of the court. On a sufficient showing, no doubt, the District Court might direct the proper officers to open the jury box and draw therefrom a special *venire* of talesmen not to exceed thirty-two, to be summoned *instanter*, and so on, until a jury should be completed, the names of the jurors so drawn being immediately returned to the box.

VII. Exceptions were taken as on the former trial, to the ruling of the Judge *a quo*, upon the challenge for cause. The following appears to me to be well taken : *George W. Waugh*, a juror called to the book and sworn on his *voir dire*, answered :

1st question by defendant. Have you formed and expressed an opinion relating to the guilt or innocence of the prisoner ?

Answer. I have formed and expressed an opinion.

Int. 2d. Have you heard a good deal said about the case ?

Answer. I have.

Question by the State.

1st. Have you heard any evidence in the case ?

Answer. I have not.

2d. After hearing the evidence, could you give a fair and impartial verdict ?

Answer. I could.

Question by defendant. Have you heard the facts of the case ?

Answer. I heard *Bunger*, the accused, speak of them himself.

2d interrogatory by defendant. Is it now your opinion that the accused is guilty of the crime of which he is charged ?

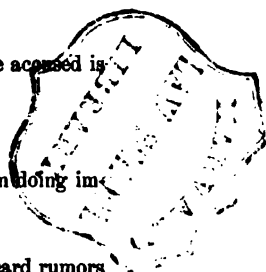
Answer. It is.

Question by the court.

1st. Have you an opinion or prejudice which will prevent you from doing impartial justice after you shall have heard the the testimony.

Answer. I have none.

It is quite evident the juror did not stand as one who had only heard rumors in regard to the case. He had heard *Bunger* speak of the facts of the case himself, and nevertheless was of the opinion, that the accused was guilty. He had



STATE  
v.  
BUNGER.

locked up in his breast, important evidence and he was beyond the reach of cross-examination.

Persons governed by prejudice are mostly unaware of its extent, and hence a person who has formed his opinions from hearing the witnesses or conversations with the accused, ought to be excluded, notwithstanding his own opinion of his capacity to render a just verdict.

Another juror stated, that he thought that circumstantial evidence different from what he had heard, would not change his opinion. In these two cases, the accused ought not to have been compelled to exercise a peremptory challenge to set aside the the jurors. See *State v. Brette*, 6 An. 656 ; *State v. George*, 11 An. 607 ; 8 Rob. 535 ; *State v. Brown*, 4 An. 505.

The law gives the accused a right to twelve peremptory challenges, and he is not bound to use one of them, so long as he has a valid challenge for cause. Any other rule would embarrass the accused and his peremptory challenges might thus be exhausted upon jurors against whom he had sufficient challenges for cause. As the accused must except, when the court decides a point against him, he is not obliged to wait in order to see whether he will exhaust all his peremptory challenges or not, before he tenders his bill. In a case like the present, where almost the whole jury were to be formed from talesmen, it was perhaps of the utmost importance to the prisoner, to husband his peremptory challenges.

The District Judge certified the facts as to the jurors, precisely as it was done in the cases of the *State v. George*, 8 Rob. 537 ; *State v. Brown*, 4 An. 505 ; and *State v. Bunker*, 11 An. 607. This court acted upon the statement in those cases, and there is no reason why a different rule should be adopted now.

It is true the District Court passed upon a question of fact when it found the jurors competent, but at the same time it applied a rule of law which the accused has the right to have reconsidered in this court, precisely as he has of the Judge's charge to the jury.

VIII. A bill of exception was also taken to the charge of the Judge to the jury, both as to the matters given in charge by him of his own accord, and his refusal to charge on certain points as requested.

It is objected that the District Judge did not inform the jury what constituted the crime of murder.

If the counsel of both the State and the accused were agreed on that point, and had explained the same to the jury, the charge on that branch of the case would have been superfluous. We do not find in the charge the exact language mentioned in the brief of defendant's counsel. It might have been, perhaps, more guarded, but taken together, I do not discover that it makes the killing the absolute test of the offence, as supposed by defendant's counsel. The jury were informed, that if the killing were wilful, that malice is implied, and that the absence of malice must be accounted for to the satisfaction of the jury. If there were error in this portion of the charge, it did not prejudice the prisoner. For the jurors might have been informed, that if they found that the homicide was committed by the accused, deliberately or without adequate provocation, the law implied malice, and it was incumbent upon the prisoner to show, from evidence or by inference from the circumstances of the case, that the offence was of a mitigated character, and did not amount to murder, and they might have been informed further, that no affront by words, or gestures, or former quarrels, (where any time has intervened,) are a sufficient provocation to extenuate the killing from murder to manslaughter. 3 Greenleaf's Ev., p. 132, sec. 144 ; 4 Black. 200.

STATE  
v.  
DUNN.

The counsel for the accused requested the court to charge the jury, that "a confession of a capital crime, from the nature of the thing, is a very doubtful species of evidence, and should be received with great caution."

This charge was refused by the Judge, and the prisoner excepted. The charge requested is in the language of a respectable writer on criminal law. But I think it was not error to withhold it. For under the same circumstances, the confession of the party might make conclusive proof, whilst an uncorroborated confession, in the absence of facts, showing that a crime had been committed by any one, might not be entitled to any serious consideration whatever.

The same author, quoted by the counsel for the accused in the bill of exception, says in another place, that: "A free and voluntary confession by a person accused of an offence, whether made before his apprehension or after; whether on a judicial examination or after commitment; whether reduced to writing or not; in short, any voluntary confession made by the defendant to any person, at any time or place, is strong evidence against him, and, if satisfactorily proved, sufficient to convict according to the English rule, without any corroborating circumstances." Wheaton, Crim. Law, p. 252, ed. 1852.

The other matters which the prisoner requested to be given in charge to the jury, it seems, were in fact given in another form.

Being satisfied that the judgment is clearly erroneous, I think the case ought to be remanded for a new trial.

LAND, J., concurs in this opinion.

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# ANDREW MATTA v. HENRY HENDERSON.

To maintain an action for the rescission of a sale of property of which the vendee is in possession, it is necessary there should have been an offer to return the property, made previous to the institution of the suit.

There must be an express allegation that the vendor has been disquieted in his possession, or has just reason to fear that he will be disquieted, to entitle the vendee to demand that security be given by the vendor against eviction.

**A** PPEAL from the District Court of the Parish of West Feliciana, *Haralson, J. A. M. Dunn*, for plaintiff and appellant. *S. J. Powell, and Collins & Leake*, for defendant.

MERRICK, C. J. The plaintiff alleges that the defendant has obtained an order of seizure and sale against him, to sell the one undivided third of the Elm Park plantation, in the parish of West Feliciana, and a number, say ninety-four negroes, described in the act annexed to the petition; that the proceedings in the order of seizure and sale are illegal; that the said *Henderson* sold to petitioner, in consideration of \$26,769 50, the one undivided third of the property described in the act of sale, on the 20th day of October, 1854, with full warranty of title against all persons whomsoever, and all incumbrances of every kind; that petitioner paid on the price of said sale, (at the times set out in his petition,) \$13,169 50; that petitioner is not bound to pay the residue of said price, but is entitled to recover principal, interest and damages, on what has been paid; that on the 2d day of June, 1856, the Supreme Court decided, in the case of the *Heirs of Stephen Henderson v. Rost & Montgomery* (the decree in which case is an-

MATTA  
v.  
HENDERSON.

nexed to the petition); that petitioner has no valid title to said slaves, and derived none from his vendor, *Henry Henderson*; that petitioner is advised, and believes that the failure of said *Henderson* to make good his said title to petitioner, entitles him to the annulling of the contract or a reduction of the price. He prays for an injunction, and upon the trial, that he have judgment cancelling the notes upon which the order of seizure and sale issued, and judgment for the amount of the payments and interest, inasmuch as the land is without value unaccompanied with the slaves, and for ten thousand dollars damages, and for general relief.

The order of seizure and sale issued upon three promissory notes, dated 20th of October, 1854, for \$2,333 33 $\frac{1}{3}$  each, with eight per cent. interest from date, and payable the 1st days of April 1856, 1857 and 1858.

A motion having been made to dissolve the injunction on the face of the papers and for the insufficiency of the bond, was sustained, and defendant decreed to pay five per cent. damages on the amount enjoined, and five hundred dollars special damages for attorney's fees.

The case of the *Heirs of Stephen Henderson v. Rost & Montgomery, Executors*, is reported in 11 An. 541.

The appellant contends, that it is disclosed by his petition, that *Henderson* sold to the plaintiff negroes which belonged to others; negroes who were not slaves, and in whom there was not a saleable interest, and the sale of which was *contra bonos mores*.

Defendant replies, the suit of *Henderson's* heirs is *res inter alios acta*, and the plaintiff seeks to cancel the notes and recover back the money he has paid as the price of the property, and also keep the possession and ownership of the property.

It does not appear from the record in this case, that the decree rendered in the suit of *Henderson's Heirs* against *Rost & Montgomery*, can have any influence on the rights of the plaintiff in this case. For it does not appear that either the plaintiff or *Henry Henderson* was a party to that suit, nor that the suit was instituted to procure the emancipation of the negroes previous to the sale; nor that the negroes sold were entitled to emancipation under *Henderson's* will and the decree of the Supreme Court. But if it be conceded that the negroes are the same, and that the decree does not place certain or all of them in the condition of *statu liberi*, still the plaintiff is in the undisturbed possession and enjoyment of the property sold, and not entitled to an action of warranty until he has been evicted.

But if plaintiff's demand be considered as an action of rescission, it is defective, because he has been several years in possession, and moreover there has been no tender of the property or offer to return the same to the defendant previous to the institution of the suit, and plaintiff subjects himself to the objection raised by defendant's counsel, of keeping the property and demanding the return of the price. 6 Rob. 472; 7 N. S. 95.

The only serious question raised by appellant, is whether, under the allegations of the petition and the prayer for general relief, he may not be entitled to compel the defendant to give security against eviction.

But, on examining the petition, we do not find any allegation that the plaintiff has been disquieted in his possession, or that he has any just reason to fear that he should be disquieted by any one, on account of the decree in the case of *Henderson's Heirs* against *Rost & Montgomery*.

In the absence of such allegation, we do not think an injunction, which, to some extent, is governed by strict law, ought to be maintained.

The motion to dissolve, rests upon the insufficiency of the allegations of plaintiff's petition, and the decree sustaining the motion may, perhaps, be a bar to any future action of the plaintiff for causes of action now existing, if such he have. We think the judgment ought to have been one of nonsuit upon the petition.

It is, therefore, ordered, adjudged and decreed by the court, that the decree of the lower court be so amended, as to dismiss the petition of the said *Andrew Matta*, as in case of a nonsuit; and that said judgment so amended, be affirmed; the defendant, *Henry Henderson*, paying the costs of the appeal.

MATTA  
v.  
HENDERSON.

A. BROTHER, Syndic of P. CONREY, JR., v. NEW ORLEANS CANAL AND BANKING COMPANY.

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Article 1083 of the Civil Code, which obliges a creditor who has been preferred, to share the loss ratably with the complaining creditors, gives the right to compel them so to do, only to those creditors whose debts were either due or would fall due before that of which the payment was anticipated by the debtor in insolvent circumstances.

In order to succeed in a suit to make the preferred creditor contribute ratably, the actors must specially allege the nature of their debts, and prove themselves to have been creditors within the meaning of the Article.

The syndic of an insolvent cannot bring such a suit.

**A**PPEAL from the Third District Court of New Orleans, *Kennedy, J.*  
*Logan Hunton and Singleton*, for plaintiff and appellant. *E. A. Bradford*, for defendant.

**COLE, J.** *Peter Conrey, Jr.*, made a judicial surrender of his property to his creditors on the 7th of November, 1851, and *Alexander Brother*, as syndic of the creditors instituted the present suit on the 28th of April, 1852.

The gravamen of the suit is, that *Conrey*, on the 8th of July, 1851, being then in a condition of actual but not declared insolvency, transferred to the Canal and Banking Co., a note of *R. W. Montgomery*, the payment whereof *Marshall & James* had assumed, for \$17,666 66, due at twelve months from the 8th July, 1851, and other notes amounting together to \$6,905 92, in payment of his two acceptances, for \$10,000 each, due, one on the 18th and the other on the 28th of July, 1851. The original petition alleged that when this anticipated payment was made, the Bank *knew* of the actual insolvency of *Conrey*; that the transfer was a fraudulent preferment of the Bank, and a fraud on the rights of the other creditors. The amended petition avers, that it was intended, both by the Bank and *Conrey*, to make an unlawful payment, and to give an unlawful and unjust preference; and it *also* alleges it to have been an *anticipated* payment that gave an unjust and illegal preference, to the injury of various creditors, whose debts fell due and became payable *before* the two acceptances.

The amended petition prayed that the Bank might be condemned to pay the syndic \$20,000, with interest, to be distributed ratably among the ordinary creditors of *Conrey*, and for general relief.

The defendants in answer, admit that they discounted the paper in question for *P. Conrey, Jr.*, and that the proceeds of the discount were applied by him to the

BROTHERS  
v.  
CANAL BANK.

payment of his acceptances, then held by them for \$20,000, but aver that the transaction was made on their part in good faith, under the full belief that *Conrey* was solvent, and without any view whatever to obtain any preference over other creditors, and deny especially all the charges of fraud or preference made by the plaintiff.

The District Judge referred this cause to a special jury of merchants, who returned the following verdict on the 18th February, 1857 :

" We, the jury, find a special verdict as follows :

" 1. That no evidence has been furnished which proves a knowledge of *Conrey's* insolvency on the part of the Canal Bank on the 8th July, 1851.

" 2. That it was the understanding on the part of the Bank that the proceeds of the discount of the 8th of July, 1851, should, in part, be applied to the extinguishment of his unmatured obligations, and that the proceeds were so applied on that day.

" 3. That we are of the opinion he (*Conrey*) was insolvent on the 8th July, 1851."

On motion of the plaintiff's counsel, this verdict was ordered by the court to be recorded, and on the 20th February, 1857, the plaintiff " moved the court to enter up judgment for plaintiff according to law, upon the special verdict of the jury rendered herein."

The defendants thereupon filed a peremptory exception, founded on law, to the amended petition, on the ground that it was not competent to the plaintiff, in his alleged capacity as syndic of the creditors of *Peter Conrey, Jr.*, to have and maintain any action against the defendants for the causes set forth in his amended petition.

This exception was sustained by the District Court, and a final judgment was entered for the defendants. Plaintiff has appealed.

It appears to us, that the court did not err. Article 1983 of the Civil Code provides that, " If a debtor, in insolvent circumstances, shall anticipate the payment of a debt not yet payable, and shall, to the injury of the creditors whose debts were either then due, or would fall due before that of which he anticipated the payment, this shall be deemed to have been done in fraud of the creditors, and the creditor so preferred, shall be obliged to share the loss ratably with the complaining creditors, each creditor, however, preserving the right of mortgage or privilege, if any, which his original debt gave him by law."

This Article establishes that the anticipated payment must be an injury to creditors whose debts were either then due or would fall due before that of which the payment was anticipated. If there are no creditors of this character, there can be no action. If there are, then they, and not the mass of the creditors derive benefit from the suit against the creditor paid by anticipation. In order to succeed in a suit to make the preferred creditor contribute ratably, the actors must specially allege the nature of their debts, and prove themselves to have been creditors at the time of the preferred payment, and also at the time of instituting their action. The syndic not having any greater rights than the creditors they represent, must make these allegations, if such right of action can be supposed to appertain to him, and also establish the same to be true.

As this action belongs to a certain class of creditors and is their special prerogative, and is enacted for their peculiar benefit on the ground that they only are injured, it can therefore be either tacitly or directly waived. There being no law authorizing the other creditors to avail themselves of this action, when the particular class have declined it, the syndic cannot therefore exercise it.

The amount paid to the preferred creditor is no part of the common assets, for the preferred creditor is only liable to a particular class of creditors, and that ratably. If the amount of the debt paid to the preferred creditor was \$20,000, and that due to the class of creditors injured thereby \$7000, the latter could not at most, get more than the total of their claims, so that there would remain a large balance belonging to the preferred creditor, which could not be touched by the other creditors. The syndic is not entitled, as he has asked in this case, to have the whole amount, or indeed, any part of the amount paid to the preferred creditor, brought into the common mass to be distributed ratably among the ordinary creditors.

It is true, that claims upon which there are privileges are tried in concurso with those against the insolvent which are of an ordinary nature, but in such case if the amount of the property of the insolvent upon which there are privileged claims exceeds that of the latter, the difference goes into the general mass of assets. By Article 1983, however, if the amount of the preferred claim exceeds that due the class of injured creditors, the excess does not go into the common mass, but is retained by the preferred creditor. So there would be no wisdom on the part of the syndic in putting the estate of the insolvent to the risk of paying costs and attorney's fees by instituting suit against the preferred creditor, when neither the whole or any part thereof can enter into the mass and be enjoyed by all the creditors.

The principal reason, perhaps, that might be given for the right of the syndic to sue is, that if the creditors injured decline suing, and the syndic sues and succeeds in the action, if the preferred creditors are paid in whole or in part, the other creditors would be benefited, because the preferred creditors would either draw no dividends at all, or not so large ones from the common mass, so that there would be a larger amount of money left for distribution among the mass of the creditors.

Such an interest as this cannot, however, give the right of action, and the law has left it to the volition of the preferred creditors, deeming the motives of self-interest to be sufficient to prompt them to institute the action, if there be any reasonable ground to apprehend success.

The syndic is the representative of the mass, and not of any particular creditor or class of creditors, so far as relates to their special interests. Sess. Acts, 1855, p. 437. § 28. *Ducuir v. Veazey et al*, 8 An. p. 453. *Campbell v. Slidell*, 5 An. 274. Boulay Paty, 1 Banqueroutes et Faillites, 430, § 322, and notes to Article 528, Code de Commerce, in Sirey's Cinq Codes Annotés.

As this case is decided upon the peremptory exception, it is unnecessary to decide at present whether the presumption of fraud, as declared in Article 1983 of the Civil Code can be rebutted by evidence.

Judgment affirmed, with costs.

MERRICK, C. J., dissenting. I am of the opinion that the syndic was the proper person to bring this suit. Our law differs in this respect from the Code de Commerce, Art. 528. See Arts. 1965, 1988, 1972, 1989, C. C. The decisions are uniform that an individual creditor cannot bring the revocatory action after the surrender, and we have just decided the same in the case of *Hart against Goldsmith, Haber & Co.* 3 M. R. 276.

It is no objection to the action that the fund when recovered may be distributed among particular creditors. Does not that almost always happen when there are judicial mortgages, and property is recovered under the *actio pauliana*?

BROTHER  
V.  
CANAL BANK.

The presumption, I think, established by Article 1983, is *juris et de jure*. It says the anticipated payment *shall be deemed to have been done in fraud of creditors*. Art. 2266 declares that, "legal presumption dispenses with all other proof in favor of him for whom it exists."

"No proof is admitted against the presumption of law, when on the strength of that presumption it annuls certain acts, or refuses a judicial action unless it has reserved the contrary proof and saving what will be said on the judicial confession."

No reservation is made in the article in question.

The injury to the creditors appears from the fact that, at the time this anticipated payment was made *Conrey's* paper had been protested in New York for a large amount, and this to the knowledge of the officers of the bank.

I think judgment on the verdict of the jury ought to have been rendered in favor of the plaintiff.

LAND, J., concurred in this opinion.

### J. BOGEREAU V. GUÉRINGER & Co.

The liability of a partner to a third person is not increased by the fact, that an individual debt of his has been assumed by the partnership of which he is a member.

A partner cannot be made liable on a note endorsed by his co-partner with the social name, after the dissolution of the partnership, unless it is shown that he was benefited by the transaction, or authorized the endorsement.

**A** PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*

*J. & E. Bermudez* and *E. Filleul*, for plaintiff and appellant. *C. Roselius* and *P. A. Ducros*, for defendants.

VOORHIES, J. The plaintiff sues the defendants, *P. U. Guéringer* and *F. N. Guéringer*, to recover from them *in solido*, as partners of the commercial firm of *P. U. Guéringer & Co.*, the amount of a promissory note of the tenor following :

"\$10,000.

New York, August 20th, 1855.

Twelve months after date, I promise to pay to the order of *P. U. Guéringer & Co.*, ten thousand dollars, value received. Payable 697, Broadway.

(Signed)

P. U. GUÉRINGER.

(Endorsed)

P. U. GUÉRINGER & Co."

One of the defendants, *P. U. Guéringer*, excepted to the plaintiff's demand, on the ground that the latter had already obtained a judgment against him for the same cause of action. It was contended on the other hand, that the plea of *res judicata* could not be set up in this instance, because the object of this suit is to make the party liable as a member of the firm, by virtue of the endorsement, whilst the judgment which has been rendered against him related to his individual liability as drawer of the note. The District Judge maintained the plea, and dismissed the suit as against *P. U. Guéringer*.

There is no doubt that this defendant is bound *in solido*, individually and as a partner, for the whole amount of the note sued on; but at all events, he cannot be called upon twice to pay the amount in controversy. A partner is individually responsible for all the debts of the partnership; but his liability is not increased from the fact that an individual debt of his has been assumed by the partnership of which he is a member.

The plaintiff occupies a somewhat inconsistent position in this matter. He alleges that this is a debt for which *P. U. Guéringer* is liable individually as maker, and as partner of the firm of *P. U. Guéringer & Co.*, by virtue of the endorsement in the name of the firm. And yet he states, in his petition, that he has "obtained this note, in the ordinary and due course of trade, from *P. U. Guéringer*, one of the members of the commercial firm of *P. U. Guéringer & Co.*, of New Orleans." Be this as it may, the only amount which the plaintiff had the right to recover from the party who drew this note in his individual name and endorsed it with the name of the firm, was the amount of the note itself. The plea of *res judicata* was, therefore, properly sustained.

The defence set up by the other defendant, *F. N. Guéringer*, is that there never existed in New York a firm entitled *P. U. Guéringer & Co.*;—that a firm bearing the same title had existed in the city of New Orleans, but had been dissolved on the 10th day of March, 1855, within the plaintiff's knowledge; that this commercial firm never had any dealings with the plaintiff; that the note sued on was the individual liability of *P. U. Guéringer*, who had no authority to endorse it in the name of the firm.

On a previous occasion, suit had been brought against the defendants as members of this firm, by the present plaintiff, for the same cause of action; but the demand against *F. N. Guéringer* was dismissed as in case of nonsuit, on the ground that the plaintiff had failed to prove, as was incumbent on him, that a partnership existed between the defendants at the time the note was endorsed with the social name, or that the consideration of the note had enured to the benefit of the partnership. Vide Opinion Book 29, p. 563.

It appears that on the first day of March, 1851, the defendants formed, in the city of New Orleans, a partnership; and it was stipulated in the act, that it would last for the space of six years, and that only one of the partners, *F. N. Guéringer*, had the right to use or sign the social name of the firm. The partnership was, however, dissolved on the 10th day of March, 1855, over five months previous to the date of the note, upon which the present action is based. The defendant, *P. U. Guéringer*, was, therefore, without authority to make the endorsement; and the plaintiff is precluded on this subject, unless he were ignorant of the fact of the dissolution of the firm, or unless the other co-defendant was benefited by the transaction, or authorized the endorsement.

It is not pretended that the latter ever gave any such authorization, or even approved of it subsequently. And the view which we have taken of the merits of the whole transaction, as between the plaintiff and *P. U. Guéringer*, dispenses with an examination as to the fact of knowledge of the previous dissolution of the partnership concern between the defendants.

The position occupied in this transaction by the plaintiff, is a very discreditable one, as evinced by his own correspondence. He was engaged in a hurried liquidation of his business affairs at Panama, with the declared intention of realizing at a sacrifice the whole of his means, for the settled purpose of making a fraudulent surrender of his property to his creditors, whose claims, he himself admitted, would exceed the assets he would thus realize. He does not blush to expose the whole plan of his operations to the defendant, *P. U. Guéringer*, then his bosom friend. It seems that one of the motives that actuated the plaintiff in this nefarious line of conduct, was his solicitude for a woman by the name of *Laure*, with whom he had had a child; and that, for fear that as a result of his embarrassed situation, he and his concubine and daughter might be left in

BOGHEAU  
v.  
GUÉRINGER.

straight circumstances, he preferred to throw the losses on his creditors, who, as he remarked, were all rich, and more able to weather the storm. He was willing to leave to his creditors a large per centage on their claims, provided, however, they showed him some leniency; but if they were refractory, he would find himself compelled to realize all that he could, and keep the same to their exclusion.

In order to carry out his plan, and for fear that death might in the meantime snatch him away, without provision being made for "the objects of his tender affections," he enlists the services of his friend, *P. U. Guéringer*, who willingly complies with the request. Large sums of money are forwarded to the latter for the sole purpose of remitting to Europe; great precautions are taken for the purpose of keeping all these movements secret; the plaintiff in several letters requests, in case of his unexpected demise, that the sum of \$10,000, and afterwards that an additional sum for the same amount, be transmitted to his concubine; the plaintiff then repairs from Panama to New York, where he lives clandestinely; and as a finale to their dishonest operations, the defendant, *P. U. Guéringer*, executes the note of ten thousand dollars in favor of the firm of *P. U. Guéringer & Co.*, long since dissolved, and endorses that note with the social name. To corroborate the already abundant proof that the consideration of this note has not enured to the benefit of the other co-defendant, the evidence in the record shows that there was no business transaction between the plaintiff and the firm of *P. U. Guéringer & Co.*, and that whatever transactions may have taken place between this firm and the house of *P. U. Guéringer* in the city of New York, and between the defendants, were duly closed without reference to the note now under consideration.

The attempt to discredit the witness, *P. U. Guéringer*, who was placed on the stand after the District Judge had dismissed the suit against him, comes with a bad grace from the plaintiff, his *particeps criminis*. The court below properly overruled all enquiries into the particulars of the conduct and character of this witness. And on the score of interest, we think the objection to his competency untenable: his interest is not adverse to the plaintiff's, but to that of the defendant, if the latter be bound for the note sued upon. This ruling disposes also of the bill of exception to the competency of the witness, *Ernest Guéringer*, for the reason assigned, that he is the son of *P. U. Guéringer*.

The last bill of exception was taken to the overruling of the following question, propounded by the plaintiff to the witness, *Riera*: "What was the share of *F. N. Guéringer* in the partnership of *P. U. Guéringer & Co.* when it was first formed, in the year 1841?" This question was properly overruled on the ground of irrelevancy. Had it been answered, it could have benefited the plaintiff in no wise; for the defendants, being commercial partners, were bound in *solido* for all the debts of the partnership.

The appellee, *F. N. Guéringer*, has moved for an amendment of the judgment rendered in his favor; and we think that, instead of a judgment of nonsuit, he was entitled to an absolute judgment.

It is, therefore, ordered and decreed, that the judgment of the District Court be amended so as to reject the demand of the plaintiff against the defendant, *F. N. Guéringer*; and that the judgment so amended be affirmed, the plaintiff and appellant paying costs in both courts.

## F. J. VANBIBBER &amp; Co. v. THE BANK OF LOUISIANA.

A bank is liable to the payees of a check made payable to their order, when the check is paid on a forged endorsement made by the collector of the payees, who receives the check in payment of a bill of merchandise intrusted to him for collection by his employers.

**A**PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*  
*H. M. Spofford*, for plaintiffs. *Levi Peirce*, for defendant.

COLE, J. *Messrs. Roche & Esclapon*, having purchased a lot of sugar of plaintiffs, the latter sent, on the 30th November, 1858, their collector, *J. F. Butler*, to collect the price thereof.

The purchasers gave their check for \$1,335 98, the amount of the bill, on the Bank of Louisiana, payable to plaintiffs or order.

The collector appears to have forged the signature of the payees, and to have presented the check personally, or by a third party, to the bank, upon the day of its execution, and then to have absconded with its proceeds.

This action is to compel the bank to pay to the payees the amount of the check.

There was judgment for plaintiffs, and defendant has appealed.

The first question that arises is, whether the plaintiffs were the owners of the check?

It is contended that they were not, because the duty of the collector was to have received only current money in payment of the bills for the sugar, and the plaintiffs would have had the right to have disavowed the act of their collector.

The plaintiffs were called upon by defendant, to answer interrogatories, and, in answer to a cross-interrogatory, testify that they "collected their money through checks, and made disbursements in the same way; that their collector had no instructions, at the time he presented the bill, as to the manner of receiving payment.

It having been the custom of plaintiffs to receive the payment of their bills by checks, they could not, with any grace, have disavowed the action of their collector.

Besides, even if the action of the collector in taking a check were unauthorized, his principals had the right to ratify it, if they desired, and they have so ratified it by bringing this suit.

The title of the check was, therefore, in plaintiffs.

The drawers of the check were accustomed to have deposits of funds at the bank, and to draw occasionally against the same.

The drawers in this check requested the bank to pay its amount to plaintiffs or order. The bank had no right to pay it to any other person. It has, however, paid it upon a forged endorsement, and the amount of the check must be considered to be still in the bank, subject to the rights of plaintiffs.

A depositor in a bank has the right to suppose that the bank will only pay out his money upon his own signature or that of his agent, and upon the conditions specified in the check. The party receiving a check drawn by a depositor is actuated by this confidence and belief, and takes a check with the understanding that it shall be paid only to his order, or as specified in the check.

In this case, no negligence is shown on the part of plaintiffs. The collector

VANTRIMMER  
V.  
LOUISIANA BANK.

had been known to one of the firm several years, and had been in their employ six months, and had always maintained a good character for honesty and proper deportment, until his sudden disappearance, on the 30th of November.

If there was negligence anywhere, it was upon the part of the bank. Their duty to their depositor required them to be satisfied that the endorsement of the check was that of the payees.

Besides, it is usual with merchants to deposit checks, payable to their order, in banks, in which they keep their accounts with their proper endorsement, as so much cash; and it is proved that such was the custom of plaintiffs. The unusual course, of demanding payment of the check, ought to have awakened the attention of the bank.

It appears also, that plaintiffs never had any account in the Bank of Louisiana, and that the signature of the firm is not on the signature book of the bank. It was, then, great laches to pay the check, without being properly satisfied of the genuineness of the endorsement.

It is also established, that the collector was never authorized by plaintiffs to endorse any check drawn to the order of the firm, or any check.

Plaintiffs also made search for the collector, and telegraphed to all points for his arrest, and sent a person to Jackson, Mississippi, in search of him. The collector took, besides the proceeds of the check, forty dollars from the safe of plaintiffs.

Art. 2966 of the Civil Code requires the power to endorse bills of exchange or promissory notes to be express and special; but defendant contends that a check is not a bill of exchange, and that this Article applies to *written powers of attorney*. Story, Prom. Notes, § 489.

It is true that bills of exchange differ, in many important particulars, from checks; yet, even without this Article, the collector would not have been empowered to have endorsed the check for plaintiffs, without showing that it was within the scope of his agency as collector; otherwise, no one would be safe from ruin. Edwards on Bills and Notes, p. 396; *Chapman v. White*, 2 Selden Rep., 412.

There was an implied engagement, upon the part of the bank, to pay to third parties the checks drawn in their favor by depositors, and thus there was a privity of contract between the plaintiffs and the bank.

*Butler* having been authorized to collect the bill, and the usual way being the receipt of a check, the check was, then, received for plaintiffs, and his possession was that of plaintiffs. The forgery of the check did not divest them of the right of property in the check, which could only properly be paid to their order.

*Butler* could not, by exceeding the limits of his authority, acquire any interest in the check which could injure plaintiffs.

Defendant contends that the bank is not liable to the payee of a good check, which it has obtained under a forged endorsement, and that its only liability is to the drawer, whose name is on its signature book.

The banks having consented to pay the deposits of their depositors on their checks, have thus tacitly agreed to pay them to the payees, and they are bound to know that the checks are paid to the real payees, or their agents, as long as they permit their depositors thus to draw checks and thus to make payments to their creditors. Otherwise, creditors would be liable to be defrauded.

*Butler* was never entrusted with the power of drawing checks, and there is no reason why the loss should fall upon plaintiffs. The bank could have prevented the loss and caused the arrest of *Butler*, by verifying the signature.

It does not appear whether the bank paid to *Butler* or to a stranger, or that any caution was used in asking his name or a reference. If to *Butler*, it is not shown that he was known, or that they knew him to be the clerk of plaintiffs.

The bank receiving the money of plaintiffs, not on special deposit, but subject to being checked for, acquires a benefit, as it has the use of the money; and in consideration, and also to oblige their customers, agrees to pay it out as ordered by the depositors, but in this case they have not obeyed their order, but contravened it, in paying it to a different person than the payees.

*Esclapon & Roche* acted with prudence, for they made the check payable to the order of plaintiffs, as is generally the case in such payments; for then the debtor knows that they cannot lose, and that the creditor cannot be defrauded.

If the defendant were not responsible, it would put innumerable obstacles in the way of business, and all to prevent the banks being at the little trouble of asking the person presenting the check for a reference, or to verify the signature, if it is unknown.

The bank becomes the agent of the debtor to pay the check. In agreeing to pay it, they agree to pay it to the right person. If they do not wish to do this, their duty is to refuse to pay. But in accepting the agency, which is for a consideration, they subject themselves to the rules and obligations of agents, and can be sued directly by the creditor of the debtor, who is the holder of the check.

It is true, that checks made payable to fictitious payees, or persons not *in esse*, and purporting to be endorsed by them, are deemed to be checks payable to bearer so far as relates to the drawer. But plaintiffs had a real existence, and the check ought to have been endorsed by them before it was paid by the bank. *Wilcox v. Beal*, 3 An. 407; *Smith v. Mechanics' and Traders' Bank*, 6 An. 624; *Etting v. The Commercial Bank of New Orleans*, 7 R., p. 462; *Morgan v. Bank of State of New York*, 1 Duer, 434, (affirmed in 1 Kernan, 404, p. 6, Spofford's cases); *Laborde v. The Consolidated Association*, 4 Rob. 193.

The bank holds the money of its depositors subject to be checked for as their agent. When, then, the bank receives a check, instructing them to pay a certain part of the deposit of the drawer to a third party, and the bank agrees so to do by its general custom, and by undertaking to pay it upon the supposed endorsement of the third party, the amount of money represented by the check, and on deposit as that of the drawer, becomes *eo instanti* the property of the payee, and the bank, from the moment it undertakes so to pay the check, holds the amount of the check as the agent of the payee, and is responsible to the payee, as his agent, if he pays it upon a forged endorsement. The bank also holds the amount of the check as the agent of the drawer, and undertakes, as his agent, to hold the amount of the check no longer as the agent of the drawer, but as that of the payee; so that, either the drawer or the payee can maintain an action against the bank, unless one of them has deprived himself of the right by some action of his own.

Judgment affirmed, with costs.

## GEO. W. HELME v. MIDDLETON, HARPER &amp; Co.

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In a transaction by which a draft is substituted in the place of a note, to constitute a novation of the debt, it must be established clearly that it was the intention of the parties that the draft should be taken in absolute payment of the note.

Where at the maturity of a draft, the firm on which it was drawn in the city of New Orleans had no place of business, and could not be found there, and had then ceased to exist as a firm. *Held*: that a protest was unnecessary to bind the drawer.

**A** PPEAL from the Fourth District Court of New Orleans, *Price, J.*  
*Clark & Bayne*, for plaintiff. *Benjamin, Bradford & Finney*, for defendants and appellants.

**COLLE, J.** The defendants being indebted to *J. H. Palmer & Co.*, gave to them as collateral security two notes of *J. B. Harper & Son.*, and upon the 6th of June, 1853, the defendants agreed to allow *Palmer & Co.*, to be paid the amount of the notes out of a judgment, in case it should be rendered in their favor, in a suit instituted by them against the Memphis Insurance Company.

Afterwards the following transaction took place between the parties, as is evidenced by their receipt :

"Received, Bayou Sara, April 23d, 1855, from *Messrs. J. B. Harper & Son*, their draft on *Messrs. B. F. Shields & Co.*, New Orleans, La., for \$972 32 in full of all demands, in case said draft is accepted and acceptable to the representative of *J. H. Palmer & Co.*; also order on *Messrs. Bonford & Finney*, for control of the suit of *Middleton, Harper & Co. v. Memphis Insurance Co.*, and when suit is brought to a successful termination and the money made, we agree to return to said *J. B. Harper & Son*, the aforesaid draft, notes, &c., and the balance due from insurance, less costs for collection, costs etc.,

J. H. PALMER & Co.,  
 A. N. BAXTER."

At same time of execution of this receipt, the following order was given :  
 To Messrs. Bonford & Finney.

Please give in charge the suit *Middleton, Harper & Co. v. Memphis Insurance Co.*, to *Wm. M. Abernethy, Esq.*, executor of *J. H. Palmer*, and his receipt will be good to you.

J. B. HARPER & SON.

Bayou Sara, April 23d, 1855.

The draft on *Shields & Co.*, was not paid at maturity, and was returned to *J. B. Harper & Son*, whereupon plaintiff, who is the receiver of *Palmer & Co.*, instituted this suit, in which he averred that more than enough had been collected from the judgment against the Memphis Insurance Co., to pay the two notes of *J. B. Harper & Son*, and he prayed for judgment against *Middleton, Harper & Co.*, and their attorneys in the suit against the Insurance Co. No service of citation was made upon the attorneys, as they agreed to pay, if judgment should be rendered against *Middleton, Harper & Co.*, and they were willing to have paid without suit, but were prevented by their client.

There was judgment for plaintiff upon the amount of the two notes, and defendant has appealed.

It is contended by defendant that the draft on *Shields & Co.*, was given in payment, and that the original debt was novated by the receipt of April 23d, 1855.

There may be some obscurity about this receipt, but it is clear that novation was not created thereby of the two notes.

If it had been the intention of the parties that the draft on *Shields & Co.* should be taken in absolute payment of the two notes, and that the draft was substituted in their place, then there would have been no reason for giving *Palmer & Co.* the control over the suit against the Insurance Company, and for stipulating that when the money was made out of this suit, then, that the draft, notes, etc., should be returned to *Harper & Son*. The draft could not have been given in absolute payment, because in a certain event, it was to be returned.

Novation must be clearly established.

The conduct of the parties corroborates our interpretation of this receipt.

The return of the notes was not required. The draft on *Shields & Co.*, was on the 11th February, 1856, returned to *Messrs. Harper & Son*, in a letter, in which it was stated that plaintiff held the draft only as collateral.

The statement is not contradicted until the 28th of December, 1857, when the answer is filed.

We would here remark, that *J. B. Harper* was formerly a member of the firm *Middleton, Harper & Co.*

It is also contended that defendants are released, because the draft was not protested, but it is established that *Shields & Co.*, had, at the maturity of the draft, no place of business in New Orleans, and that they could not be found, and that the house had ceased to exist before the maturity of the draft.

Even if *Shields & Co.* were indebted to *Harper & Co.*, at the time of the maturity of the draft, it is evident from the record, that the money could not have been made out of them.

The long silence of *Harper & Son*, after the return to them of the draft, shows that they did not attach any importance to the failure of the protest.

There is, however, an error in the judgment.

The court has omitted to notice credits of March 18th, 1854, upon the note of \$579 61, amounting to \$300 84.

The two notes were evidently to be accepted as full satisfaction for the original debt with the additional guaranty of the obligation of the defendants to be personally responsible for the same, and they must be deemed to have been so taken and assumed, subject to a deduction for the endorsed credits.

One of the credits asked for by appellant cannot be allowed, for it is on the original note, represented by the two notes now sued upon.

It is, therefore, ordered, adjudged and decreed, that the judgment be amended by making the sum of \$579 61, mentioned therein, subject to a credit of \$300 84 paid on the 18th March, 1854; that the judgment so amended be affirmed, and that appellee pay the costs of appeal.

## STATE v. THE JUDGE OF THE EIGHTH JUDICIAL DISTRICT.

The 129th Article of the Constitution which requires that the laws of this State shall be promulgated in the English and French languages, is not violated by section second of the Act of the Legislature of March 16th, 1859, entitled "an act to change and regulate the terms of the District Courts in the Eighth Judicial District," which declares that the Act shall take effect from and after its passage. There is no prohibition in the Constitution, against the repeal of laws, in any form, in which the Legislature can give a clear expression of its will.

ON an application for a *mandamus* to the Hon. J. C. Wilson, Judge of the Eighth Judicial District Court. *M. T. Carter*, District Attorney, relator.

MERRICK, O. J. This is an application (with the proper averments showing interest and jurisdiction) for a writ of *mandamus* against the Judge of the Eighth Judicial District, to compel him to hold the courts for the April and May terms, in the parishes of St. Helena and Livingston.

The refusal of the Judge to hold the above named terms of the court, is the consequence of his construction of the recent Act of the Legislature, bearing the number 120, approved March 16th, 1859, and entitled "an Act to change and regulate the terms of the District Courts in the Eighth Judicial District of the State of Louisiana."

It consists of two sections, as follows :

"Sec. 1. Be it enacted, &c., That the terms of the District Courts in the Eighth Judicial District, be as follows, viz :

"In the parish of St. Helena, the jury terms shall commence on the third Monday of April, and first Monday of November.

"In the parish of Livingston, the jury terms shall commence on the second Monday of May and the third Monday of October.

"In the parish of St. Tammany, the jury terms shall commence on the fourth Monday of May, and fourth Monday of November.

"In the parish of Washington, the jury terms shall commence on the third Monday of June and second Monday of December.

"Sec. 2d. Be it further enacted, &c., That this Act shall take effect from and after its passage, and all laws regulating the terms of courts in said parishes, are hereby repealed."

The District Judge rests his refusal to hold the courts in St. Helena and Livingston, under said Act, on two grounds, viz :

1st. That the Act has not been promulgated in English and French, as contemplated by the Constitution.

2d. That it is in fact, an amendment of the fifteenth section of the Act of the Legislature, approved March 10th, 1855, entitled an Act relative to District Courts, and as such is void, being in contravention of Art. 116 of the present Constitution.

I. The 129th Article of the Constitution is in these words, viz : "The Constitution and laws of this State, shall be promulgated in the English and French languages."

Article 132 of the Constitution of 1845, was in the same words.

This provision was not supposed to be necessary when the Constitution of 1812 was adopted. The portion of the inhabitants speaking English, did not then, as now, outnumber those using the French language as their mother tongue. At

that time, it was deemed necessary to provide that the laws, &c., should be written and promulgated in the English language; the language in which the Constitution of the United States is written. In 1845, as well as in 1852, it was considered necessary to protect, by the Constitution, those speaking the French language.

STATE  
v.  
JUDGE vs. Ju. Dis.

Those whose mother tongue was English, were protected by Article No. 103 of the Constitution of 1845, and 100 of the Constitution of 1852.

The Article in question does not therefore appear to have been introduced for the purpose of declaring that laws must be promulgated before they can be made to have effect, but simply that they shall be promulgated in French as well as English.

The Judges, under the Constitution of 1845, some of whom had aided in framing the instrument, do not appear to have had any doubt on this question. In the matter of the *Merchants' Bank of New Orleans*, 2 An. 68, they gave effect to a statute containing a similar clause, without hesitation.

In the affairs of a State, as well as of individuals, it is impossible to anticipate the exigencies which may arise in the future, and there would be a singular want of foresight to take from the State or the individual, the power of immediate action to meet such emergencies. See *Buhol v. Boudousquie*, 8 N. S. 433; *City of New Orleans v. Holmes, Recorder of Mortgages*, 13 An.

II. On the second ground, the Act does not appear to contravene the 116th Article of the Constitution. It does not revive any Act which has expired by limitation or been repealed. It does not amend any Act by its title. The only reference it makes to former statutes, is to *repeal* them, and there is no prohibition in the Constitution against the repeal of laws in any form in which the Legislature can give a clear expression of its will.

But were it to be considered as an amendment, instead of a repeal of the 15th section of the Act of 1855, p. 493, sec. 15, we are not prepared to say that it would contravene the Article in question, for the new law (the amended section) is reenacted and published at length, and the Constitution seems to require no more. See the case of *Arnault v. The City of New Orleans*, 11 An. 56, 57; and 12 La. 318.

The District Judge, in order to facilitate this proceeding and enable the relator to obtain a speedy trial, has taken notice of the application for a writ of *mandamus*, and filed his answer, and waived all formalities and delays, and consents that a peremptory *mandamus* issue at once, should the reasons assigned by him be deemed insufficient by this court.

After carefully considering the grounds of objection to the constitutionality of the Act, they do not appear to us to be sufficient to enable this court to declare the Act in question void.

But it is now evident, that the term of the court cannot be held in the parish of St. Helena, in the remaining portion of the time allotted by the Act for the April and May term, and it would be idle to order the Judge to hold such term. Indeed, the court can only be held in Livingston, by availing ourselves of the consent of the District Judge to award the peremptory *mandamus* at once.

It is, therefore, ordered, adjudged and decreed by the court, that a *mandamus* issue immediately, commanding the *Hon. Julius E. Wilson*, Judge of the Eighth Judicial District of Louisiana, to proceed to hold a jury term of the District Court, in and for the parish of Livingston, to be begun and holden on the second Monday of May instant, in accordance with the Act of the Legislature, approved March 16th, 1859, and that the relator pay the costs of court.

VALERY GAIENNIE *v.* WILLIAM FRERET.

Where in a redhibitory action, brought to rescind the sale of a slave, and recover back the price paid, it was established by parol evidence received without objection, that upon being informed of the sickness of the slave, the vendor had consented to his return—*Held*: That effect must be given to the evidence, and that after its reception, it is too late to raise the objection, that the fact of such consent on the part of the vendor, should have been established by written proof, in order to rescind the sale.

Where the consent of the vendor to take back the slave has been given, and in accordance with it, the slave has been returned to him by the vendee—*Held*: That in a suit brought to rescind the sale, and recover back the price paid for the slave, the consent of the vendor throws the burden of proof upon him, and he cannot be relieved from it, without showing fraud or concealment on the part of the vendee in procuring such consent, or some negligence in returning the slave.

**A** PPEAL from the Fourth District Court of New Orleans, *Price, J.*  
*H. H. Straubridge and H. D. Ogden*, for plaintiff. *C. Dufour*, for defendant and appellant.

MERRICK, C. J. This is an action of redhibition brought to rescind the sale and recover back the price of a negro woman sold by defendant to the plaintiff.

The negress was sold to the plaintiff on the third day of February, 1857, and immediately removed to the parish of Natchitoches, where plaintiff resides. About the 15th or 20th of the same month, the plaintiff had discovered that the slave was unsound. He wrote to his cotton factors in this city, desiring them to communicate with the defendant, and that he should take her back. On being applied to for this purpose, the defendant verbally consented to the return.

A physician was called upon by the plaintiff, to examine the woman, and, we infer, to prescribe for her, as he says he visited her four times. As she grew worse, he advised she should be returned immediately. Defendant was notified of her arrival in the city, and thereupon took charge of her, and had her treated at the hospital by skillful physicians, but, notwithstanding, the slave died. The disease was an ulceration of the uterus.

We are satisfied that the defendant was not aware of the existence of the disease at the time of the sale, and we doubt not the suit is defended on the supposition that the complaint was not incurable, and perhaps that the negress did not receive the proper attention.

The case, however, does not depend upon the ordinary rules governing the action of redhibition. As just mentioned, it is proven by parol, received without objection, that when plaintiff's agent informed defendant of the sickness of the negress, he consented to her return, and she was accordingly sent back and taken charge of by defendant. It is now objected, that the sale could not be rescinded without written proof. The objection comes too late, and according to the well settled rules of law, effect must be given to the testimony.

This consent of the defendant, throws the burden of proof upon him, and he cannot be relieved from such consent, without showing fraud or concealment on the part of the plaintiff, by which it was procured, or some negligence in returning the slave.

The testimony makes it more probable that the disease existed at the date of the sale, than the contrary, and if the physician was not called until the 15th or 20th of February, it is but reasonable to suppose that it was not without delay

and reluctance that the negro woman communicated to her new master, a disease which she had carefully concealed from her former one.

The plaintiff cannot be charged with improper conduct in sending the negress to New Orleans, notwithstanding her debility. It was done under the advice of a physician, after defendant had given his consent.

Under the proof in this case, it was not incumbent upon the plaintiff to show, that the disease was absolutely incurable. The consent of defendant to the return of the negress, appears to have been given without any reference to the nature of the disease. When, therefore, plaintiff showed that the disease terminated fatally, notwithstanding the care of physicians employed by defendant himself, he proved more than was required, for it could no longer be objected, that the disease was not incurable, or redhibitory in its nature. That objection had been waived by the consent to the return of the slave.

Judgment affirmed.

### JOSEPH T. LEBEAU v. JEAN B. BERGERON.

In a contest of boundary between two parties who have purchased adjoining tracts from a common vendor, the line which their vendor had caused to be run as the dividing line between the two tracts before he sold them, will be recognized as the dividing line between the two parties deriving title from him.

Under such circumstances, if either party has not the quantity of land called for by his title, he must seek it from his vendor, and not from the proprietor of the adjoining tract, who does not claim or possess beyond the line established by their common vendor.

In such a case, the plat of a survey, and the *procès verbal* of a parish surveyor, are admissible in evidence after the death of the surveyor, to show that the line was run by him at the request of the common vendor, and that he considered it the boundary of the two tracts which had been divided by him, and also to show that the parties bought the land in accordance with the lines established by the survey, and that the defendant took possession and cultivated his tract according to it.

In an action of boundary, a division line which has been long established by surveyor's marks, a canal and fence, and under which both parties bought, and which is referred to in the act of sale, will be taken as the true line, in preference to a new one, which gives to one of the parties a larger boundary.

**A** PPEAL from the District Court of the parish of Point Coupée, *Haralson, J. U. B. & E. Phillips and T. G. & H. Cooley*, for plaintiff. *A. Provosty*, for defendant and appellant.

**COLE, J.** The plaintiff, in his petition, states "that he is the owner of a certain tract of land in the Island of False River, containing two arpents in front, by forty in depth; that defendant has taken possession of a portion of said land; that said land formerly belonged to, and was part of a tract of land twenty arpents front belonging to *J. B. Désorme*; that said *Désorme* sold in May, 1832, five arpents to *J. B. Bergeron, père*, and on the same day sold to defendant, *J. B. Bergeron, fils*, another tract of five arpents—making ten, bounded on one side by lands of *J. B. Bergeron, père*, and on the other by the vendor.

"That the balance of said tract has passed by a regular chain of titles to *Abeis O. Lebeau*, who sold two arpents of the same, adjoining the land of defendant, to *Auguste Guerin*, and the same has descended by regular transfers and by inheritance to your petitioner."

Wherefore he prays to be decreed to be the legal owner of two arpents front,

LEBEAU  
v.  
BERGERON.

commencing at the distance of ten arpents from the side of said tract of twenty arpents, bounded by lands of said *J. B. Bergeron, père*, as aforesaid.

There was judgment in favor of plaintiff for a portion of the land in possession of defendant. The latter has appealed.

Plaintiff has not alledged the location or the quantity of land illegally taken possession of by the defendant.

The prayer of the petitioner merely asks that he may be decreed to be the legal owner of two arpents front, commencing at the distance of ten arpents from the lower lateral line of the tract of twenty arpents.

It appears that plaintiff is in possession of the quantity of land in front, called for by his title, but conceives that the defendant has encroached upon his land in the rear.

The evidence sufficiently establishes the line BZ to be the upper boundary of the tract of defendant; it is consequently the lower line of that of plaintiff.

The latter contends that the line XX is the upper line of defendant. The testimony, however, shows, that in 1823, *L'Hermite*, a surveyor, at the request of *J. B. Désorme*, the common vendor of all parties, made a survey of the twenty arpent tract, which was then divided into two tracts, numbered 4 and 5, each having a front of ten arpents.

He traced the line of division between them, and drew the line BZ as that which separated the two tracts.

The upper boundary of the estate now owned by defendant was, therefore, fixed by the former owner in 1823.

*St. Ville Lebeau* testifies, that the plaintiff, and also his father, took possession of their land, as surveyed by *L'Hermite*.

As defendant is not in possession of land beyond the line BZ, if plaintiff has not his complement of land in the rear, he must seek it, if he has any legal claim from his vendor, and not from the defendant.

The survey of *L'Hermite* was rejected by the District Court. It should have been received. *Wells et al. v. Compton et al.*, 3 R. 185.

The survey was made by *L'Hermite*, the parish surveyor of Point Coupée, at the request of *Désorme*, and the *proces verbal* is signed by him. This survey was good evidence to show what the common vendor of the land in dispute considered to be the boundaries of the two tracts into which the twenty arpents were divided. It was also admissible, as rebutting evidence, as it is referred to by the witnesses of plaintiff.

This survey is also important, as it is shown that the parties have bought in accordance with the lines established thereby, that defendant has taken possession of his land according to it, and has thus held and cultivated the land since 1832. Plaintiff purchased his tract in 1857, according to its recognized limits, and he cannot now disturb the division line consented to for twenty-five years, by the previous holders of the tract.

The titles show, also, that the lateral lines of the estate of plaintiff close in the rear.

The upper boundary of the defendant is established by the surveyor's marks, by posts, a canal and fence; and it has been for twenty-five years considered as the dividing line between the estate of defendant and that of plaintiff. *Williamson v. Hymel*, 11 La. 185; *Gray v. Couvillon*, 12 An. 732.

We are of opinion, that plaintiff has failed to show that defendant is in possession of any part of his land. In a petitory action, the plaintiff must establish

clearly his title to the property in possession of another, otherwise he cannot recover.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; that there be judgment in favor of defendant against the demand of plaintiff, for the land claimed by the latter of the former, and that defendant be recognized as the owner thereof; that the line BZ, as drawn on the map of *C. G. Hale*, in the record in this suit, be recognized as the division line between the estate of defendant and that of plaintiff; and that the latter pay the costs of both courts.

LEBAU  
v.  
BERGSON.

F. M. FISK v. E. T. PARKER, Sheriff, et al.

A judgment of dismissal is nothing more than one of nonsuit, and cannot support the plea of *res judicata*, as to any of the matters at issue.

The reasoning, and opinion of the court upon a subject, on the evidence adduced before it, cannot have the force and effect of the thing adjudged, unless the subject matter be definitively disposed of by the decree.

**A** PPEAL from the Third District Court of New Orleans, *Duvigneaud, J.*  
*F. A. Bartlett* and *G. A. Breauz*, for plaintiff and appellant. *T. H. Howard* and *A. G. Brice*, for defendants.

**LAND, J.** In November, 1851, *George H. Wallace* commenced suit by attachment against *Bennett E. Smith*, in the Third District Court of this city, and attached the slaves *Mary Ann* and "*America*," as the property of the defendant. On the 7th of same month, *Francis M. Fisk* intervened in the suit and claimed the slave *America* as his property, and prayed for judgment recognising him as owner. To this petition of intervention the plaintiff filed, on the 29th of November, 1851, a general denial. On the 10th day of December following, the plaintiff filed a supplemental petition making *Fisk* a party garnishee to the action and propounding to him interrogatories, the third of which was—"have you not in your possession or under your control, or had you not when seizure was made in your hands on the 6th day of November last, or at any time since, certain slaves belonging to said defendant, or which were standing in his name, to-wit: *Francis Peterson, Harriet, Jane, Frank, Rhoda, Austin* and *Maria*."

To the answers of the guarnishees to the interrogatories, the plaintiff filed a traverse, which was tried together with the principal action and third opposition of *Fisk*, and thereupon the following judgment was rendered:

"For the reasons assigned in the written opinion of the court this day delivered and on file, it is adjudged and decreed, that the plaintiff, *George H. Wallace*, recover of defendant, *Bennett E. Smith*, the sum of five thousand and sixty dollars, with legal interest from 6th of November, 1851, until paid. *That the intervention of F. M. Fisk be dismissed*; that the said *F. M. Fisk*, as garnishee, deliver up to the Sheriff, the slaves *Rhoda* and *Peterson*, as subject to the plaintiff's attachment, within two days after this judgment shall become executory, and in default thereof, that the plaintiff recover of the said *Fisk*, garnishee, the value of the said slaves *Rhoda* and *Peterson*, to be fixed by evidence on motion; it is further ordered, that the defendant, *Smith*, pay the costs of the main action, and that *Fisk* pay the costs of the intervention and of the traverse."

FISK  
v.  
PARKER.

From this judgment, *Fisk*, the intervenor, appealed to this court, and the appeal was dismissed, "because much of the oral testimony was not reduced to writing, and partly because certain extracts from written books had not been produced by the party who offered them, and because there was no agreed statement of facts."

The plaintiff, after the dismissal of the appeal, sued out an execution on his judgment and caused the slave "*America*," to be seized as the property of the defendant. Thereupon, *F. M. Fisk* commenced this suit by injunction, to arrest and prevent the sale of the slave on the grounds of his possession and ownership. To this demand the defendants pleaded *res judicata*, by alleging that all of his rights have been adjudicated upon and against him, on his intervention and third opposition filed in the suit of *Wallace v. Smith*.

The exception of *res judicata* was sustained by the lower court, and the plaintiff has appealed.

It is to be observed that the petition of intervention in the suit of *Wallace v. Smith*, was filed and issue joined by answer of the plaintiff, before *Fisk* was made a party garnishee, and consequently before interrogatories were propounded to him.

And it is also to be observed, that the interrogatories, the answers, and the traverse thereof, are silent as to the title to the slave *America*, and that the only pleadings in which the title to this slave was at issue, were the petition of intervention and the answer thereto.

Upon these pleadings, the judgment of the court was, that the intervention of *F. M. Fisk* be dismissed, and that he pay the costs of the intervention. This judgment did not determine the rights of the parties, but was one of dismissal or nonsuit, and cannot support the plea of *res judicata*. *Baudin v. Roliff*, 1 N. S. 165. Nor will the reasoning and opinion of the court upon a subject, on the evidence adduced before it, have the force and effect of the thing adjudged, unless the subject-matter be definitively disposed by the decree. *Pepper v. Dunlap*, 5 An. p. 200.

It is, therefore, ordered, adjudged and decreed, that the judgment be reversed, and the plea of *res judicata* be overruled, and the cause remanded to the lower court for further proceedings according to law, and that defendants pay the costs of this appeal.

#### JOHN E. HYDE v. MISSISSIPPI SOUND COMPANY.

The property of insolvent corporations, when sold by a commissioner for cash, must be appraised, and bring two-thirds of its appraised value, as in the case of property sold under execution.

**A** PPEAL from the Fourth District Court of New Orleans, *Price, J.*  
*Mott & Fraser*, for plaintiff. *Bonford and Singleton & Clark*, for defendant and appellant.

LAND, J. The opinion and decree of the District Judge are as follows:

"*J. E. Caldwell* alleges, that at a sale made by the Sheriff of the property of defendant, he became the purchaser of the hull and machinery of the steamboat *Virginia*; that he paid the price of the adjudication, and possession of the property was delivered to him by the Sheriff; that since said sale, the Sheriff has

repossessed himself of said property, and has readvertised and is about to sell the said property again. The plaintiff in said rule, now moves the court, to compel the Sheriff to redeliver the possession of said property to plaintiff in rule, and to desist from all further proceedings in relation to the property. The Sheriff, for cause, alleges that the sale was made not in accordance with the order of court, and therefore null. On the 9th of December, 1858, an order was obtained for the sale of the hull and machinery of the said boat, after due and legal notice and appraisement.

HYDE  
v.  
MISS. SOUTHERN CO.

"The hull and machinery were appraised at \$8,000, and the plaintiff shows he purchased the same at \$1,395, not two-thirds of the appraised value.

"The day of sale was fixed for the 22d of December, and there were two sales of different properties belonging to the defendants, on the same day. On the day of sale, the commissioner obtained an order to sell the 'goods and furniture' of said defendants, without regard to the appraisement. This order only has reference to the 'goods and furniture' of defendants, and not to the 'hull and machinery of the steamboat Virginia,' as erroneously supposed by the Sheriff. The order of the court of 9th December, 1858, was the only authority to the Sheriff to sell, and he was bound to obey said order. That order required the 'hull and machinery' to be sold for cash, the appraisement already having been made. The sale was to have been made with reference to the appraisement, and the property not bringing two-thirds of its appraised value, the adjudication was null. *Succession of Packwood*, 2 An. 96.

"It is, therefore, ordered, adjudged and decreed, that the rule taken herein by *J. E. Caldwell*, be dismissed, with costs."

In this decree there is no error. The 6th section of the Act of 1855, "*for the organization of corporations for works of public improvement and utility*," provides, that they shall forfeit their charter for insolvency, evidenced by a return of no property found on execution; and, in such case, it shall be the duty of the District Court, at the instance of any creditor, to decree such forfeiture, and to appoint a commissioner for effecting the liquidation, whose duty it shall be to convert all the assets of the company, including any unpaid balance due by stockholders on their shares, into cash, and to distribute the same under the direction of the court, amongst the parties entitled thereto, *in the same manner, as near as may be, as is done in cases of insolvency of individuals*. Acts 1855, p. 184.

Article 2180 of the Civil Code provides, that all sales of property ceded to creditors, must be made *at the same terms and under the same formalities, that property seized on execution is sold*.

It seems clear, from these provisions of the law, that property belonging to insolvent corporations, must be appraised, and bring two-thirds of its appraised value, at sales for cash, as in the ordinary case of a sale on execution.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

## R. M. FUNKHOUSER &amp; Co. v. J. B. DUTCHER et al.

When a shipper has shipped goods to his factor in the usual course of business, and has sent forward with the shipment, or by mail, one of the bills of lading consigning the goods to him, the shipper cannot destroy the lien and privilege that the factor and consignee will have for advances upon the goods, by transferring other bills of lading to secure other debts.

**A** PPEAL from the Fourth District Court of New Orleans, *Price, J.*  
*Mott & Fraser*, for plaintiffs and appellants. *Singleton & Clark*, for defendants.

COLE, J. About the eleventh of December, 1855, *Shinkle*, one of the defendants, shipped from St. Louis to his factor, *Dutcher*, 2054 sacks of wheat. The bill of lading consigning the wheat to him was signed on the 11th of December, and was either sent by the steamer upon which the merchandise was shipped, or was transmitted by mail to the defendant, *Dutcher*.

At the time of the shipment, and also when the wheat was received by *Dutcher*, the shipper was indebted to *Dutcher*, the consignee, in more than the value of the proceeds of the wheat, for bills paid and accepted to be paid for the accomodation of *Shinkle*, by *Dutcher*, who was his factor.

About the 20th of December, 1855, *Shinkle* assigned one of the bills of lading to plaintiff, to secure the payment of a draft for \$2,081 05, which he sold to plaintiff, and which was afterwards protested for non-acceptance and payment.

This suit is brought to compel *Dutcher* to pay plaintiff the draft, on the ground that it was specially drawn against the shipment of wheat, and that the sale of the bill of exchange, with the bill of lading annexed, specially charged the property mentioned therein with the amount of the bill.

There was judgment for *Dutcher*, (*Shinkle* was not cited) and plaintiff has appealed.

Defendant having received the wheat with a bill of lading consigning it to him, had a privilege on it for the balance due him, as the factor of the shipper. C. C. Art. 3214; Sess. Acts, 1841, p. 21.

This privilege cannot be defeated by the claim of plaintiff. At the time the bill of exchange and one of the bills of lading were delivered to plaintiff, he knew that another of the bills of lading consigning the wheat to defendant had been transmitted to the latter. If this were unknown, ordinary prudence, at least, would have made him demand all the bills of lading and a transfer thereof to him, or he should have caused *Shinkle* to have inserted in the bill of lading forwarded to the defendant, that he had drawn a certain bill against the shipment. If this had been done, the defendant would have received the consignment with notice, and he would have been obliged to have paid the bill of exchange in favor of plaintiff. *Farmers' and Merchants' Bank v. Franklin*, 1 An. 393.

The plaintiff could also have been protected, if *Shinkle* had taken all the bills of lading deliverable to his own order, and had then endorsed them to plaintiff, for then the bill of exchange would have been covered to the extent of the value of the shipment. *Fetter v. Field*, 1 An., p. 80.

If a shipper can be permitted to send one bill of lading to his merchant, in which goods are consigned to him, and subsequently transfer another to secure a

bill of exchange, there would be no end to the frauds that would be committed against factors and other persons.

In this case, there were four bills of lading.

If persons sufficiently imprudent could have been found, *Shinkle* might have transferred two of them, each for more than sufficient to cover the value of the wheat shipped. There would, then, have been three parties claiming the proceeds of the wheat—the factor, by virtue of his privilege, and the two holders of the two bills of exchange, each by reason of a transfer to him of a bill of lading to guaranty their payment.

We are of opinion, when a shipper has shipped goods to his factor in the usual course of business, and has sent forward with the shipment, or by mail, one of the bills of lading consigning the goods to him, that the shipper ought not to be permitted to destroy the lien that the consignee will have for advances, by transferring other bills of lading to secure other debts.

The reason of the apparent imprudence of plaintiff, in accepting one bill of lading as security, without protecting himself against the others, is, however, explained by the evidence.

It appears, there was an evident understanding between *Shinkle* and plaintiff, at the time the latter bought the bill of exchange, that plaintiff was not to be paid out of the proceeds of the wheat, unless there would be sufficient to satisfy first the balance due defendant, as factor of *Shinkle*.

*Shinkle* testifies that he "stated to *Funkhouser*, when he gave him the draft, that he had shipped and drawn on general account. It was understood, however, at the same time, that this shipment of 2054 sacks was included in that general account. I thought there would be enough (and so represented to *Mr. Funkhouser*) of a balance in my favor, on the shipments made by me to *Dutcher*, to pay this draft. Upon these representations, *Mr. Funkhouser* took the draft.

Judgment affirmed, with costs.

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### BUCHANON, CARROLL & Co. v. WM. SWITZER et als.

Where cotton, consigned to a commercial house, had been sunk and damaged, and re-shipped, the party re-shipping paying the freight and charges for salvage, and consigning it to another house, who paid the charges for freight and salvage, the original consignees refusing to pay them, on the ground that they were exorbitant—*Held*: That where there is no evidence of any bad faith on the part of the second consignees, or of a combination to commit extortion by the shippers, the consignees were justifiable in paying the charges, and that the payment of such charges should be considered as advances, for which a privilege is given by Article 3214 of the Civil Code and the statute of 1841.

**A** PPEAL from the Sixth District Court of New Orleans, *Howell, J.*  
*Singleton & Clark*, for plaintiffs and appellants. *Mott & Fraser*, for defendants.

**COLL, J.** Certain cotton, consigned to plaintiffs, was shipped at a point above Camden, Arkansas, on the Washita River, on the flat or keel boat Walk-in-the-Water. The privilege of re-shipping was expressly reserved to take place at Camden.

BUCHANAN  
v.  
TWITTEE.

The cotton was injured by the sinking of the flat, before it reached Camden.

At Camden, the cotton was shipped on the W. C. Young, by *E. Hill & Co.*, and was consigned to *Oakey & Hawkins*. The bill of lading consigning it to them states that they are to pay freight for the cotton, at \$3 00 per bale, and \$587 25 for charges, which were for salvage and freight.

These charges were paid in Camden, by *E. Hill & Co.*, to the flatboat men, who delivered the cotton there; the steamer S. B. Young paid them to *Hill & Co.*, and *Oakey & Hawkins* paid them to the W. C. Young, upon her arrival at New Orleans.

After the arrival of the cotton in this city, the plaintiffs commenced this suit by a sequestration of ninety-four bales of cotton, alleging themselves to be the consignees thereof, and that the steamer refused to deliver the cotton, unless they were paid certain demands against the cotton, in the shape of freight, charges, &c., which they alleged to be unjust and not due.

*Oakey & Hawkins* intervened, and alleged that they were in possession of the cotton sequestered, at the time of the sequestration, as the consignees of *Hill & Co.*

That on the receipt of the cotton and bill of lading, the intervenors paid the sum stipulated in the bill of lading.

The only question is, whether the intervenors were justifiable in making the payment of the charges for salvage, &c., and should be paid for the same.

It is established, that the charges are not higher than the ordinary rate in Arkansas, for salvage and freight, and that it is not usual to re-mark and re-ship cotton that has been saved from a wreck, to the original consignees, except where the original shippers have paid the charges for salvage and freight.

As the charges were justly due, the intervenors, as consignees, were justifiable in advancing the money to pay these charges, in order to get the cotton into market as soon as possible.

Art. 3214 of the Civil Code, and the statute of 17th February, 1841, p. 21, give the consignee a privilege for the amount of his advances on the value of the goods consigned to him, and on the unpaid price of the goods which may have been sold.

The payment of these charges was an advance upon the cotton, and the intervenors are entitled to a privilege on the cotton, to secure the same. The District Judge in his opinion says, "There is no evidence of any bad faith on the part of the intervenors, or of a combination to commit extortion by the shippers. The bill of lading was an order on the intervenors, for the sum they paid, and from the evidence, I think they should be re-imburshed."

Judgment affirmed, with costs.

## PEYTON A. KEY v. JOHN BOX et als.

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Under the operation of Articles 2203 and 2204 of the Civil Code, compensation does not take place between partnership and individual debts.

During the existence of the partnership, suit must be brought against the firm, and not against individual partners.

An exception to this rule has been recognized in the case of a Louisiana creditor, attaching the interest of a non-resident debtor in property belonging to a foreign firm, of which he was a member, for a debt due by him individually.

**A**PPEAL from the Fourth District Court of New Orleans, *Price, J.*  
*Mott & Fraser*, for plaintiff. *Singleton & Clack*, for defendants and appellants.

VOORHIES, J. The correctness of the plaintiff's demand is not disputed; but the defendant contends, that it is extinguished by compensation to the amount of a claim which he sets up against the firm of *Peter Telson & Co.*, of which he alleges the plaintiff to be a partner. Then follows a reconventional demand for the surplus of this claim.

It is well settled, that compensation does not take place between partnership and individual debts, under the operation of Articles 2203 and 2204 of the Civil Code. So that the defendant, *John Box*, cannot plead, as an off-set to the debt which he owes to the plaintiff individually, his claim against the firm of *P. Telson & Co.*, although the plaintiff be liable solidarily for all the debts due by the firm.

The rule of law is, that during the existence of the partnership, suit must be brought against the firm, and not against individual partners. C. P. 165; 4 L. 107, *Davis v. Eloi et als.*; 6 R. 131, *Lambeth et als. v. Vawter et als.* An exception to this rule has been recognized in the case of a Louisiana creditor attaching the interest of his debtor in property belonging to a foreign firm, of which the debtor, himself a non-resident of the State, was a partner, although the debt was due by the latter individually. Ante 140, (p. 242, vol. 30 Opinion Book), *Frost & Co. v. White*. See also 5 An. 260, *Sherly, Escott & Co. v. Owners of Steamboat Bride*.

But the case at bar does not fall within this exception; for it appears by the pleadings, that both the plaintiff and the defendant, as well as the firm of *P. Telson & Co.*, have their respective domicils out of the State of Louisiana. Our courts are vested of jurisdiction over this case by reason of the agreement of the parties, reading as follows, to-wit:

"We, the undersigned, hereby bind ourselves as securities of the defendant, *John Box*, to plaintiff, *Peyton A. Key*, in the sum of eighteen hundred dollars, and we agree, that whatever judgment may be rendered against the said *Box* in this case, may, at the same time that it is rendered, be entered up against us in *solido*, and we hereby authorize the plaintiff to grant any extension of time that he may see fit to grant said *Box*, and it shall not release us as securities.

New Orleans, Feb. 8th, 1858.

(Signed)

JOHN BOX.

B. P. ETHEL."

The defendant also filed an answer to the merits, without pleading to the jurisdiction of the court.

Key  
v.  
Box

The defendant has not attached any property, in this State, belonging to the firm of *P. Tellon & Co.*; so that, it would be fruitless to determine whether the privilege granted to a creditor, to attach, for the payment of the individual debt of a non-resident debtor, his interest in the property of the firm, can be extended to a non-resident creditor. Nor is the case subject to a different solution, from the fact that the claim is set up in the shape of a reconventional demand; the objection is one *ratione materiae*.

We come to the same conclusion as the District Judge, but without examining into the merits of the reconventional demand; and for this reason, it is unnecessary to dispose of the bill of exceptions taken by the defendant to the ruling of the court below, rejecting the testimony of *Peter Tellon*, on the ground of interest.

Judgment affirmed.

MERRICK, C. J., took no part in this decision.

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### M. WALLACE v. N. F. SHELTON et al., Levee Commissioners.

The decision in the case of *Yeatman v. Crandell*, 11 An. 220, reaffirmed.

An assessment for levee purposes is not a tax within the meaning of Article 123 of the Constitution. An Act of the Legislature authorizing the assessment of an annual tax on alluvial lands, "specifically upon each and every acre," for the purpose of building or making and repairing levees, is not in violation of the Constitution.

**A**PPEAL from the District Court of the Parish of Madison, *Farrar, J.* *Goodrich & Defrance*, for plaintiff and appellant. *Short & Parham*, for defendants.

MERRICK, C. J. The plaintiff who is appellant from a decree against him in the lower court, states his case as follows, viz :

"The plaintiff sued out an injunction against the Collector of the Levee Tax, imposed under the Act of 1857, by the Commissioners of Levees, for the district composed of the parishes of Madison and Carroll. He charges that the said Act, which amends the 2d section of the Act of 1853, and changes the *ad valorem* into that of a specific tax upon lands alone, is—first, *unconstitutional*; second, that it is *unjust, unequal and oppressive*; and third, that the mode of assessing and collecting said tax is illegal.

"The Act of 1857 reads as follows: Be it enacted, 'That the second section of the above entitled Act (of 1853,) be so amended and reenacted as to read as follows: That for the purpose of building or making and repairing all levees in said levee district, the commissioners of the same are hereby authorized and empowered to assess an annual tax on all the alluvial lands situated in the Parishes of Carroll and Madison, *specifically* upon each and every acre.' See Session Acts, p. 105; see also, Session Acts of 1853, p. 44.

"The Article 123 of the Constitution, it is contended, has been violated by the passage of the above Act of 1857. That Article reads: 'Taxation shall be equal and uniform throughout the State. All property on which taxes may be levied in this State, shall be taxed in proportion to its value, to be ascertained by law. No one species of property shall be taxed higher than another species of property of equal value on which taxes shall be levied,' &c.

"The court below sustained the constitutionality of the tax levied under said Act of 1857, upon the authority of the case of *Yeatman v. Crandell*, reported in 11th Annual, p. 220. It is respectfully submitted that, that decision, and indeed, others of a recent date, should not be considered as having settled the question; and for the following reasons, plaintiff desires that it may be treated as still an open one:

"He thinks that the well known maxim *stare decisis* should not be invoked upon those decisions. They are not entitled to the weight of authority, until their correctness has been tested by time and experience. 'Even a series of decisions are not always conclusive of what is law'; and again, 'crude and hasty decisions should be revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error.' 1st Kent. 476.

"This is the correct doctrine, and is founded in justice; and the best evidence of its correctness is to be seen in the conflicting decisions that have been had upon this Article of the Constitution since 1854."

It cannot be denied, that the proper construction of Article 123 of the Constitution has occasioned this court much perplexity. The decisions, until recently, at least, have been rendered by a divided bench, and the present doctrine of the court upon the construction of Art. 123 of the Constitution of 1852, was preceded by two decisions the other way. But the questions arising in the *Yeatman* case were decided after a full consideration of the subject. We had not only the aid of the arguments of the learned counsel in that case, but the case of the *Draining Company* was then under advisement on a re-hearing, in which we had the assistance of a number of the most distinguished and experienced counsel of this city. The conclusion arrived at in the case of the *Draining Company*, was after the most mature deliberation. The decree was also concurred in by four Judges. This case was followed by the two cases of *Surgi v. Snetchman*, and *Surgi v. Batalord*, affirming the same doctrine. 11 An. 387.

After those decisions, which were in conformity with those under the Constitution of 1845, we had hoped the question would be considered as at rest. See *Second Municipality v. Duncan*, 2 An. 182; *Gillespie v. Police Jury of Concordia*, 5 An. 403.

We have not discovered any new argument in the learned brief of the plaintiff, which has not been fully considered in the former cases, and we content ourselves by referring to the reasoning of the court in the cases cited. In addition to what is said in the case of *Yeatman v. Crandell*, we refer to the reasoning of the court in the case of the *Draining Company*, on pages 372, 373 and 377, 11 Annual.

The plaintiff attempts to distinguish this case from the case of *Yeatman v. Crandell*. He says, the tax there enforced under the Act of 1852, was an *ad valorem* tax upon land, while the tax of 1857 is a specific tax.

In the case of *Layton v. The City of New Orleans*. 12 An. 515, we said, that nothing prevented the Legislature from adopting different principles as the basis of its legislation. When the different municipalities were consolidated into one city, the Legislature adopted the principle, that each municipality ought to pay its own debts. Subsequently the Legislature adopted the principle that it was equal and just that the city at large should pay the very unequal debts of the different municipalities. It was not in the power of this court to say, that the legislation was unconstitutional.

WALLACE  
v.  
SHEPHERD.

So here the Legislature has established at different periods, different principles in regard to the assessments made for the levee district for these parishes, viz:

1st. That it was right, equal and just, to levy an *ad valorem* assessment upon the *lands* alone; that the property receiving the advantage should bear the burden. 2d. That in order to protect the *people* from inundation, it was just and equal that they should pay an *ad valorem* assessment upon all of their taxable property in the levee district. 3d. That it costs (as in the Draining case) as much to protect one acre of land from inundation as it does another; that every acre of land in the District of land subject to overflow, will be benefited to a much greater amount than the assessment; and that, therefore, it is just and equal, that each acre should pay into the hands of the agents charged with protecting it, the same sum as every other acre; and now, by a statute, since this litigation arose, and, 4thly, that the second and third principles ought to be combined, and that the *land* ought to be subject to a specific tax, and all other property to an *ad valorem* tax.

It is easy to perceive, by examination, that none of these theories can attain absolute equality or bring about exact justice among the different individuals composing a community subject to assessment. The first and second theories operated harshly upon those persons who occupied high tracts of land and had already protected themselves by sufficient levees at their own expense, and there may be cases of individual hardship under the third and fourth theories of legislation.

But it is not pretended, but that the plaintiff is benefited to the full amount of his assessment. The money he pays to the agents appointed to protect his property, is restored to him in the increased value of his lands, and their security from overflow. The argument, that he may not wish to sell or cultivate his lands, and that he may prefer that the soil should be raised by the overflow of each year, cannot be admitted. *Salus populi suprema lex*. The obstinacy of a proprietor in one case, or the wishes of a capitalist who holds by speculation in another, cannot be permitted to stand in the way of the safety of a whole community. Courts of justice cannot look to these wishes of parties, but must judge of their liability to assessment and taxation by reference to their property. The argument which would relieve them from the assessment in this case, would relieve them from taxation in every other.

Upon the whole, we cannot say that the principle upon which the Act of 1857 is based is unequal or unjust. The numerous Acts upon the subject show, that the subject has received the careful consideration of the Legislature, and that they have adopted a principle which, with reference to its subject-matter, must, in the absence of conclusive proof to the contrary, be considered just and equal. The presumption is not rebutted by any evidence in this record.

Judgment affirmed.

BUCHANAN, J., and COLE, J., took no part in this decision.

## ALICE MATILDA PORÉE v. CAPTAIN CANNON et als.

In a suit brought against the captain and owners of a steamboat, to recover damages for loss or injury arising from the bursting of the boiler, the Act of Congress approved July 7th, 1838, entitled, "An Act to provide for the better security of the lives of passengers on board of vessels propelled, in whole or in part, by steam," should govern, and not Article 2299 of the Civil Code.

The 13th section of that Act, in such an action, throws the burden of proof upon the captain and owners of steamboats to show, that the explosion was not the result of negligence on their part, or those employed by them.

**A**PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Singleton & Clack*, and *Geo. L. Bright*, for defendants and appellants.

MERRICK, C. J. The appeal in this case was taken in 1852, and the case, under the rules of the court, was placed upon the delay docket, from whence it has been recently removed by motion.

The suit was brought to recover one thousand dollars damages for the loss of a slave killed by the memorable and disastrous explosion of the steamboat *Louisiana*, in November, 1849.

The very learned and able judge (now deceased) who presided over the Fourth District Court at that time, rendered judgment in November, 1851, in favor of plaintiff, for the sum of nine hundred dollars, and interest from judicial demand.

The defendants appealed.

The relationship of the bailor and bailee, as in the case of a common carrier, did not exist between these parties. The negro was at the time employed at the scales of another steamboat, about thirty feet distant, weighing freight. He received an injury in his side, and his nostrils were filled with hot ashes, or some substance carried by the steam. He was insensible, and in that condition taken to the hospital, where he died the next day.

The argument of defendants' counsel may be resolved into two propositions, to-wit:

1st. That there is no proof of any fault or negligence on the part of the defendants, or any of the officers of the boat.

2dly. If it be proven in any manner, that the explosion was attributable to the engineers, or persons having charge of the boilers and engine, still, as the captain has no power over the engineer, and as he provided competent officers, he cannot be held responsible under Article 2299 of the Civil Code, because he could not have prevented the act which caused the damage.

The proof is, that at the time of the explosion, (which seems to have been the moment the boat was leaving, or on the point of leaving the wharf) the engines were under the charge of the second engineer, a sober, careful man, who was killed by the explosion. That the first engineer had been transacting some business in the city, and was to join the boat at the Stock Landing in Jefferson City; that the boilers had been inspected within the six months preceding, and would have passed inspection the day of the explosion, although one of the boilers had been taken out of another boat, and the others were five or six years old.

On this state of facts, it is urged that recent experiments have demonstrated that an explosive something, probably electricity, is generated in the steam boiler, which no care can prevent, and that it is a fallacy to attribute explosions to care-

FORÉ  
v.  
CANNON.

lessness, simply because the explosion occurred, and that all presumptions ought to be so based upon well established and well known facts, as to admit of no reasonable doubt of their correctness.

In the unsatisfactory state of science on the subject of the explosions of steam boilers, were it left to us to settle the question of presumptions arising therefrom, we might feel some embarrassment. But even then, we think it might be safely assumed, that where steam boilers and engines are properly constructed, of good materials and proper strength, and are managed with that prudent and reasonable care which the powerful agent employed requires, they will not explode; and that if a well authenticated instance can be given, where a steam boiler with sufficient strength and carefully managed has exploded, it will prove such a rare exception, as not to render the rule so doubtful or uncertain as to be an unsafe guide in considering these questions. The long period of prosperity and freedom from explosions which followed the passage of the Act of Congress of 1852, and the comparative security of steamboats constructed and managed under the regulations of the French Government, in that country, give great weight to this inference.

Aside from the single fact, that the second engineer was a sober, careful man, the proof in this case creates a probability that the accident was the result of a want of water under the action of too much heat, and consequently negligence on the part of the officers of the boat.

It is shown that the head of the "chock joint" forming the connection between two boilers, was burnt out about two feet in length; "a part of one of the boilers was in a collapsed state; the other flue, that is, the whole length of the cylinder was also collapsed, and a portion of it torn"; the upper side of the portion of the boiler thrown some hundred and fifty feet into Canal street, had indentations apparently corresponding with the rivets of the other boiler; the flue also retained a bluish color. The engineers who examined the fragments of the boilers and flue left, judging from these indications, gave it as their opinion, that the explosion was occasioned by a want of water and the great heat of the boilers.

At the time this accident occurred, the Act of Congress, approved July 7, 1838, was in force. By the thirteenth section of the Act, the burden of proof is upon the defendant, to show that there was no negligence on his part, or those employed by him. It is in these words:

"Sec. 13. Be it enacted, That in all suits and actions against proprietors of steamboats, for injuries arising to person or property from the bursting of the boiler of any steamboat, or the collapse of a flue, or other injurious escape of steam, *the fact of such bursting, collapse or injurious escape of steam, shall be taken as full prima facie evidence*, sufficient to charge the defendant, or those in his employment, with negligence, until he shall show that no negligence has been committed by him, or those in his employment." 5th vol. Statutes at Large, p. 306.

The defendant has not rebutted the presumption resting upon him under this Act, and if it be law applicable to the case, he is left without a defence. This Act was not brought to the notice of the learned counsel for the defence, at the argument of the case, but we suppose the power of Congress over the subject, will not be questioned. If so, Congress had the right to declare what consequences should arise from a presumed violation of the requirements of the Act. A citizen of Louisiana, who takes upon himself an employment regulated by the laws of Congress, cannot claim an exemption from the rules prescribed by the

same, and that his case shall be decided by the State laws. Article 2299 of the Civil Code is not, therefore, the law governing this case, and it is needless to inquire whether the defendant, as captain or owner, could have prevented the injury.

Judgment affirmed.

PORKE  
V.  
CANNON.

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THOMAS T. TWITTY v. THOMAS CLARKE.

Where the goods of third persons are placed, with their consent, in a leased house or store, they become subject to the pledge of the lessor.

Where a Constable has property under seizure, he cannot be deprived of possession by a writ of sequestration, even by a superior court. The proper mode of procedure is by injunction.

**A**PPEAL from the Sixth District Court of New Orleans, *Howell, J.*  
*Huntton & Miller*, for plaintiff. *T. J. & A. G. Semmes*, for defendant and appellant.

**MERRICK, C. J.** The defendant was the lessor of one *Charles*, a jeweller. The latter contracted with the plaintiff for a large iron safe, which was to be shipped from New York. In the mean time plaintiff agreed to furnish *Charles* with another large safe until the arrival of the safe contracted for. *Charles* being in arrears of the monthly rent, suits were instituted before a Justice of the Peace, and judgments obtained against the tenant, with a privilege upon the property attached. Under these judgments, executions issued, and the safe was seized to satisfy the same.

The plaintiff then instituted the present suit against the defendant *Clarke*, and sequestered the safe, claiming the same as owner.

The Constable intervened in the suit, praying that the possession of the safe should be restored to him.

The judgment of the lower court being in favor of defendant and intervenor, plaintiff appealed.

The proof shows that the safe was placed in defendant's store with plaintiff's consent. It, therefore, became subject to the pledge of the lessor. U. C. 2677 and 3227.

Moreover, the proceeding by sequestration was irregular. The Constable's authority, when he has property under seizure, cannot be treated in this summary manner, and he cannot be deprived of possession by a writ of sequestration, even by a superior court. The custody of the Constable, no less than that of the Sheriff, is the custody of the law. If plaintiff had rights, his remedy was by injunction.

Judgment affirmed.

THE STATE, on the Relation of HICKMAN praying for writ of Prohibition, v. JUDGE OF THE THIRD DISTRICT COURT OF NEW ORLEANS.

The writ of prohibition is only issued to a court which takes cognizance of a cause that does not belong to it, or which it is incompetent to decide.

The writ should not be issued to a court which grants an order of sequestration, only as a conservatory measure to insure the jurisdiction of another court in which the action is to be instituted.

To maintain an application for a writ of prohibition there must be a clear usurpation of jurisdiction.

ON an application for a writ of prohibition to the Third District Court of New Orleans, *Duvigneaud, J. A. N. Ogden & Stansbury*, for the relator. *Thos. Curry*, for defendant.

BUCHANAN, J. The record does not present to this court a clear case for the exercise of the power to issue a peremptory writ of prohibition.

This writ is only issued to a court that takes cognizance of a cause which does not belong to it, or which it is incompetent to decide. C. P. Art. 846.

In this case, it appears that the Judge of a District Court in New Orleans has granted an order of sequestration of a slave who intends to bring suit at the domicile of her master for her freedom—as a conservatory measure, to insure the jurisdiction of the court (that of Rapides,) in which the action is to be instituted. There is nothing in our late decision in the suit of *Mary Ann Logan v. Hickman*, which is necessarily or apparently inconsistent with the issuing of this writ of sequestration by the District Court in New Orleans.

The case in the District Court of New Orleans will scarcely come before us by appeal; for we understand from the answer filed herein by the counsel of *Mary Ann Logan*, that it is not intended to prosecute his proceedings in that court to judgment.

We gather as much from the prayer of *Logan's* petition in the District Court, for sequestration. To maintain the present application, there must be a clear usurpation of jurisdiction. This case has much analogy to that of *Williams v. Duer*, 14 La. Rep. 531. The application for sequestration appears to be in aid of the jurisdiction of the District Court of *Hickman's* domicile.

The counsel of the applicant for that writ has annexed to his answer herein, a copy of the petition which he has filed, or is about filing, in the District Court holding sessions in the Parish of Rapides; and we must presume that the sequestration ordered in the Parish of Orleans will last only so long as will be indispensable to sustaining the jurisdiction of the court in Rapides. Should the suit not be brought within a reasonable time, in Rapides, it will be the duty of the court in New Orleans to quash the sequestration.

Writ of prohibition refused, at costs of relator.

## STATE OF LOUISIANA v. BENJAMIN MASON et al.

In a suit contesting an election on account of violence used in keeping voters from the polls, it should be alleged that there was a sufficient number prevented from voting to have varied the result; and the absence of such material allegations is fatal to the suit.

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**A** PPEAL from the District Court of the Parish of Jefferson, *Burthe, J.*  
*Wheelock S. Upton*, for plaintiffs. *W. T. Scott* and *A. N. Ogden*, for defendants and appellants.

COLE, J. Petitioners represent that they are citizens of the United States; that they reside in the town of Carrollton, a municipal corporation created by the Legislature of Louisiana, and wherein they have a right to vote.

That the municipal election, held in Carrollton on the 5th of April, 1858, was carried on and completed by the wrongful interruption of the right of free suffrage, by the intimidation of tumult and the interference of degraded banditti, brought from afar to thwart the exercise of their rights as electors.

That by no good and honest authority does one *Benjamin Mason*, under such election, hold the office of Mayor of the town of Carrollton, and that by no like right do *W. W. Cochran*, *C. C. Thompson*, *J. O. Neibert*, *E. A. Wilcox* and *E. St. Pierre*, hold the office of councilmen, but that the said *Mason* doth usurp the office of Mayor, and the others do likewise usurp the offices of councilmen.

That the said election was null and void, because very many of the electors of the town of Carrollton were prevented from the free exercise of the right of suffrage, by intimidation and threats.

That some were thwarted by personal violence, and others were stricken down with concealed weapons, carried and used by strangers, who were designated only as "Red Bill," "Big Tom," and such like *soubriquets*.

That these persons so designated, are believed to have been of the number of thirty or more, and that their appearance and force were intended and used to prevent a fair and impartial election at the polls on the 5th of April aforesaid.

Wherefore, they pray for the issuance of the writ of *quo warranto*, and that the said *soi-dissant* Mayor and Councilmen, be forbidden from any further performance of the duties in the offices and trusts they usurp.

There was judgment for plaintiffs, and defendants have appealed.

The writ of *quo warranto* is an order rendered in the name of the State, by a competent court, and directed to a person who claims or usurps an office, in a corporation, inquiring by what authority he claims or holds such office. C. P. Art. 867.

The petition merely accuses the defendants of having usurped their offices.

Usurpation conveys the idea of wrongful action on the part of him who usurps an office, but the petition does not accuse the defendants of any improper or illegal action on their part, but only alleges that they were usurpers, because other persons have acted illegally.

The petition admits that they hold the office by virtue of an election, and it is not contended that the election was not held on the day fixed by law, or that all the formalities of law were not followed by the commissioners of the election.

The defendants have shown that they received a majority of sixty-five votes.

STATE  
v  
MABON.

and on the return of the commissioners, of their election, they qualified themselves and entered upon the discharge of their duties.

It thus appears that they are not technically usurpers, but have apparently the warrant of law for the tenure of their offices.

The intent of plaintiffs is, however, to go behind the certificate of their election, and to show it was so improperly conducted, that it ought to be viewed as a nullity, and defendants ought to be ousted from their offices, on the ground of never having been chosen according to law.

The defendants excepted to the sufficiency of the allegations in the petition, to have the election annulled, on four grounds. It is only necessary to consider two of them :

1. Because the right of defendants not being contested by any persons claiming for themselves a right to said offices, the grounds set forth were wholly insufficient to maintain the action.

It appears reasonable that no one but a person pretending to have a right to an office, should be permitted to contest the right of the incumbent of that office. If each citizen be entitled so to do, then a hundred or a thousand writs of *quo warranto* could be sued out.

Each citizen is, indeed, interested to have elections conducted without intimidation or tumult, but this interest can be manifested by prosecuting those who have sought to thwart the peaceful deposit of suffrages in the ballot-box.

Laws exist for the punishment of the disturbers of public elections. It is to be supposed these laws will suffice as a general rule to maintain sufficient order to permit the expression at the ballot-box of the will of the majority.

Exceptional cases may occur, as the present, where it is alleged, that a band of thirty men intimidated the population of a town, and prevented the free expression of public opinion.

Principles cannot be established for the exception, but the general rule.

It is, perhaps, better, that in a few instances, the results of elections should remain undisturbed, even when the will of the majority has been thwarted, than to allow each citizen to contest them.

For if every citizen possessed this right, more disorder would characterise the administration of public affairs, than would ensue from the occasional defeat of the will of the majority.

The judicial tribunals would be burdened with innumerable contestations of elections, and clogged in the execution of their ordinary duties.

Citizens, alarmed at the immense cost for attorney's fees and other things, would fear to run for offices, when the malice of any personal enemy might keep them in litigation during the whole term for which they were elected.

Conceding that Article 873 of the Code of Practice, implies the power of courts of justice to determine by the writ of *quo warranto*, the validity of the elections of the officers of a corporation, when the Legislature has not granted to the corporation this prerogative, except with regard to offices which are conferred in the name of the State, by the Governor, with or without the consent of the Senate, mentioned in Article 868 of the Code of Practice, still the law has not enunciated the rules which shall govern the courts in deciding upon the validity of elections under the writ of *quo warranto*, and the degree of interest which shall empower a party to inquire into the validity of an election.

It is true, that Article 869 of the Code of Practice declares, that a mandate to prevent the usurpation of an officer in a city or other corporation, may be ob-

tained by any person applying for it, but a person does not commit an usurpation who takes possession of an office by virtue of a majority of voters, manifested by the correct return of commissioners of elections duly appointed, of the votes cast and of those who are elected.

Webster's Dictionary defines usurpation to be the "act of seizing or occupying, and enjoying the power or property of another without right; as, the *usurpation* of a throne; the *usurpation* of the supreme power."

Bouvier's Law Dictionary explains usurpation, when used in relation to government, to be "the tyrannical assumption of the government by force, contrary to and in violation of the Constitution of the country." And in defining the word "tyrant," he says: "The term tyrant and usurper are sometimes used as synonymous, because usurpers are almost always tyrants; usurpation is itself a tyrannical act, but properly speaking, the words usurper and tyrant convey different ideas. A king may become a tyrant, although legitimate, when he acts despotically; while a usurper may cease to be a tyrant by governing according to the dictates of justice."

Although, then, Article 869 permits any person to apply to prevent the usurpation of an office in a city or corporation, still this Article would not apply to persons who have been duly and honestly returned as elected by the commissioners of election, as in the present case. Besides, "any person," used in this Article, cannot have been used in an unrestricted sense. No one would certainly contend that a foreigner just arrived upon our shores, would be entitled to sue out the writ of *quo warranto*, and inquire by what right the Mayor or Councilmen of a corporation held their offices. This Article means that "any person" having a sufficient interest to justify an action of *quo warranto*, may institute it, and it is for the tribunals of the country to decide when the person applying for this writ, possesses such interest as to justify the courts in acting under it.

It is a rule appertaining to all suits, that a party cannot institute a legal proceeding without having sufficient interest to justify him.

Neither, then, Article 869, nor indeed any other of the Code of Practice, relative to the writ of *quo warranto*, justifies an action against persons in possession of offices who are not usurpers, unless it is granted by Article 873 by implication, and this Article does not declare the rules that shall regulate this proceeding, and does not specify the persons who shall be deemed to have a sufficient interest to apply for the writ. It then becomes the duty of courts to decide the degree of interest to be possessed by a person to justify him in applying for this writ, in order to oust any one from office. The Legislature of Louisiana have enunciated what they consider to be a sufficient degree of interest.

The Act of 1855, relative to elections, (Session Acts, p. 408,) only provides for the contestation of elections to certain specified offices, and only allows those who claim the right to hold those offices to contest the elections of those who pretend to have been elected, and this contestation must be commenced before parties get possession of the offices. See sections 41, 42, 45, 46 and 53 of said Act of 1855.

We can see no reason for differing from this view of the Legislature, and we are of opinion that the first exception was well taken by the defendants, and that plaintiffs were not entitled to the writ of *quo warranto* in this case, because they do not pretend to be entitled to the offices from which they wish to oust the defendants.

2. The other exception taken by defendants is, "because it was not alleged in

SEARS  
v.  
MASON

the petition, that a sufficient number of voters were prevented from voting, to have varied the result of the election."

It is evident there would be no reason to contest an election, if the result could not be changed, and such would be the event, unless a number of voters had been prevented from voting, sufficient to have varied the result.

In *Augustin v. Eggleston*, 12 An. 367, this court held, that since elections are determined by the majority of the ballots cast, they are not to be set aside on account of the meagreness of the vote, "without distinct and circumstantial allegations of error, fraud, violence or illegality affecting the result."

In *Andrews v. Saucier*, 13 An. 302, it was held by this court, that "if the voters think proper to go forward and vote under a defective law, those who were candidates ought to be the last to complain, when the result has been affected by neither the unconstitutionality of the law, fraud, error, nor collusion."

The petition of praintiffs was, therefore, essentially defective, as it did not contain this material allegation.

In conclusion, it should be observed, that it is not alleged that the defendants participated in any act of violence, or had in any manner interfered with or prevented persons from voting, or had aided and abetted any persons so doing.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; and that there be judgment in favor of the defendant against the demand of petitioners, and that the writ of *quo warranto* issued at the demand of appellees, be dismissed, and that appellees pay the costs of both courts.

LAND, J., absent.

#### NICHOLSON & CO. v. PELANNE BROS.

A party is concluded by the first bill which he presents for work done under a contract. Without showing error he cannot be permitted to recover the items added to that bill since it was rendered.

**A** PPEAL from the Third District Court of New Orleans, *Duvigneaud, J.*  
*V. H. Ivy*, for plaintiffs. *C. Dufour*, for defendants and appellants.

**MERRICK, C. J.** The plaintiff is concluded by the first bill which he presented the defendants for the work done under the contract. Without showing error he cannot be permitted to recover the disputed items added to this bill since it was rendered.

There is no foundation for the reconventional demand.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be amended so as to reduce the principal sum decreed the plaintiff from \$3400 to \$3350, and that the judgment so amended be affirmed, the plaintiff paying the costs of appeal.

## TALLANON &amp; DESSOMMES v ANTONIO CARDENAS.

The 9th section of the Act of 1855, repeals the Acts of 1840 and 1847, modifying the 212th Art. of the Code of Practice, relative to the arrest of debtors about to leave the State, but expressly declares that the Act is not intended to repeal the provisions of the C. P. on the subject.

The provision of the 3d section of the Act of 1855, that no non-resident shall be arrested in this State except he has absconded from his residence, must give way to the 212th Art. C. P. in the case of a foreign debtor about permanently leaving the State.

The repeal of a repealing law does not revive the first law unless it be so particularly expressed. C. C. 22 and 23, and the same rule may be laid down as to the amendment of laws, which is but a partial repeal.

**A**PPEAL from the Third District Court of New Orleans, *Duvigneaud, J.*  
*J. L. Tissot*, for plaintiffs and appellants. *C. Dufour*, for defendant.

VOORHIES, J. The question presented for adjudication in this case is, whether a non-resident debtor residing in a foreign country, can be arrested under the provisions of the Article 212 of the Code of Practice, as amended by the Acts of 1840 and 1847, when about leaving this State permanently. There would be no difficulty in this matter, were it not for the 3d section of the Act of 1855, (p. 42), which reads: "that no non-resident shall be arrested in this State, at the suit of a resident or non-resident creditor, except in cases where it shall be made to appear by the oath of the creditor that the debtor has absconded from his residence."

This Act, of which the above is one of the sections, is entitled *An Act relative to persons arrested and imprisoned for debt*; and, in its last section, repeals "all laws or parts of laws conflicting with the provisions of this Act, and all laws on the same subject-matter except what is contained in the Civil Code and Code of Practice." Sec. 9. The provisions of the Act of 1840 and 1847, which relate to the subject-matter under consideration, are consequently repealed notwithstanding the discrepancy which exists in the French and English texts of the 3d section of the Act of 1855. The English text prevails.

The 212th Art. C. P. gave the right of arrest to any creditor, whose debtor was about to leave the State, even for a limited time. This last clause was modified by the Act of 1840, so as to apply only to debtors about departing permanently from the State. Another modification was introduced by the Act of 1847, p. 63, sec. 1, with regard to debtors, who were citizens of another State; they were subject to arrest only in case they absconded from their residence. In giving effect to the Article of the Code as amended by these two statutes, the rule was that any creditor had the right to arrest any debtor about departing permanently from the State, except when such debtor was a citizen of another State, in which case the right of arrest accrued only when the latter debtor absconded from his residence. A non-resident debtor from a foreign country might therefore be arrested although not absconding, when about to leave the State permanently; so much was left then of Art. 212 C. P., after the restrictions imposed by the Acts of 1840 and 1847.

From this it will appear that the section 3d of the Act of 1855 is in conflict with the Article 212 of the Code of Practice upon the subject of the arrest of

TALLAMON  
v.  
CARDENAS.

foreign debtors; and yet the 9th section provides expressly that the Act is not intended to repeal the provisions in the Code of Practice. In order to give effect to both, the rule might be laid down that a foreign debtor may be arrested in two events; 1st, when about permanently leaving the State; 2d, when absconding from his residence. But that provision of the 3d section of the Act of 1855, which reads, that no non-resident shall be arrested in this State except he has absconded from his residence, must give way to the 212th Art. C. P. in case of a foreign debtor about permanently leaving this State.

In thus giving effect to the Art. 212 C. P., it has not escaped the attention of the court that the Act of 1855 has repealed the two Acts of the Legislature amending that Article, and that the repeal of these two Acts has not re-instated the Article of the Code of Practice in its original state. "The repeal of a repealing law does not revive the first law, unless it be so particularly expressed." C. C. 22 and 23. And the same rule may be laid down as to the amendment of laws, which, after all, is often but a partial repeal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed.

It is further ordered, that the plaintiffs do have judgment against the defendant *Antonio Cardenas*, for the sum of six hundred and three dollars, with legal interest thereon from the twenty-third day of November, A. D., 1857, till paid.

It is further ordered, that the decree quashing the writ of arrest, issued on behalf of the plaintiffs against the defendant *Antonio Cardenas*, be set aside and annulled; and that the plaintiff's right of recourse on the bond furnished for his appearance by the said *Antonio Cardenas*, with *Paul Pouillot* as his security, be, and is hereby recognised.

It is further ordered, that the defendant pay the costs in both courts.

LAND, J., took no part in this case.

MERRICK, C. J., dissenting. It seems to me that the third section of the Act of 1855 has enlarged the Acts of 1840 and 1847. The term non-resident must be intended to mean any person residing in other States of this Union or foreign countries. I can see no other motive for the change of phraseology in the revised statute. See Acts 1840, p. 133, sec. 9; 1847, p. 63; 1855, p. 42.

The Act of 1855 cannot be made to yield to any former legislation, whether contained in the Code of Practice or not. *Lex posterior derogat priori*. See 1 *Bouvier Inst.* 42-43.

The Act of 1855, was the last expression of the legislative will, and being express, all former laws in opposition thereto must, under the ordinary rules of interpretation give way. It could hardly be supposed that the Legislature which had taken the trouble to declare explicitly its will, would have made the same subject to any law, which it had power to repeal and annihilate.

But in the instance before us they have expressly repealed all laws in conflict with the Act, as well those contained in the Code of Practice, as elsewhere. All that is required to make this evident is to punctuate the repealing clause according to the rules of interpretation.

The section should read as follows:

Sec. 9. "Be it enacted, &c., That all laws conflicting with this Act, and all laws on the same subject-matter except what is contained in the Civil Code and the Code of Practice, be repealed."

Here then, are repealed all laws in conflict with the Act, also all laws on the same subject-matter, except what is contained in the Civil Code and Code of Practice.

The lawgiver was reducing the laws to a code. The last expression of his will on this subject, was the Act in question. The citizen and magistrate was not to regard any other law on the subject except contained in the Civil Code and Code of Practice. *Holmes v. Wiltz*, 11 An.

I think the judgment should be affirmed.

TALLAMON  
V.  
CARDENAS.

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SAME CASE—ON A RE-HEARING.

VOORHIES, J. Upon a re-examination of this case, we have come to the conclusion that the former decree should be amended, for the purpose of having the case tried on the merits.

It is, therefore, ordered and decreed, that the judgment heretofore rendered by the court, be amended so as to read as follows, to-wit: That the judgment of the District Court be avoided and reversed; that the decree quashing the writ of arrest, issued on behalf the plaintiffs against the defendant *Cardenas*, be set aside and annulled, and that this case be remanded for further proceedings, the defendant paying the costs of appeal.

MERRICK, C. J., adhered to his former opinion.

LAND, J., absent.

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H. W. PITKIN V. ROUSSEAU & JEAUFREAU, and DYAS POWER, Warrantor.

The action for delivery of merchandise, or other effects, shipped on board any kind of vessels, is prescribed by one year.

This prescription begins to run from the day of the arrival of the vessel, or that on which she ought to have arrived.

The party pleading this prescription should show that the vessel either did, or ought to have arrived one year before the suit was brought—an omission to do which is fatal to his plea.

Art. 3212 C. C., fixing the time at which a ship is considered to have made a voyage, refers alone to the privileges, given by the Articles which precede it, to creditors upon a ship, and does not govern the time when a shipper may bring an ordinary action (asking no privilege) for the delivery of goods.

**A** PPEAL from the Fourth District Court of New Orleans, *Price, J.*  
*Waples & Eustis*, for plaintiff and appellant. *Clarke & Bayne, Lacy & Upton*, and *R. Woolridge*, for defendants.

MERRICK, C. J. In this case, Hon. C. Voorhies having recused himself, on account of relationship to some of the parties, and the other members of the court having been equally divided in opinion, the Hon. P. N. Morgan, Judge of the Second District Court, was requested to sit, in this case, in the place of Mr. Justice Voorhies, under the 70th Article of the Constitution. And now, this day said P. N. Morgan having taken his seat in pursuance of said previous request, and after having had this case under advisement, the following opinion and decree were pronounced.

MORGAN, J. The steamer *Echo*, through her proper officers, agreed, for a certain consideration, to transport some property of the plaintiffs to a place called

PITKIN  
v.  
ROCHELLEAU.

Doaksville, which is in that portion of this country known as the Choctaw Nation. The bill of lading which witnesses this contract gave to the carrier the right to store and re-ship, in case the Echo could not reach Doaksville.

The goods were never delivered to the consignees at Doaksville, and this action is instituted for the purpose of recovering from the carrier their value, which the testimony fixes at \$400.

The defence is :

1st. Prescription of one year.

2d. Denial of ownership.

The District Judge being of opinion, that inasmuch as more than one year had elapsed from the time the Echo ought to have arrived at Doaksville before the petition was filed, that the prescription commenced to run from the time when the vessel ought to have arrived, according to Art. 3502 C. C., that a vessel is considered to have made a voyage when her departure from one port and her arrival at another shall have taken place, or when, without having arrived at another port, more than sixty days have elapsed between her departure and return to the same port, according to Art. 3212 of the Civil Code, sustained the plea of prescription, and gave judgment in favor of the defendants.

The plaintiffs have appealed.

The facts upon which the plea of prescription is pleaded, are unquestionable. The goods were shipped on the 12th of June, 1854. This suit was not instituted until November, 1856. A period, then, of more than one year had elapsed, (allowing sixty days as the time in which a voyage ought to be completed by a vessel leaving this port for Doaksville,) from the time the goods were shipped to the time when the suit was brought.

The Articles of the Code relied upon by the appellees, are as follows :

Arts. 3501, 3502. "The action for the delivery of merchandise or other effects, shipped on board any kind of vessel, is prescribed by one year from the day of the arrival of the vessel, or that on which she ought to have arrived."

Art. 3212. "A ship is considered to have made a voyage, when her departure from one port and arrival at another shall have taken place, or when, without having arrived at another, more than sixty days have elapsed between the departure and return to the same port, or when the ship, having departed on a long voyage, has been out more than sixty days, without any claim on the part of persons pretending a privilege."

It is thus apparent, from the terms of the law, (C. C. 3501,) that the plea of prescription of one year, properly sustained, is an effectual bar to any action for the delivery of merchandise shipped on any vessel ; and it must follow that if the Article 3212 of the Code is to regulate the time when the prescription in this case commenced to run, the appellant can have no relief.

One portion of the Article 3212, taken by itself, or if perhaps it were transferred to a different part of the Code, would leave the subject beyond any two interpretations. Its terms are express ; a voyage is considered to have been made when more than sixty days have elapsed after the departure of the vessel.

To serve the case of appellees, the three Articles, 3501, 3502 and 3212, must be construed together. The first, to determine what prescription he is allowed to plead ; the last to fix the period when his prescription should commence to run. To enable him to do this successfully, the Articles should, according to the just rule of construction, treat of the same subject, and relate to the same matter, and must have been made to govern the same case.

Do the Articles 3212, 3501 and 3502, refer to the same subject or matter, and do they govern the same case?

The Article 3212, is to be found under the second section of the title of the Code which relates to privileges on ships and merchandise.

The Arts. 3501 and 3502, are to be found under the head of prescription.

Art. 3212 was, in my opinion, made generally to fix the time when a ship is presumed to have made a voyage, with reference to the period when a creditor, who has a privilege upon such ships, arising out of any of the causes mentioned in Art. 3204, seeks to exercise that privilege; and particularly to Articles 3206, 7, 8, 9, 10 and 11, which relate to the sale of ships and the privileges which parties may have upon such ships as the property of the vendor. They provide, that where a ship has been sold, and has made a voyage in the name and at the risk of the purchaser, without any claim on the part of the privileged creditors of the vendor, that these privileges are lost and extinct against the ship, if she was in port at the time of the sale (Art. 3210); but that if a ship was on a voyage, at the time of the sale, the privilege of the creditor against the purchaser, shall only become extinct after the ship shall have returned to the port of departure, and the creditors of the vendor shall have allowed her to depart on another voyage for the account and risk of the purchaser, and shall have made no claim. Art. 3211.

Then follows, and as it seems to me, as a legal necessity, the Art. 3212, which fixes the time when a voyage is presumed to be at an end, and the consequence of not presenting the claim on the part of the person pretending a privilege within the time therein specified.

Besides this, it appears to me, that a correct reading of this Article, as well as those immediately preceding it, shows that the legislator had alone in view when these Articles were enacted, the security which the creditor might have upon a specific piece of property of his debtor for the payment of his debt.

Giving any force to these Articles which may be claimed for them, the obligation of the owner of a ship may still exist, whilst the privilege which rested upon his ship to secure the faithful performance of that obligation may, by the lapse of time, have been lost. As for instance: if supplies are furnished to a ship, the furnisher has a privilege upon the ship for payment; but if he does not seek to exercise that privilege within a certain period, the privilege is lost. But the obligation of the owner still remains; the furnisher is merely changed from a privileged to an ordinary creditor.

Upon this branch of the case, I am, therefore, of opinion, that Art. 3212 does not give the time when a shipper may bring an ordinary action asking for no privilege for the delivery of goods, but that it refers alone to the *privilege* which creditors have upon a ship.

The only prescription which, in my opinion, the defendants can invoke, is to be found under Article 3502 of the Code, which provides as follows: "The prescription mentioned in the preceding Article (one year) runs, with respect to the merchandise injured or not delivered, from the day of the arrival of the vessel, or that on which she ought to have arrived."

The vessel upon which the goods for which this suit is instituted, never reached or attempted to reach the port for which she started. Prescription then, according to this Article, must commence to run from the day on which she ought to have arrived there. When that time was, or at what time it should have occurred, must be determined, I think, by the contract between the parties and the evidence in the record.

PYTHEM  
v.  
ROUSSEAU.

The contract was, that the goods should be taken to Doaksville, the carrier reserving the right to store and re-ship, in case the river would not allow of his going so high up.

The reservation of this right to store, did not alter the contract so far as regards his obligation to carry the goods to Doaksville. It allowed him the privilege, should circumstances prevent him from carrying the goods to their port of destination, to forward them by some other boat, and to have them stored in the meanwhile; but his obligation to have them delivered at or shipped to Doaksville, if it were possible for him to do so, still subsisted. *Hatchett v. Steamboat Compromise*, 12 An. 783.

These goods were landed at a place called Rowland, the river not allowing him to proceed any further, and there they remained until they were sold by the person with whom they were stored.

When the goods were landed at Rowland, the second obligation of the carrier under his contract, commenced. This obligation was to re-ship the goods. This he never did, and nothing in the record shows that he attempted to re-ship them. He had proceeded a long distance up a falling river, and his whole efforts seem to have been directed to hurrying out of it as fast as he could. He never even notified the shipper that he had failed in performing his contract, and that his goods had been left to the mercy of a frontier warehouseman. He was thus placed in the category of a man who had violated his engagement, without giving notice of the violation to the parties in interest. Can a man, under these circumstances, plead prescription?

The law says he may. There is no exception made for bad faith by the Article of the Code which the defendants rely upon. But I am of opinion that he should be held to bring himself clearly within the law whose protection he invokes.

Prescription is a legal plea and must be enforced, whenever it is legally made. But prescription is of strict law; it is not presumed. It cannot be supplied by the courts. It is liable to interruptions, and can only be enforced upon the strictest evidence.

Now, this being, as I understand it, the well settled jurisprudence of this State, upon whom did the burden of proving the prescription relied upon in this case rest? The defendants.

And what is the period from which prescription began to run?

According to the views I have expressed when considering the Arts. 3212, 3502, from the time the goods ought to have arrived at Doaksville, taking into consideration the fact of their having been stored in consequence of the low stage of the river.

When the goods should have arrived at Doaksville, is not a question of law, but is a matter of fact. Upon whom did it rest to show this fact? Clearly the defendants. It was, in my opinion, incumbent upon them to show that the goods ought to have arrived at Doaksville one year before this suit was brought.

But this they have neglected to do. The record furnishes no clue as to when the goods ought to have arrived. The defendants have offered no proof. This duty devolved upon them; the court cannot supply the deficiency. The fault in not having done it lies at his own door. His plea is not made out by the face of the record, and is entirely unsupplied by any evidence. It must, therefore, fail.

Upon the merits, I think the case is with the plaintiff.

The defendants allege that they had sold the boat to *Dyas Powers*, whom they call in warranty.

PRYKE  
v.  
ROUSSEAU.

The evidence to support this allegation is, I think, nothing more than a charter party. This evidence, under the special defence set up, was inadmissible as against the plaintiff. The proof should correspond with the allegation, and their allegation was not that their boat had been chartered, but that she had been sold.

The testimony is good, however, as between the defendants and their warrantor; it having been received without objection.

I think there should be judgment in favor of the plaintiff and against the defendant, with the same judgment in favor of the defendant over against the warrantor.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed; and that the plaintiff do recover and have judgment against the said *Jean A. Rousseau* and *Alphonse J. Jeaufreau in solido*, for the sum of four hundred dollars, with legal interest thereon, from the 19th day of November, 1856, and costs of both courts; and that said defendants do recover and have judgment against the defendant in warranty, *Dyas Powers*, for the same sum of money, viz, four hundred dollars, and interest from the same date, and costs of both courts.

COLE, J., dissenting. The bill of lading obliged the captain of the steamer "Echo," to deliver the corn mills at the port of Doaksville, but it contained the clause, "privilege of storing and re-shipping, in case there is not water to get up."

It appears from the evidence, that it is the usage to carry the goods shipped, as far up as they can be taken; then, if the water permits, to re-ship the goods in a lighter draught boat, if there be an opportunity to do so, and if not, they are stored.

It is also established, that the "Echo" could not get up higher than "Rowland," which is forty miles below Doaksville, and no boats were there by which the freight might have been re-shipped to Doaksville. The river was falling rapidly at the time. There was not water sufficient to make a trip that season to Doaksville, and the "Echo" never afterwards returned.

That the mills were stored with *Mrs. Markhouse*, who carries on a regular commission business: that she paid the "Echo" the freight on the mills, as far as Rowland, and the charge was in proportion to the distance the goods were taken.

It is also shown that the "Echo" discharged at Rowland with *Mrs. Markhouse* other goods for the same consignees to whom the mills were consigned, and that they were afterwards received by them.

A member of the firm to whom the "corn mills" were consigned, testifies that he learned by a letter from *Mrs. Markhouse*, that the ten corn mills were at Rowland, Texas, in her warehouse, and she wanted the firm, as consignees, to accept delivery at Rowland, which they refused to do.

I am of opinion, that under the circumstances of this case, the defendants are not liable.

The privilege of "re-shipping" must be interpreted to refer to the period of the arrival of the "Echo" at a place where the water would not suffice for her further advance up, and not to an epoch a long time subsequent.

If, upon the arrival of the steamer at such a point, it were possible to re-ship the goods in a steamer of lighter draught, then it would have been the duty of the "Echo" to have re-shipped them.

It having been, however, impossible so to do, the obligation of the common carrier, under the bill of lading now under consideration, was to store them, and such is also proven to be the usage upon the river at Rowland and other points,

PITKIN  
v.  
ROUSSELAU

It seems unreasonable to suppose that the responsibility of the "Echo" continued until a season of high water.

The bill of lading referred to a certain voyage; its clauses and obligations are to be interpreted as referring to that trip.

The "Echo" having stored the "mills" with a regular commission house, according to the authorization of the bill of lading, and it being impossible to re-ship them at that time, the contract between the shipper and the common carrier were, under the circumstances of this case, terminated, except perhaps as to the duty of giving notice to the consignees.

But as this notice was given by the commission merchant with whom the goods were stored, plaintiff suffered no damages from not being notified by the captain of the "Echo."

As then it was impossible to have re-shipped the "mills" that season, as defendants were authorized to store them, and it was the usage so to do, as notice was given to the consignees, I think, that the defendants are not liable. Besides, two of the defendants cannot be held liable, because they had made a conditional sale of the "Echo," to the warrantor, and another person, and she was in possession of *Powers*, under this conditional sale, at the time the "mills" were shipped.

I consider it unnecessary to express any opinion upon the points discussed by the organ of the majority of the court, except so far as they are embraced in my opinion.

I am of opinion that the judgment of the District Court should be affirmed.

BUCHANAN, J., concurred in this opinion.

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#### WILLIAM BESTE v. HIS CREDITORS.

Charges of fraud in an opposition to the application of an insolvent to be allowed the benefit of the laws of this State in favor of insolvent debtors, should be clearly enunciated and specifically made.

**A**PPEAL from the Second District Court of New Orleans, *Morgan, J. Ogden & Augustin*, for plaintiff. *A. & A. Pitot*, for defendants and appellants.

COLE, J. On the 24th February, 1858, *William Beste*, of New Orleans, filed in the Fifth District Court of New Orleans, his petition for a cession of his property to his creditors, and a meeting of the creditors was ordered, to take place on the 31st March following.

On the 26th February, 1858, *G. M. Laning* was appointed provisional syndic.

On the 31st March, the meeting of creditors was held, and *Joseph Deynoodt* was appointed syndic.

On the 16th April, 1858, *Joseph Deynoodt*, not in the capacity of syndic but as a creditor, and also some other creditors filed their petition of opposition to the demand of *Beste* to be allowed the benefit of the law of this State in favor of insolvent debtors, and charged him with fraud.

*Beste* filed this among other exceptions, "because on the face of the petition no legal cause of action is set forth in said petition against him."

The District Judge being of opinion that the allegations were not of such a nature as to constitute fraud, sustained his exception and dismissed the opposition.

Opponents have appealed and rely upon sections 19, 20 and 21 of the Act of 1855, relative to the voluntary surrender of property and mode of proceeding. Sess. Acts 1855, p. 435.

The first ground alleged by opponents to prove the fraudulent action of *Beste* in his insolvent proceedings is, "that before making a cession of his property to his creditors, he was accused by his partner, *Grima*, of knowingly and fraudulently attempting to sell, at public auction, without notice thereof to his partner, eleven pianos, which he represented as coming from the manufacture of *Pleyel*. when he knew that they did not; and was only prevented therefrom by the suit for a settlement of partnership, instituted against him before the Second District Court, by his partner *Felix Grima, Jr.*, in which suit a writ of sequestration was obtained, and the pianos were sequestered by the Sheriff in the hands of *Beste & Laning*, a commercial firm of New Orleans, composed of *Edward Beste & G. M. Laning*, and in which the said *Wm. Beste*, the insolvent, is the chief clerk and manager of all the affairs of said firm.

So far there is no averment of fraud which is covered by the statute. This charge consists of an accusation by *Grima*, that *Wm. Beste* attempted to commit a fraud anterior to his cession, but was prevented by the vigilance of his partner, who caused the pianos to be sequestered.

Opponents further alledge, "that in the schedule filed in court by the said *Wm. Beste*, he has omitted to mention said pianos and to surrender them to his creditors, thereby concealing said property with the intention to keep it from them."

Section 19th of the Act of 1855, Sess. Acts, p. 435, declares that all persons shall be considered as guilty of fraud, who shall have concealed any of their property, with an intention to keep it from their creditors.

The insolvent cannot be said to have concealed the pianos, for at the demand of his partner they were sequestered and were placed in the custody of the Sheriff before his cession.

The omission to put these pianos on his schedule cannot be said to be covered by section 20 of said Act, which provides that every insolvent debtor shall also be considered as guilty of fraud, if he shall have knowingly omitted to declare any of his property, rights or claims in his schedule.

This charge does not even aver that the pianos belonged to the insolvent or the firm of which he was a member, but leaves this essential point to be deduced from the general allegations of the petition.

As these pianos were sequestered by *Grima*, the partner of the insolvent, this induces the impression that *Grima* must have considered himself to have had a claim, or privilege upon the same, or a title thereto.

Opponents do not alledge that *Beste* knowingly omitted, but only that he omitted; the averment is not therefore consonant with the requirements of the statute, and is essentially defective. Even if the averment had been agreeably to the law, *Beste* could not be deemed to have omitted the inscription of the pianos on his schedule with any fraudulent intent, for it was his partner, one of the present opponents, who had caused them to be sequestered, and knew whether they were the property of *Beste* or not. The object of the law in punishing the intentional omission of the insolvent to put certain property on his schedule is to prevent its concealment from the creditors. But how could this omission conceal the pianos from the creditors, when one of them had sequestered them by legal process, and they were in the hands of the Sheriff or his appointed guardians.

The second charge is, "that the insolvent connived with the house of *Beste &*

**BESTE  
v.  
CAMERONS**

*Laning* in order to conceal or cover the pianos so that his vendors or creditors cannot render the same liable for their claims, and *pretends* to have sold some of them to *Beste & Laning*, which he had no right to do after the sequestration above mentioned, and even then the said *Wm. Beste* fraudulently concealed from his creditors the proceeds of sale of said pianos."

The intended gravamen of this charge is by no means clearly indicated.

The 24th section of the Act of 1855, p. 436, provides very severe penalties against the insolvent debtor, who has been declared by the jury, to have been guilty of fraud; one of these penalties is imprisonment for a term not exceeding three years. The averments constituting the fraud ought therefore to be specific, and clearly enunciated, so that the accused may know what particular charges he is obliged to answer.

The second charge contains two contradictory averments, one is that the insolvent conniving with a certain firm *pretends* to have sold some of them to this house; the other averment is that he fraudulently concealed the proceeds.

If the insolvent did not sell but only *pretended* to do so, then there could be no proceeds to be concealed.

Besides, this charge does not specify whether *Beste* was in insolvent circumstances at the time he pretended to have sold some of these pianos.

The first charge avers that *Beste attempted* to sell them at public auction, but was prevented by the sequestration; the second charge declares that after the sequestration he *pretends* to have sold them.

The second charge does not affirm in what manner the insolvent connived with *Beste & Laning*, unless it be that he *pretends* to have sold some of them to that house. It does not aver that *he did sell* any of the pianos to them.

This charge is evidently too indefinite. The third ground of the proof of fraud is, "that the said *Wm. Beste* has collected monies from sundry debtors of the firm of *Beste & Grima*, without accounting for the same on his schedule.

The averment is also too indefinite. It does not aver whether these monies were collected a month or years before *Beste* became insolvent. It does not specify the names of any of the debtors, so as to enable the insolvent to contradict the charge.

For the above reasons the petitioners aver, that they have the right to proceed against *Wm. Beste* to have him convicted of fraud, and against the house of *Beste & Laning* to oblige them to pay into the hands of the syndic the value of said pianos, for the benefit of the creditors of *Beste & Grima*. They pray that *Wm. Beste* be forever deprived of the benefit of the law in favor of insolvent debtors in this State, and be sentenced to imprisonment according to law. They further pray that *G. M. Laning & E. Beste* be cited to answer this petition for the reason of having connived with *Wm. Beste* to conceal or cover the said pianos and be condemned *in solido* to pay to the syndic of the creditors of *Beste & Grima*, and for the benefit of said creditors \$2750, the value of the eleven pianos.

Section 19th, Act of 1855, p. 435, directs that the creditors, charging fraud, shall lay before the court his written opposition, *stating specially* the several facts of fraud alleged against the insolvent debtor. Whereupon the Judge, after receiving the insolvent debtor's answer, shall order a jury to be summoned for the purpose of deciding on the accusation.

The District Court very properly decided that the accusation in this case is not sufficiently precise to authorise the calling of a jury to try the insolvent upon so serious a charge as that of fraud.

*Beste & Loring* also filed an exception to the suit on several grounds, which was sustained, and the demand against them was dismissed.

It is unnecessary to consider the grounds of the exception, for we have already shown that no sufficient cause of action against the insolvent for fraud has been shown, and that the allegations are not sufficiently specific to justify the District Court in calling a jury.

It is, therefore, ordered, adjudged and decreed, that the judgments of the District Court upon the exceptions filed in this suit be affirmed, with costs of appeal.

BESTE  
v.  
CREDITORS.

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### DEACROIX v. LACAZE et als.

The right of a party purchasing real estate, in good faith and for a sound price, from one in whom the legal title is vested, as shown by the records of the country, cannot be impaired or affected by a previous simulated sale.

**A** PPEAL from the Sixth District Court of New Orleans, *Howell, J.*  
*J. Magne*, for plaintiff and appellant. *Elmore & King*, and *G. & C. E. Schmidt*, for defendants.

**LAND, J.** The object of this suit is to set aside and annul, on the grounds of fraud and simulation, three different acts of sale, and to subject the property conveyed to the payment of plaintiff's judgment.

The facts are stated by plaintiff's counsel as follows.

"On the 19th November, 1855, the plaintiff obtained against *D. Montégut* and *J. Lacaze*, in *solido*, a judgment for three hundred dollars, with interest, and costs, which judgment could not be satisfied; subsequently, he was informed that two lots of ground situate at Gentilly, in this parish, were the property of the defendant, *Lacaze*, although concealed under the names of other parties, and then he instituted the present suit, alleging, among other things, that the defendant, *Lacaze*, had, on the 15th of April, 1853, purchased said two lots of ground under the name of *F. J. Robert*, as vendee; that on or about the — of May, 1854, said *Lacaze* married *Virginie Laizer*, and that on the 16th of May, 1854,—the very day the marriage contract, stipulating a separation of property, was signed—said *J. Lacaze* caused his *prête-nom*, *Robert*, to assign the aforesaid two lots of ground to his future wife, *Virginie Laizer*; and that on the 1st of September, 1856, said *Virginie Laizer* pretended to sell said lots to the other defendant, *Emile LaSère*."

The good faith of the vendee, *LaSère*, is not impeached by the evidence in the record. The District Judge says, "I do not consider the sale to *E. LaSère* simulated; he clearly acted in good faith, and has paid the purchase price."

In this case, the title to the lots was never in the name of *Jean Lacaze*, and the plaintiff was not his creditor on the 15th of April, 1853, the date of the sale to *F. J. Robert* by notarial act; and *LaSère* purchased in good faith from the party in whom the legal title was vested. Under these circumstances, the plaintiff, as the creditor of *Jean Lacaze*, has no right to disturb either his title or possession.

The right of a party purchasing real estate, in good faith and for a sound price, from one in whom the legal title is vested, as shown by the records of the country, cannot be impaired or affected by a previous simulated sale.

DELAEROCK  
v.  
LACAZE.

The doctrine, that the sale of the property of another is void, has no application to this case. The authorization obtained by the wife, *Mrs. Lacaze*, to sell the lots, from the Judge, was sufficient.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

### HENRY ZIMMERMAN v. JOHN BARTCHY.

When the principal, interest and costs of a judgment do not amount to fifty dollars, the Sheriff has a right to sell immovable property to satisfy it.

**A** PPEAL from the District Court of the Parish of Jefferson, *Burthe, J. H. Train*, for plaintiff. *R. K. Culler*, for defendant and appellant.

COLE, J. *Bartchy*, the defendant, having obtained a judgment against the plaintiff in a Justice's Court, in the parish of Jefferson, for \$28 and costs, (in all thirty-two dollars), the Sheriff of Jefferson, under the judgment, seized a lot of ground with all the buildings and improvements thereon, belonging to plaintiff, being lot No. 17 of square No. 35, in Rickerville, in said parish, and adjudicated the same to the defendant in this suit, for one hundred dollars.

This suit is instituted to recover the property.

There was judgment for plaintiff, and defendant has appealed.

Several exceptions were filed by defendant; but as he went into trial on the merits without any decision upon them, it is unnecessary now to notice them.

The plea of prescription, based upon the 49th Article, paragraph 4, of the Code of Practice, 613th Article of same Code, and 1989th Article of the Civil Code, do not apply to an action like the present.

Articles 1144, 1145 and 1146 of the Code of Practice provide the mode in which defendant ought to have proceeded for the satisfaction of his judgment.

As the principal, interest and costs of the judgment did not amount to fifty dollars, the Sheriff had no right to sell immovable property to satisfy it.

It is contended, that the defendant had a mortgage upon the property to secure his debt, upon which the judgment was rendered, and that immovable property can be sold to satisfy a mortgage of any amount whatever.

No mortgage is recognised in the judgment of the Justice of the Peace, and, besides, the defendant does not appear to have had any mortgage to secure his debt.

The sale by the Sheriff of the property in dispute, was without warrant of law, null and without effect.

The District Judge correctly reserved to the defendant all his rights resulting from the judgment in his favor before the Justice of the Peace.

Plaintiff has asked for an amendment of the judgment in his favor, so as to allow him damages, &c.

We are of opinion the judgment of the District Court has done justice between the parties.

Judgment affirmed, with costs of appeal.

## THE STATE OF LOUISIANA v. PETER, a slave.

Article 78 of the Constitution of 1852 vests Justices of the Peace "with such criminal jurisdiction as shall be provided by law."

According to sections 21, 22, 26, 27 and 28 of the Act of 19th March, 1857, relative to the trial of slaves accused of capital offences, Justices of the Peace act, in the trial of slaves, not only as jurors, but also in an official capacity, and cannot be excluded from the trial of a slave, because they have presided and taken part in a previous trial of the same slave, for the same offence.

Before a confession is allowed to go to the jury, the witness to whom it was made should be interrogated as to whether it was voluntary.

If he testifies that the confession was voluntary, then the counsel for the accused may impeach his testimony by his former statement to the contrary.

Although the laws relative to the organization of the tribunals for the trial of slaves, in the country parishes, do not contemplate that the presiding Justices of the Peace should charge the jury on points of law, yet it would not be illegal if they thought proper so to charge them.

In a case of rape, the evidence of witnesses to prove the details of the complaint made by the prosecutrix against the accused, immediately after the commission of the offence, is admissible as part of the transaction, and not as proof of the truth of the statements.

Slaves are prosecuted as persons, and their right to have all the testimony that may establish their innocence, is superior to the principle which would exclude their owners, on the ground of interest, and their testimony ought to be received, subject to the credibility which the jury may attach to it.

**A** PPEAL from the Justice's Court of the Parish of West Feliciana.  
*W. F. Hardee*, District Attorney, for the State. *McVea and Muse & Hardee*, for defendant and appellant.

**COLLÉ, J.** The slave, *Peter*, having been tried and convicted, under the Act of 19th March, 1857, for attempting to commit a rape on the person of a free white female, was sentenced to capital punishment. Sess. Acts, 1857, p. 231.

He has appealed, and relies on several bills of exception to the ruling of the court, which will be considered in their order.

1. "Because *G. W. Catlett*, a Justice of the Peace, having already presided at a former trial of the same slave, accused of the same offence, when the jury could not agree, was incompetent to try him again."

Article 78 of the Constitution of 1852 vests Justices of the Peace "with such criminal jurisdiction as shall be provided by law."

The Act of 19th March, 1857, sections 21 and 22, p. 231, provides, that whenever it shall be necessary to try a slave accused of a capital offence, the Justice of the Peace before whom the complaint shall have been made, shall notify another Justice in the parish, and shall require such Justice to attend at his office, for the purpose of selecting ten owners of slaves for the purpose of forming the tribunal for the trial of the accused. (See also sections 26 and 28.)

Sections 27 and 28 declare that if the offender be convicted of any crime punishable with death, the said Justice or Justices shall sign a sentence to that effect, and that the said Justices, or either of them, are authorized to summon and compel all persons to appear and give evidence in all prosecutions of slaves.

These sections show that the Justices of the Peace act, in the trial of slaves, not only as jurors, but also in an official capacity; and it does not seem reasonable that, as justices, they should be excluded from the trial of a slave, because they have presided and taken part in the previous trial for the same offence, any more than District Judges are when placed in a similar position.

It is unnecessary, in the present case, to decide whether he would have been

STATE  
v  
PETER.

competent, if the record showed that at the first trial he had voted for the conviction of the accused; but it would seem he might, unless his mind was so impressed with the guilt of the accused, that his opinion could not be changed by evidence of a different nature at the second trial, than at the first.

2. Upon the trial, the counsel for the accused propounded to *Mrs. Knight*, a witness on the stand, the following question :

" Were you, or not, at *Mr. Samford's* house during the evening of Monday, the 22d of February, 1858, and if so, did you, or not, hear *Mr. Samford* state that he had used threats against the boy *Peter* to induce him to confess ? "

The counsel for the State objected to this question, on the grounds, that it was hearsay, and was not the best evidence; that the best witness of the fact would be *Mr. Samford*, and that the object of the testimony sought to be introduced was to contradict a witness not yet on the stand.

It appears from the remarks of the Justices in the bill of exceptions, that the State proposed to prove the confession of the accused to *Mr. Samford*, a witness on the stand; that the counsel for the accused objected, and offered *Mrs. Knight*, a witness, to prove that the confession was made under threats, and the Justices were of opinion, that the questions as to threats ought to have been propounded in the first place to the witness *Samford*, before introducing testimony to discredit him.

There was no error in excluding the testimony *at the time* when it was proposed to be offered.

The usual and proper rule of proceeding is to first interrogate the witness to whom a confession has been made, before even it has been given to the jury whether it was voluntary. 1st Greenleaf on Evidence, § 219.

If the witness testifies the confession to have been voluntary, then it would be competent for the counsel of the accused afterwards to impeach his testimony by his former statements, that the confession had been induced by threats, or violence, or any illegal causes.

The tribunal did not reject the offered evidence of *Mrs. Knight*. It only required the question, as to threats, to be asked, in the first place, of *Samford*.

It also appears from the next bill of exceptions, that *Samford* testified the confession to have been voluntary. It was, therefore, in the power of the counsel of the accused, if it were possible, to have discredited the testimony.

3. The counsel for the accused asked the Justices to charge the jury, that the testimony of *Samford*, a witness in the case, should not be considered by them in making up their verdict, because he stated in his examination in chief, that he asked the accused, *Peter*, " what could have induced him, *Peter*, to do this ? " " what could have induced him, *Peter*, to do this thing to this girl ? " and various other questions of the same kind, at the same time; and because *Samford* did also state, that the confessions of *Peter*, made the first time, were made in answers to questions put directly by witness to *Peter*, and during said time that said *Peter* was handcuffed.

The Justices declare, in their addition to the bill of exceptions, they were of opinion that " the confession was given without threats or inducements, the witness, *Samford*, having sworn that the confession was entirely voluntary." and they refused so to charge the jury, on the ground that there was no law authorizing them to give any charges.

The laws relative to the organization of the tribunals for the trial of slaves in the country parishes, do not appear to contemplate that the presiding Justices of

the Peace should charge the jury upon points of law, although, perhaps, it would not be illegal, if they thought proper to charge them.

4. There was no error in permitting *Mrs. Dudley* and other witnesses to prove the details and circumstances, and the particulars of the complaints made by the prosecutrix against the accused immediately after the commission of the offence, as a part of the transaction, and not as proof of the truth of the statements as made. Wharton, Crim. Law, p. 441; Starkie on Ev., vol. 2, p. 951; Greenleaf on Ev., vol. 1, p. 167, § 123.

Such evidence is generally admitted after the complainant has testified to the nature of the offence committed against him, in order to show his credit and the accuracy of his recollection.

We have been thus particular in considering the bills of exceptions, because there are two, relating to the same point, which oblige us to reverse the judgment.

The counsel of defendant offered to prove an *alibi* by *Mr. and Mrs. Sadler*, the owners in community of the slave *Peter*. The testimony was objected to, on the ground of interest in the witnesses, and was excluded by the court.

This testimony ought to have been admitted.

Slaves are prosecuted as persons, and they ought not to be deprived of the testimony of their owners, because the verdict may injure them in a pecuniary view. The point at issue is not their value, but their guilt or innocence.

The rights of a slave to have all the testimony that may establish his innocence are superior to the principle which would exclude his owners on the ground of interest, and their testimony ought to be received, subject to the credibility which the jury may attach to it.

Besides, the interest of the owners is not direct, certain, or immediate, for they cannot know whether the slave will be convicted, or if convicted, whether he will be condemned to death, or corporeal punishment, as the jury have the right to inflict in certain cases, as in the present, either punishment. Sess. Acts, 1857, p. 232, § 28. Greenleaf on Ev., § 386.

It is, therefore, ordered, adjudged and decreed, that the verdict and judgment appealed from, to-wit, of the two Justices and the ten owners of slaves, be avoided and reversed, and that this case be remanded for further proceedings according to law.

MERRICK, C. J., concurring. I am inclined to think the Justices of the Peace ought to have charged the jury, as required. They exercise judicial functions and also act as jurors. They cannot, therefore, be challenged, and the sentence of the tribunal receives its vitality and force only through the *judicial power* vested in the Justices of the Peace. The concurrence of the jurors is a prerequisite to the judgment; but when rendered, the judgment receives its judicial force from the Justices of the Peace themselves. Const., Arts. 61 and 81; Acts 1857, §§ 27 and 28, p. 232; *State v. Isaac*, 3 An. 360.

As an appeal is given as in other cases, I think the accused is entitled to have the law relied upon by the State against the accused given in charge to the jury, in order that he may present, by bills of exceptions, such legal questions to the appellate court, as arise during the trial. I know that some inconvenience may result from a want of experience on the part of magistrates; but a discussion of the questions with the counsel for the accused and District Attorney will enable them to charge the law substantially as it exists. See Act, 1857, sec. 39; Acts 1855, p. 37.

I prefer to rest my concurrence upon this ground.

## J. Q. PROFILET v. HALL &amp; HILDRETH.

There is a distinction to be observed between those effects of a traveler, which are not immediately requisite to his comfort, and which the law requires him to deposit with the inn-keeper or his servant, in order to hold such inn-keeper responsible for their loss, and those which are essential to his personal convenience and which it is necessary to have constantly about him. So that if a guest had been personally notified to deposit at the office of the hotel or inn, his watch and other personal effects necessary to his comfort, this would not liberate the inn-keeper from responsibility, if they were not so deposited.

But where the traveler contributes by his own act or negligence to the loss of such things, the inn-keeper is released from liability.

**A** PPEAL from the Sixth District Court of New Orleans, *Howell, J.*  
A. N. Ogden & Stansbury, for plaintiff. Clark & Bayne, for defendants and appellants.

COLL, J. The plaintiff, a citizen of the State of Mississippi, alleges that he came to the city of New Orleans during the month of July, 1857, and stopped at the St. Charles Hotel, a public house of entertainment, kept by *Hall & Hildreth*.

That petitioner was given, in this hotel, room No. 124. and retired to rest therein.

That during the night of July 10th, 1857, the room occupied by him was entered, and the following articles, his property, were taken therefrom, and wholly lost to him: one gold watch, of the value of \$225; one seal ring, worth \$30; one masonic medal, of the value of \$20; and one hundred dollars cash in bills of Louisiana banks.

The answer of defendants pleads the general denial, then specially admits, they are the proprietors of the St. Charles Hotel. That as such, they aver, they have provided a safe for the deposit of valuable articles, and have given notice to all the inmates and the visitors of their hotel, to place any valuable articles in this safe, and if not so deposited, they would not be responsible for them, if lost.

That plaintiff had due notice of this fact, before he took his lodgings in the hotel, and was so bound thereby.

The District Judge was of opinion that the possession of the money and the loss thereof, were not established, and rendered a judgment for \$225, the value proved upon the trial of the watch, ring and medals.

Defendants have appealed.

Laws have been made in different countries and periods, regulating the obligations of keepers of inns and hotels.

The Spanish law rendered the keepers of inns and hotels responsible for "every thing which travelers, either by sea or land, put into inns or taverns, or ships that navigate the sea or rivers, to the knowledge of the owners thereof, or of those that act in their places," which was lost through their neglect, fraud or other fault, or if were stolen "by any persons who came with the travelers."

This law, however, limited the liability of inn or hotel keepers in certain cases. The first is, where they tell the traveler, before they receive him, to take care of his own effects, as that they would not be responsible for them, if they should get lost.

The second is, where they show him, before they receive him, a trunk or

chamber, saying, "if you choose to stay here, put your things in that trunk or room, and take the key into your own keeping."

The third is, where the effects are lost by some fortuitous event, as by fire, &c. Partida Fifth, title 8, law 26, vol. 2, p. 744.

The Spanish law seems to have held them liable, when it was to their knowledge, or to that of their agents, that the traveler had put property in their inns or hotels.

The civil law declares, that there is formed between the inn-keeper and traveler, an agreement, in most cases tacit, by which the inn-keeper obliges himself to the traveler to lodge him, and to take care of his baggage, and other equipage; and the traveler, on his part, binds himself to pay his charges.

This law forces inn-keepers to take the same care, as if they were expressly paid for watching the goods, and declares that this obligation is an accessory to the commerce in which they are engaged, and that it is for the interest of the public, considering the necessity under which travellers are to trust inn-keepers, that they be bound to an exact and faithful care of the things committed to their custody, and that they be made answerable even for thefts. For otherwise they might, with impunity commit thefts themselves. Domat's Civil Law, Cushing's edition, vol. 1, No. 1172 to 1178.

The common law obliges the inn-keeper to keep safely all such things as his guests deposit *within his inn*, and Sir William Jones, in his work on the law of Bailments, quotes *Cayle's case*, 8 Rep. 33, § 4, where it was held that this obligation exists, "although the guest doth not deliver his goods to the inn-keeper to keep."

He further says, that the law of this case was recognized in *Bennett v. Mellor*, 5 Tenn. Rep. 273, where it was determined, that "if an inn-keeper refuse to take charge of goods till a future day, because his house is full of parcels, still he is liable to make good the loss, if the owner stop as a *guest*, and the goods be stolen during his stay."

Jones further declares, that if the inn-keeper fail to provide honest *servants* and honest *inmates*, his negligence is highly culpable, and he ought to answer *civily* for their acts, even if they should *rob* the guests who sleep in his chambers. He gives as the reason, that travelers are obliged to rely almost implicitly on the good faith of inn-holders, who might have frequent opportunities of associating with ruffians or pilferers, while the injured guest could seldom or never obtain legal proof of such combinations, or even of their negligence, if no actual fraud had been committed by them.

He further says, that in all such cases, however, it is competent for the inn-holder to repel the *presumption* of his knavery, or default, by *proving* that he took *ordinary* care, or that the *force*, which occasioned the loss or damage, was truly irresistible. Jones on Bailments, pp. 95, 96.

Story, in his work on bailments, holds that a delivery of the goods into the custody of the inn-keeper, is not necessary to charge him with them; for although the guest doth not deliver them, or acquaint the inn-keeper with them, still the latter is bound to pay for them, if they are stolen or carried away; even though the person who stole them or carried them away, is unknown. If the goods are in his house, they are under his implied care, whether he knew it or not.

But if the inn-keeper requires of his guest, that he should put his goods into a particular chamber, under lock and key, and that then he will warrant their safety, and otherwise not; and the guest, notwithstanding, leaves them in an outer court, where they are taken away, the inn-keeper will be discharged.

PROFILER  
v.  
HALL.

Story also says, that by the common law, as laid down in *Cayle's case*, (8 Rep. 32,) the inn-keeper is bound to keep the goods of his guest safe, without any stealing or purloining, but he adds, that this doctrine is to be understood with this qualification, that the loss will be deemed *prima facie* evidence of negligence; and that the inn-keeper cannot exonerate himself but by positive proof that the loss was not by means of any person, for whom he is responsible.

It is also held, that the inn-keeper may be exonerated in many other ways; as, for example, by showing that the guest has taken upon himself exclusively, the custody of his own goods, or has, by his own neglect, exposed them to peril. Story on Bailments, §§ 482, 483.

The same author holds, that if goods be stolen from the chamber of a guest, the inn-keeper is liable, although he received no notice that they were placed there. Story on Bailments, § 456; 8 Co. 32; Hayw. N. C. R. 41; 14 John. R. 175; 1 Bell's Com. 469; 1 Bl. Com. 430; 2 Kent. Com. 458 to 463.

The Civil Code of Louisiana provides, that an inn-keeper is responsible for the effects brought by travelers, even though they were not delivered into his personal care, provided, however, they were delivered to a servant or person in his employment. C. C. Art. 2937.

The doctrine of this Code seems to be, that the goods must be deposited with the inn-keeper or his agent, in order to hold the former responsible. The duties and obligations of inn-keepers are treated of under the head of the necessary deposit. C. C. 2935 to 2940; *Dunn & Yates v. Branner*, 13 An. 454.

It has, however, recently been held by us, in the case of *Pope v. Hall & Hildreth*, 14 An., that a guest is not bound to deposit with the proprietor of the hotel or his agent, his watch, which he may need to know the hour for a particular purpose, or a small sum of money which may be necessary to be used at any moment for his personal necessities.

We see no reason to differ from this doctrine, and do not think it necessarily conflicts with the Articles of our Code upon the subject of inn-keepers. For they may be interpreted as referring to those goods which are not essential for the personal convenience of the traveler.

Certainly, it could not be reasonably averred, that these Articles required the traveler to deposit at the office of the hotel, his trunk, containing his wearing apparel, which he might need at almost any moment. When, then, a trunk, watch or other articles of indispensable personal necessity are stolen, the hotel becomes liable, not under Articles 2935 to 2940 of the Civil Code, but under the tacit or acknowledged contract between the keeper of the hotel and his guest, that he shall exercise due diligence to protect his guest and his property whilst in his house, unless indeed he has been relieved of this liability by the negligence of the guest, or by some other lawful cause.

It is not necessary, in this case, to decide whether an inn-keeper can in any instance absolve himself from liability, by showing notice by placards posted up in his house.

It is sufficient for the present to say, that even if a guest had been personally notified to deposit at the office of the hotel or inn, his watch and his personal effects, of an indispensable necessity for the comfort of the traveler, this would not liberate the inn-keeper from responsibility, if they were not so deposited.

The only question that remains for our consideration is, whether the plaintiff was guilty of negligence to such a degree, as to free the defendants from liability.

For, as he constitutes himself in part the custodian of such personal effects if as he is not obliged to deposit, he is bound to exercise a certain personal supervision over them. The hotel keeper cannot be held liable, if he has done all in his power to protect these effects, and if he has placed it within the ability of the guest to prevent them from being stolen, and the guest has neglected to avail himself of such means. It cannot be expected at the present day, when hotels are constructed of immense capacity and capable of holding hundreds of persons that the proprietor should be obliged to have a guard at every door.

If the keeper of the hotel provides with a lock the room where his guest lodges, which opens inside and does not open from outside, it would be in the power of the guest to protect himself and the hotel-keeper would not be responsible, unless it were shown he was guilty of gross negligence in other respects.

For Article 2939 of the Civil Code declares, the inn-keeper "is not responsible for what is stolen by force and arms, or with exterior breaking open of doors, or by any other extraordinary violence.

The evidence, as to the key of room No. 124, is contradictory.

*Mr. Soria*, a witness for plaintiff, testifies, that about 9 o'clock at night, or later, on the 10th of July, 1857, he went with plaintiff to the office, and asked for the key of the room in which the latter had been previously and was then lodging; that the reply from *Mr. Hitchcock*, or the person then officiating, was that there was no key to that room. Witness is not positive as to the name of the person who gave this reply, but thinks it was *Hitchcock*.

*Mr. Hitchcock* testifies, he was at the town of Nahant, Massachusetts, from June to November, 1857.

*D. L. Mudge* testifies, he was a Clerk in the St. Charles Hotel in July, 1857; that he and *Mr. Hildreth* had charge of the office where the keys of the rooms are kept, when not in the door; that plaintiff arrived at the hotel on the 9th of July, at tea-time, and received the key of his room, 124; that during the night of the 9th, he had a friend lodging with him and had an extra breakfast on the morning of the 10th, and no complaint was made at the office of the want of a key for plaintiff's room. That if a call had been made for a key, one would have been furnished in a few moments by the carpenter, upon an order from the office.

He further testifies, that on the evening of the 10th, plaintiff came in with three or four other gentlemen, about eleven o'clock at night. All of the party seemed to be intoxicated, and one of them asked, if plaintiff's key was in the box. Witness looked, and seeing it was not, said he supposed that plaintiff had left it at the room, or had it with him.

The party went up stairs and the witness heard nothing more of them, except that a boy was sent down for liquor, and witness had to get bar checks for the boy, and no mention was then made of the want of a key, and witness heard nothing of any complaint until next morning.

Upon his cross examination, he says he cannot swear positively that he handed plaintiff the key on the night of his arrival, but feels confident that he gave him the key, as there was no complaint of the want of one until the next night, when asked for by *Mr. Soria*.

*Mr. Hitchcock* testifies, that the carpenter of the hotel keeps blank keys on hand, and, by examining the locks of the doors, can file the appropriate wards, and fix a key in the lock, in some ten minutes. From the very frequent occurrence of the carrying away, by guests of the hotel, the keys, as well as carrying them with them all the time they are not staying at the hotel, instead of depositing them at the

PROFFET  
P.  
HALL.

office, when they leave their rooms, it is, therefore, necessary for the carpenter to keep these blank keys. That if plaintiff had applied for a key, and there had been none in the office for him, a key would have been fitted in ten minutes and furnished to him.

*Soria* testifies, that he told the servant who went for the liquor, to bring up the key of the room, and that, on his return, he said a carpenter was then fitting a key for the room. That the waiter shortly afterwards brought up a card from *Mr. Lucoste*, and witness again asked the waiter for a key, who replied, that there was none except the pass-key, which would only lock the door from the outside.

It appears from the testimony of *Mudge*, that no application was made by these two servants to him for the key. It was certainly an act of negligence to depend upon the servants, instead of going to the office to get the key. If plaintiff had done this, he would not have lost his effects.

But it appears from the testimony of *Soria*, that he, plaintiff and some other gentlemen, had gone on the night of the 10th of July, from the last train of steam cars of the Pontchartrain Railroad to the St. Charles Hotel. They had gone to the lake by the four or five o'clock train of cars, and during their stay there had some champagne. Upon their arrival at the hotel, plaintiff insisted that witness should stay all night with him. Witness wound up plaintiff's watch, because he had put him to bed; he was partially asleep, and was somewhat under the influence of the liquor he had drank.

*Mr. Lewis*, a witness of plaintiff, testifies, that he was with the party to the lake, and was at plaintiff's room at the hotel on the night of the 10th of July; that plaintiff was affected by the liquor he had drank, and was lying on the bed, but had not been undressed.

It thus appears, that plaintiff was not in a condition to protect himself or to exercise the most ordinary vigilance.

Instead of depending upon himself, and taking proper care of his personal effects, he was obliged to confide in another.

*Mr. Soria* declares, that he attempted to secure the door in the best way he could, drew his bed cot against the door, as he thought, and put a chair there, but in the morning, when he woke up, he found that he had not pulled the bed far over enough, and had just left space enough for the door to be opened, and to admit an ordinary sized man without disturbing witness or the bed.

It thus appears, that the friend of plaintiff did not manifest sufficient care in seeking to protect him.

Witness also states, that he laid the watch of plaintiff on the bureau, that the ring of plaintiff was attached to the watch-guard, and also his masonic medal.

Upon waking in the morning, he found that the watch, ring and medal were gone.

It was an act of negligence to leave the watch upon the bureau. It would have been more prudent and just as easy to have concealed it under the mattress, or in some part of the room.

We are of opinion, if plaintiff had been sober, he might either have procured a key or have so concealed his effects, that they would not have been lost.

His state of intoxication raises the presumption of the omission of that care which he was bound to bestow for his own protection. If he had not been under the effect of liquor, he might have been awakened by the noise of the robber in entering the room. His condition may have induced some one to attempt the robbery.

Under all the circumstances of this case, we think that plaintiff ought not to recover.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; and that there be judgment in favor of defendants against the claim of plaintiff, and that plaintiff pay the costs of both courts.

HALL  
v.  
PROFFIT

### WILLIAM R. HALLET v. JAMES DESBAN.

A community of profits is the criterion by which to determine the contract of partnership; but to render a party liable as a partner, he must share in the profits as *principal*, and not as a mere *agent*, *factor* or *servant*.

**A**PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*  
T. J. & A. G. Semmes, for plaintiff and appellant. *Whitaker & Fellows*, for defendant.

VOORHIES, J. The plaintiff, a creditor of the firm of *J. B. Steel & Co.*, sues the defendant, who acted in the capacity of confidential clerk, book-keeper and agent of the firm, to render him liable as a partner, on the ground that his services as clerk and agent were remunerated by one-fourth of the net profits.

The question is, whether, notwithstanding the fact that, as between the partners, the defendant was a mere agent and subordinate, he can be held liable, as a partner, to third persons, to whom he has not appeared in any but the real capacity of clerk and agent. The plaintiff, it is proper to remark, states in his petition, "that the defendant, *James Desban*, ostensibly acted as the chief clerk and book-keeper of said *Steel* in his said business, but in truth and in fact, the said *Desban* was interested in the profits of said business, and was, in law, a dormant partner of said *Steel*, of which fact your petitioner was entirely ignorant."

As between the defendant and the firm of *J. B. Steel & Co.*, it is clear that the former was not a partner. There was no express or implied consent to that effect, and in truth, the stipulation was quite otherwise. "Partnership must be created by the consent of the parties." C. C. 2776; 11 An. 278, *Pickrel v. Fisk*.

The rule, with regard to third persons, concerning the liability of parties who have a share or proportion in the profits, is different when they appear as principals, or merely as agents, clerks, or factors. In the latter case, they are not responsible to creditors, but in the former, their liability invariably attaches. The 2784th and 2785th Articles of the Civil Code apply to the partners, and not to the class of persons whose services are remunerated by a proportion of the profits.

These Articles read:

C. C. 2784. "A participation in the profits of a partnership carries with it a liability to contribute between the parties to the expenses and losses, but, the proportion, like that of the profits, may be regulated by the stipulation of the parties, and, where they make none, is provided for by law."

C. C. 2785. "A stipulation that one of the contracting parties shall participate in the profits of a partnership, but shall not contribute to losses, is void, both as it regards the partners and third persons. But in the case of a partnership in

PAILLET  
v.  
DESMAN.

*commendam*, hereinafter provided for, the liability to loss may be limited to the amount of stock furnished."

These Articles evidently refer to those acting as *principals* in the contract of partnership, and not to such as are mere employees, whose exertions as such are stimulated by a share in the profits, without their being invested thereby with "any additional control over the affairs of the partnership, nor authorized to bind the house or firm, further than by the express consent of the partners, or an implied consent resulting from the nature of their employment."

Such has been the view taken upon this subject by our courts.

For instance, in the case of *Bulloc v. Pailhos*, reported in 9 La. 462. *Bulloc* had entrusted to *Pailhos* a quantity of goods for sale; the latter was to receive, by the articles of agreement, one-half of the profits on the goods, as compensation for his labor. The court said, "We think with the plaintiff that the defendant was not a partner, but an agent. He is so stated in the agreement. The property was not at joint risk. The share in the profits was the compensation he was to receive for his labor." 8 N. S. 174, *Bulloc v. Pailhos*.

In the case of *St. Victor v. Daubert*, 9 La. 317, the court again said, "Between the partners of a commercial house and a clerk who, in addition to his monthly salary, is allowed as a further stimulus to his industry, a share of the profits, we have no hesitation in deciding that this allowance does not constitute him a partner; it gives him no additional control over the affairs of the partnership, nor does it authorize him to bind the house, or firm, further than by the express consent of the partners, or an implied consent resulting from the nature of his employment. The person thus employed and rewarded has no right to retain the funds of the house, which employed him to collect them. *They must be supposed, until the affairs of the partnership are liquidated, to be provided for, and required to meet its engagements, and afterwards to reimburse the partners for their advances, before a division of the profits is made.*"

In the case of *Cline v. Caldwell*, the court remarked, "The circumstance of the manner in which the actor was to receive remuneration or payment for his performances, by an allowance of a share in the profits gained by them, although it makes a slight change in the *ordinary contract of hiring for fixed and certain wages*, does not create *one essentially different*. Overseers of plantations are frequently hired on the express condition of receiving, in lieu of a certain salary, a portion of the profits arising from crops, &c.; but on that account it is believed that they ought not to be considered as in partnership with the owners of the property used to produce the crops." 4 La. 139.

The cases of *Bank of Tennessee v. McKeage*, 11 R. 136, and of *McDonald v. Millaudon*, 5 La. 408, are reconcilable with the above quoted decisions; for in both of them the parties appeared as principals, and not as employees or agents. In the case of *Lee et als. v. Bullard et als.*, the clerk, whose compensation depended on the profits, was held liable; but the court expressly states, "Besides this participation in the net profits, on several occasions he held himself out as a partner, and thus clearly rendered himself liable." 3 An. 462.

Judge Story says, "There may be a community of interest in the profits between the parties, without any community of interest in the property itself. But this participation in the profits will not (as we have seen) create a partnership between the parties themselves, as to the property, as well as the profits, contrary to their intentions. Nor will it necessarily create such a partnership in all cases, as to third persons." . . . . "Thus, if a party has no interest whatsoever in the

capital stock and as between himself and the other parties, *he has also no rights as a partner, or no mutuality of powers and duties, but is simply employed as an agent, and is to receive either a given sum out of the profits, or a proportion out of the profits, or a residuum of the profits beyond a certain sum, as a compensation for his labor and services, as agent of the concern, and not otherwise; he will not be deemed a partner in the concern from that fact alone; not a partner with the others INTER SESE, for that would be contrary to their intentions and objects, nor as to third persons, because the transaction admits of a different interpretation, and may justly be deemed a mere mode of ascertaining and paying the compensation of an agent, as in a naked case of agency.* In such a case, it may be properly enough said, that the agent is entitled to a *share or portion in the profits, liquidated or unliquidated, and, therefore, that he has, in a certain sense, a community of interest therein with the actual partners.* But he does not participate therein as an owner *pro tanto*, or as possessed thereof *per my et per tout*, or as clothed with the rights, powers and duties of a partner. He has only a *limited interest* therein, either as entitled to a fixed sum, to be paid out of the profits, or as entitled to a lien thereon, or as possessed of an undivided portion thereof, as a tenant in common." Story on Partnership, § 32.

Chancellor Kent says, "A person may be allowed, in special cases, to receive *part of the profits* of a business, without becoming a legal or responsible partner." Vol. 3, p. 33. He also says, in speaking of the essence of the contract of partnership, "It is sufficient that *his interest in the profits* be not intended as a mere substitute for a commission, or in lieu of brokerage, and that he be received into the association as a merchant, and not as an agent." Vol. 3, p. 25.

Smith on Mercantile Law states, at page 40 :

"This community of profit is the criterion whereby to ascertain whether a contract be really one of partnership, for one partner may stipulate to be free from loss, and the stipulation will hold good as between himself and his companions, though it will not diminish his liability to strangers."

But this author adds further in explanation, that, "to constitute such a *community of profit* as is here intended, a partner must not only share in the profits of his companions, but must share in them as a *principal*, i. e., he must not be a mere agent, factor, or servant, receiving, in lieu of wages, a sum proportioned to the profits gained by his employers, or a certain portion of a fund which includes the profits, but is not dependent on them for existence."

It is true, that it is laid down as a rule, "that if a servant or agent stipulate for a share in the profits, and so entitle himself to an account of them, he becomes, as to third persons, a partner, though in questions between himself and his employer, he would not be so considered." Smith, M. L. 43. The author then states, that this distinction is extremely fine, and quotes the following expression of Lord Eldon in *Ex parte Harper* : "It is clearly settled, though I regret it, that if a man stipulates that he shall have, as the reward of his labor, not a specific interest in the business, but a given sum of money, even in proportion to a given quantum of the profits, that will not make him a partner; but if he agrees for a part of the profits as such, giving him a right to an account, he is, as to third persons, a partner."

The sum and substance of this doctrine is, that a *community of profits* is the criterion by which to determine a contract of partnership; but the party must share in the profits as a *principal*, and not as a mere agent, factor, or servant. If, however, this agent or servant stipulates for a share of the profits, so as to entitle

HALLAT  
v.  
DEBBAX.

him to an account, then he is held bound as a partner. But then it is necessary that he have clearly the right to an account, in order to place him on the same footing as a principal; and Chancellor Kent lays it down, "that the interest, however, in the profits, to render one responsible as a partner, must be such as will entitle him to an account, and give him a specific lien or preference in payment over other creditors." Vide Smith M. L. 44, (notes).

The English decisions on this subject are not so very uniform as could be expected, as will appear by the following quotations :

"To make a party liable to a third person, as a partner, he must either be in fact a partner, or must have held himself out as a partner." *Dickenson v. Valpy*, 5 M. & R. 126.

"An agent who is paid by a proportion of the profits of the adventure, is not therefore a partner in the goods." *Meyer v. Sharpe*, 5 Taunt. 74.

"If the agreement between the owner of a lighter and of his man had been, that the man, in consideration of working the lighter, should have received half the gross earnings, it would not have constituted a partnership, being only a mode of paying the man for his labor. Aliter, however, if the stipulation was for the net profits." *Dry v. Boswell*, 1 Camp. 329.

"A partner in a firm contracted to give his clerk one-third portion of his (the partner's) own share in the profits. The other partners knew of, and assented to the arrangement. Held: that this did not make the clerk a partner." *Holme's case*, 2 Lewin; C. C. 256.

See also the cases of *Wist v. Small*, 1 Camp 331; *Benjamin v. Porteus*, 2 H. Black, 590; *Smith v. Watson*, 3 D. & R. 71; *Burnell v. Hunt*, 5 Jur. 650 O. B.; *Wilson v. Whitehead*, 10 Mee & W. 503.

The ground upon which is based the doctrine, that an agent who receives a share in the profits, as such, becomes liable to third persons, as a partner, is, "that those profits form a portion of the fund upon which creditors have a right to rely for payment," (*Pott v. Eyton*, 3 C. B. 32); and yet, if a clerk contracts for the net profits, after the payment in full of all the liabilities, he becomes liable as a partner,—whilst, if he gets a proportion of the gross profits, without reference to the payment of the debts, he escapes the liability of a partner! This is on a par with the nice distinction, so much regretted by Lord Eldon, between a proportion of the profits and a sum equal to a given quantum of the profits. In other words, under this distinction, a clerk who gets from his employer, in payment of his services as employee, one-fourth of the net profits, is a partner, because he has a right to sue for an account; but if he stipulates for a sum equal to one-fourth of the net profits, then he is not a partner, having no right to demand an account! It will be conceded, that in either hypothesis, the clerk, in this State, would have the right to sue his employer, and to look into the accounts of the firm, for the purpose of ascertaining the amount due him. And, on the other hand, it is evident that, in neither hypothesis would he have the right to sue for a liquidation or dissolution of the firm or partnership. The truth is, that the employee's interest in the profits, where he is not, besides, a principal in the partnership, does not vest him with additional authority in the management of its affairs; his responsibility is always the same, even as regards third persons.

Under this view of the case,—it appearing that the defendant was not in reality a partner, and did not hold himself out as such, and especially, that that was the plaintiff's own understanding at the time,—judgment must be rendered in favor of the defendant.

It is, therefore, ordered and decreed, that the judgment of the District Court be affirmed, with costs.

MERRICK, C. J., dissenting. This suit has been brought to charge the defendant as a partner of *J. B. Steel*.

The whole case turns upon the construction of a contract by which *Norman, Steel & Co.*, appointed the defendant in 1840, their confidential clerk and book-keeper, at a salary of \$1200 per annum for two years, and made this further agreement, viz: "that from and after the expiration of said two years, and for and during the space and term of two years thereafter, that is to say, from the 3d day of November, 1842, until the 3d day of November, 1844, the said *James Desban* shall receive as compensation for his said services *one-fourth part of the entire net profits of the business of said firm*, and at the end of the said two years, that is to say, on the 3d day of November, 1844, the said *James Desban* shall have it in his option to remain for two years longer in his capacity aforesaid at the said compensation of *one-fourth part of the entire net profits of the said firm.*"

*Norman, Steel & Co.*, dissolved partnership in July, 1843, and the business after this time was conducted in the name of *Steel* alone. *Steel* made his power of attorney to the defendant fully authorizing him to conduct his affairs, to draw bills of exchange and promissory notes, to sell and buy real estate and slaves, to lease, let and hire houses, to receive shipments of goods, sign customhouse bonds, grant mortgages, pledges, &c., &c.

*Desban* continued in the employment of *Steel* as clerk and book-keeper until 1854, under his agreement, to receive *one-fourth part of the entire net profits of the business of said Steel* for his compensation. During this period, *Steel* became indebted to the plaintiff for the loan of money in suit which was used in the business of the house.

Did this agreement of *Desban* to receive as compensation for his services as clerk and manager of the affairs of the concern, the *one-fourth of the net profits of Steel's business*, make *Desban* a dormant partner?

The learned Judge of the Fifth District Court (who has been followed in his conclusions by a majority of the court,) after a very elaborate and able exposition of the authorities, was of the opinion that the contract partook more of the nature of the letting of industry, *locatio operarum* than partnership and that the defendant was not bound. It may be true, perhaps, that the defendant, as between himself and *Steel* was only a clerk; that he was bound to conduct the business as *Steel* directed, and was entitled to no voice in the management of the affairs, and was liable to be discharged by *Steel* at any moment, saving his right to claim an indemnity if he were discharged without sufficient cause.

But on the other hand, the engagement has some of the elements of a partnership in this, the defendant with extensive powers of administration brought into the concern his industry against *Steel's* capital, and for this industry he was to receive *one-fourth of the net profits*. And he was subject to lose his entire services in case of loss.

The profits could not be ascertained until the debts were paid or deducted each year, and at the termination of his employment he had an action to compel *Steel* to account.

The contract we have to consider then partakes of the nature of letting, hiring and of partnership. Which shall control? Under the civil and French law the contract would be construed with reference to third persons perhaps, as it would between the parties to the same, as the *locutio operarum*.

HALLIST  
v.  
DUBREAN.

But the law of Louisiana must be consulted on this question. If the civil law prevails, the judgment of the lower court can be rightfully affirmed. If any other rules have been adopted they ought to be applied.

On the subject of what was intended by the Code in its reference to the commercial law, our predecessors said in 1833, that "when the tribunals of this country were first called upon to interpret this and a similar provision in our law, there was great doubt as to what laws and usages of commerce reference was there made. It was finally concluded, though not without hesitation, that they must have had in view the usages and laws prevailing in our sister States, unless these laws and usages conflicted with the positive legislation of Spain, or were in opposition to the local usages prevailing in Louisiana. Whatever difficulty attended this decision when first made, there can be none in following it now. A considerable time has elapsed since it was made public. Contracts almost innumerable have been executed in reference to it. Rights have been repeatedly adjusted under its authority. Property to a large amount acquired in relation to it; and stronger than all, the legislature of the State by their silence on the subject, have authorized the belief that the court correctly interpreted the previous expression of their will." The court concludes, "We must therefore look to the law merchant of the United States for the consequence attending acts such as are proved in this case on the defendant." *McDonald v. Millaudon*, 5 L. R. 408.

This decision has been considered as settling the law in relation to commercial partnerships from that day to the present time. See *Bank Tenn. v. McKeage*, 11 Rob. 136. *Pinton v. New Orleans and Carrollton Railroad*, 3 An. 30.

But on the particular question before us, it appears to be conceded that the current of authorities under the commercial law, are adverse to the pretensions of the defendant. Wherever a party receives a compensation for services in the profits, as such, or in other words, wherever the party can call upon his employer to account in equity for the profits there, by the commercial law he is bound towards third persons as a partner. *Vaugh v. Carver*, 2 Henry Black, 246-7. *Hisketh v. Blanchard*, 4 East, 146. 3 Kent, 25 note b, 4 ed. Story, 35.

The case at bar is precisely such a case, and the judgment of this court has just been demanded upon the settlement of the account of profits between these parties. *Desban* has demanded and received, as he was entitled by his contract, the one-fourth of the net profits.

He was entitled to this therefore as a principal, that is, he had a direct claim for the one-fourth of the net profits as such. He was not to receive a per centage upon the profits which would be but a mode of ascertaining the compensation, but he was entitled to one-fourth of the profits themselves. He was, therefore, a partner; for his compensation was, (in the language of Smith, in his mercantile law,) dependant on them for existence.

*Desban* was interested in the debts, for they had to be paid before his net profits could be ascertained, and his agreement bound him for a share of the losses, for if the concern was unsuccessful, he lost his entire services. He ran the risk of losing his labor, and *Steel* the risk of losing his capital. The case comes within the summary of the common law as laid down in the opinion of the majority of the court. Mr. Justice Story says that, "Where the agreement either expressly or by fair implication admits, that the parties are to share in losses as well as profits, that circumstance will ordinarily at common law be held to make them partners as to third persons, and in many cases also between themselves, upon the ground that such is the proper and essential accompaniment of a partnership, and that

it is inconsistent with the notion that the share of the profits is designed to be a mere remuneration for services," Story, § 55.

In another place he says, "The true meaning of the language on interest in the profits, *as profits*, (which has probably been borrowed from the subtle and refined statement of an eminent Judge,) seems to be, that the party is to participate indirectly, at least, in the losses as well as in the profits, or in other words, he is to *share in the net profits*, and not in the gross profits." Story, § 34.

As heretofore observed, it seems to be conceded, that if the case were to be governed by the rules of the commercial law that it would be with the plaintiff.

An examination of the authorities from the common law will not, I think, show that supposed inconsistency mentioned in the opinion of the majority of the court.

Of necessity in a commercial age, nice distinctions will always accompany the administration of justice, and courts have only to inquire whether such distinctions really exist, and in the event of their existence to enforce them.

I think I have shown that the commercial law has been recognized by our courts as the law of Louisiana, and that it is in plaintiff's favor.

If we examine such Articles of the Civil Code of 1825, as seem applicable to the case, we shall find that the provisions of the common law on this subject seem to have been adopted *ex industria* by the Legislature. They were not contained in the Code of 1808, and would seem to have been introduced for the purpose of rendering the law of Louisiana on this subject harmonious with that of our sister States.

Article 2772 declares that, "It is of the essence of this contract (partnership) that a profit is contemplated, and that each of the parties is to partake therein,"  
\* \* \* \*

Article 2784. "A participation in the profits of a partnership carries with it a liability to contribute between the parties to the expenses and losses. But the proportion, like that of the profits, may be regulated by the stipulation of the parties, and where they make none, is provided for by law."

Article 2785. "A stipulation that one of the contracting parties shall participate in the profits of a partnership but shall not contribute to losses, is void, both as regards the partners and third persons. But in the case of a partnership in *commendam* hereinafter provided for, the liability to loss may be limited to the amount of stock furnished."

Now, under our Code, the industry which the defendant was to furnish is of precisely the same dignity as money or any other capital. C. C. 2780. But if a capitalist had furnished money in any other form than in *commendam*, with an express agreement that he was not to be considered a partner, nor bound for losses, but should receive one-fourth of the profits, he would be held as a partner. Why should not the person whose only capital is his skill and industry, be subjected to the same liability particularly as he is daily violating the provisions of Art. 2820, which in no manner permits the partner in *commendam* to act as agents for the other partners?

The Civil Code, therefore, makes a participation in the profits the criterion by which we are to judge whether an individual is or is not a partner. The cases cited from our own reports and relied on by the defence, viz: *Bulloc v. Pailhos*, 8 N. S. 174; 9 L. R. 317, and 4 L. R. 139, were controversies between the parties themselves, and what was said by the court in those cases has no relation to third persons.

I have no doubt that the commercial law, as it stood at the time of the adop-

HALLAT  
v.  
DENBAY.

tion of the Code of 1825, is the law governing this case. And as it was adopted by the Legislature, it must continue the same, until repealed by the power which gave it force and vigor.

In my opinion, the judgment ought to be reversed, and rendered in plaintiff's favor.

### SUCCESSION OF JOHN TOY.

The Act of 1855, regulating the duties and powers of administrators, being highly penal, should be strictly construed.

An executor or administrator, if he has funds to distribute before the expiration of a year from his appointment, may be called upon to distribute them after the time of delay provided by law has expired; but if he fails to obey the order of court, he cannot be subjected to the penalties of the Act of 1855, as he does not, under the Act, so far as relates to filing an account, become liable to its penalties until the expiration of twelve months.

**A**PPEAL from the District Court of the Parish of East Baton Rouge, *Wilson, J. Greeves & Seymour*, for plaintiff. *W. H. Sherborne*, for defendant and appellant.

**COLE, J.** On the 26th May, 1858, *Lafayette Caldwell*, a creditor of the deceased *John Toy*, filed a motion, calling on *Prendergast & Jeremiah Toy*, the son of *John Toy*, to render an account as testamentary executors of the deceased.

An order of court was granted, in accordance with the motion.

On the 2d of November, 1858, a motion was made to dismiss the executors, on the ground that they had failed to comply with the order of court.

On the 19th of November, 1858, an account was filed by *Prendergast*.

Upon trial of the rule to dismiss the executors, the District Court dismissed the rule, and the relator has appealed.

It appears that *Jeremiah Toy* cannot be held responsible for not filing an account, for he was not appointed till January, 1858, and had received no funds or property of the estate. The object of the law is not to force an executor or administrator to render an account when there is nothing in his hands.

With relation to *Prendergast*, the judgment was correct, because the motion to file an account was made before the expiration of a year from the time of his appointment.

The order of court upon this motion was given before the expiration of the year.

The Act of 1855, to regulate the duties and powers of administrators, is highly penal, and must be strictly construed. Sess. Acts 1855, p. 78.

If the administrator or executor has funds for distribution before the expiration of the year from his appointment, he may be called upon to distribute them after the time of delay provided by law has expired. If he fails to obey the order of court, he cannot, however, be subjected to the penalties of the said Act of 1855, because the administrator or executor becomes liable to the penalties of this Act, so far as relates to filing an account, only at the expiration of twelve months. Acts 1855, sec. 4, p. 79.

The rule to dismiss the executor, because he had not obeyed the order of court to file an account, was based upon an order granted before the expiration of the year, and does not render him liable to the penalties of the Act of 1855.

Judgment affirmed, with costs.

## BENJAMIN WEBER v. LUDGER ORY, Administrator.

The right of action of an heir, to compel a partition of the immovables and slaves belonging to the succession, in order that his portion may be set off to him, as owner, is an immovable—and when such a right is conveyed by last will, the instrument must conform to our laws, or it cannot have any effect.

Where such a right was sought to be conveyed by a will made in the State of Missouri, in these words :

*"I do hereby give and bequeath, absolutely and unconditionally, to M. G. and to A. J., to have and to hold the same, unto them jointly and severally, that is to say, as joint tenants, so that all and singular, the property hereby devised and bequeathed shall, upon the death of either of them, the said M. G. and A. J., descend, pass and belong to the survivor of them, and to the heirs of such survivor forever,"*—

*Held:* That such a disposition is a conditional substitution prohibited by our law.

**A** PPEAL from the District Court of the Parish of St. James, *Duffel, J.*  
*Berault & Legendre*, for plaintiffs. *Johnson & Denis*, for defendants and appellants.

MERRICK. C. J. The principal question in this case is, whether the sum of \$3,740 49, demanded, be considered to form a part of the succession of widow *Ory*, deceased, or whether the same is to be considered as personal property, and subject to the law of the domicile of *Eugénie Ory*, who died at St. Louis, Missouri. If the sum demanded can be regarded as a movable, dependent upon her succession at St. Louis, then the judgment must be affirmed; if not, then we must further consider whether the will under which plaintiffs claim, does or does not contain a *fidei commissum* or substitution.

*Widow J. B. Ory* died in July, 1854, and an inventory was taken at the instance of the heirs. An administrator was appointed in November following. In January, the testatrix *Eugénie Ory*, and her co-heirs of age brought an action of partition. A decree was entered, ordering the movables, immovables and slaves to be sold by the administrator of the succession; the movables for cash, the land and slaves payable one-half in March, 1856, and the other half in March, 1857.

The sale was accordingly made by the administrator on the 2d day of February, 1855. On the 3d day of July following, two days previous to her death, the testatrix made her will at St. Louis, under the forms of law of Missouri. It was admitted to probate in September following.

At the time the sale was made, in February, the administrator of the succession does not appear to have been in funds, or to have paid any debts. After the two instalments fell due, he proceeded to collect the money due the estate, and, in May, 1857, filed an account of his administration and what he called a tableau of distribution. He charged himself with \$39,583 24, amount of probate sale and crop, and claimed credit for payments made by him to the amount of \$14,401 26, and proposed to pay certain other creditors, amounting to \$2,737 02, and to distribute \$22,442 96, the remainder, among the six heirs of the deceased, giving to each one \$3,740 49½, the succession of *Eugénie Ory* being placed on the tableau as one.

This suit was brought against the administrator, to recover the above named sum of \$3,740 49½, in October, 1857.

It is difficult to distinguish this case from the cases of *Mercenaro v. Mordella*, and *Bone v. Sparrow*, in 10 and 11 An. The question to be decided depends upon the condition of the estate at the time of the death of *Eugénie Ory*, on the

Widow  
v.  
Ory.

5th day of July, 1855. At this time, the administrator had not collected funds sufficient to pay the debts of the succession of *Widow Ory*, for the movables and the crop did not amount to a sum sufficient for this purpose. The rights of the heirs had not been fixed and settled, and the action of partition was as essential in order to ascertain and recover the rights of the heirs, as when first commenced. The heirs and administrator had made but one step towards a definitive partition, viz, a sale or licitation of the property. In order to complete the partition, a reference to a notary and the appointment of experts was necessary, in order that the map could be formed, the accounts stated, and deductions made, lots formed and drawn, or set apart, as required by law. Art. 1272, C. C., et seq. This, then, required a decree of homologation, before it could become final. The heirs too would be bound to each other for the warranties incident to a partition.

The testatrix had, therefore, at the time of her death, nothing more than an action of partition. There was no sum of money which she could claim as her own; none of the debts due the succession were hers; in fine, there was no one thing dependent on the succession of her mother which she could call her own, and the immovables and slaves were liable to be brought back to the succession by the resolatory condition, in the event of non-payment of the price. All that she had was an *action* to have one-sixth part of her mother's succession, after all collations were allowed, set off to her as owner. This *action* appears to us to be an immovable. 10 An. 776; 11 An. 185; C. P. 45, 164, 165; C. C. 463.

The form in which the administrator chose to present his account cannot change the situation of the parties. It has been repeatedly decided by the court, that an administrator cannot bind the heirs, at least when not cited, by a proposed tableau of distribution, wherein he proposes to distribute the proportion coming to each. In other words, he cannot make a partition for the heirs.

The defendants contend that the will under which plaintiff seeks to recover of the administrator, contains a substitution and *fidei commissum*. The clause of the will is as follows :

" *Item.* As one of the heirs of my deceased mother, *Marie Madelaine Ory*, born *Webre*, late of the parish of St. James, in the State of Louisiana, I am possessed or entitled to an interest in the estate of my said mother, which consists chiefly of a plantation, together with certain slaves, and the stock on, and belonging to said plantation, situated in the said parish, all of which my said interest in the estate of my said deceased mother, be it real, personal or mixed property, and all other property whatsoever, and wheresoever situated, of which I may die seized and possessed, or to which I may be in law or equity entitled. I do hereby give, devise and bequeath, *absolutely and unconditionally* to *Margaret J. Gallway*, of the city and county of St. Louis, in the State of Missouri, a member of the said order, and to *Aloysia Jouve*, of the parish of Opelousas, I believe, in the State of Louisiana, a member also of the same order, to have and to hold the same unto them, *jointly and not severally*, that is to say, as *joint tenants*, so that all and singular, the property hereby devised and bequeathed shall, upon the death of either of them, the said *Margaret J. Gallway* and *Aloysia Jouve*, descend, pass and belong to the survivor of them and to the heirs of such survivor forever."

If we have arrived at a correct conclusion in relation to the nature of the right conveyed by the will, then the instrument cannot conform to our laws as to its provisions, or it cannot have any effect. The testimony of two lawyers in Missouri had been taken, as to the effect of the instrument. One holds that it creates a joint tenancy, with a contingent remainder over to the survivor; the

WIDOW  
v.  
OR.

other, that it is a simple joint tenancy, by which the survivor takes the whole estate. In the one case, neither can defeat the contingent remainder; in the other, either of the joint tenants may defeat the right of survivorship by a partition or sale of the property, before such right has accrued by the death of the other party.

As the instrument must have its effect in Louisiana, if at all, it must receive its construction by reference to our law. By the language of the will, it contains a conditional substitution. The predeceased is to preserve for and return to the survivor the one undivided half of the property bequeathed. As it cannot be known before the event, which one-half will be released from the charge by the condition annexed, the whole property is tied up until the condition happens.

The disposition of the will, therefore, appears to us to be prohibited by Article 1507 of the Civil Code.

We think, judgment must be rendered in favor of defendants.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed; and it is now ordered, adjudged and decreed, that there be judgment in favor of the defendants, and against the demand of the plaintiffs, and that the defendants recover costs in both courts.

### EMILE SAINET v. WIDOW DUCHAMP et al.

A conveyed to B a house and lot for the sum of \$5,500, which the purchaser obliged himself to pay to the seller in one year from the date of the contract, with the express agreement, however, that the purchaser, his heirs or assigns, should have the right to prolong the payment of the sum of \$5,500, indefinitely and at their will, on paying the vendor or his heirs or assigns, interest annually in advance, at the rate of seven per cent. per annum—*Held*: That such a contract is not a contract of sale, but one of "rent of lands," *rente foncière ou bail à rente*.

**A** PPEAL from the Third District Court of New Orleans, *Duvigneaud, J.*  
*H. H. Taylor*, for plaintiff and appellant. *G. LeGardeur* and *Julien Seghers*, for defendants.

MERRICK, C. J. The facts of this case are correctly stated in plaintiff's brief, as follows, viz:

"In 1832, the father of the plaintiff sold to *Mr. Bernard Duchamp*, a house and lot, for the sum of \$5,500, with the stipulation that the purchaser, his heirs or assigns, should have the right to prolong the payment of the price, indefinitely and at their will, on paying the vendor, his heirs or assigns, interest in advance, at the rate of seven per cent. per annum. The following is the clause referred to:

'La présente vente est faite pour et moyennant la somme de cinq mille cinq cents piastres que l'acquéreur s'oblige de payer au vendeur dans un an à partir de ce jour, étant expressément convenu entre les parties que l'acquéreur aura le droit de prolonger indéfiniment et à sa volonté, lui, ses héritiers ou ayans-cause le remboursement de la dite somme de cinq mille cinq cents piastres, en payant au vendeur ou à ses héritiers ou ayans-cause, et annuellement, les intérêts de la dite somme sur le pied de sept pour cent par an payable d'avance en la demeure du vendeur ou de ses héritiers dans l'étendue de cette paroisse, le tout ainsi que l'acquéreur s'oblige.'

"This property afterwards passed into the possession and ownership of *Mrs.*

*Saint*  
v.  
*Duchamp.*

*Delphine Ezémie Macarty*, by act of sale from *Charles Claiborne*, (who acquired by mesne conveyances from *Mr. Bernard Duchamp*), before *Carlile Pollock*, dated 7th April, 1836. In the act of sale to *Ezémie Macarty*, is the following clause :  
 "The balance of said price of \$5,500, is to be paid in the obligation which the present purchaser hereby takes to assume, as she hereby does assume, the before recited mortgage in favor of *Emile Sainet*, and to pay unto the latter, his heirs or assigns, to the acquittance of the present seller and all other preceding vendors, the full amount of said debt of \$5,500 in capital and interest, annually in advance, in conformity to the tenor and true intent and meaning of the before recited act of mortgage, in favor of said *Emile Sainet*, on the 10th of February, 1832."

"The present plaintiff became the owner of this claim by purchase at probate sale of his father's estate.

"*Bernard Duchamp* died in 1832, soon after the purchase, leaving a large estate, exceeding the sum of \$20,000 over and above his debts.

"The interest not having been paid in advance for the year 1857, according to the terms of the agreement, this suit is brought to recover the price both against the widow and heirs of *Bernard Duchamp* and *Ezémie Macarty*, who assumed the obligation of *Duchamp*, and bound herself to execute the same."

It is conceded by counsel on both sides, that the contract is either one of rent of lands or annuity, and if the contract were to be construed as simply a sale, the rights of the plaintiff under it, would be the same as in the case of an annuity.

The case, therefore, as presented by counsel, involves only a comparison of the definitions and provisions of the Code of 1825, in reference to the two species of contract.

If it be the *rente foncière*, a tract of land, or other immovable, has been conveyed by one party to the other, to be held by the latter as owner, but reserving to the former an annual rent of a certain sum of money, or of a certain quantity of fruits which the other party binds himself to pay. C. C. 2750.

Now, the contract under consideration, has but one of the qualities called for by the definition, viz, the conveyance of a tract of land. It is wanting in this essential particular, viz : There is no reservation of an annual rent of a certain sum of money or fruits, which the other party has bound himself to pay. There is no obligation on the part of the vendee, to pay the rent which the other party could enforce by an action. He had the right to prolong the payment of the price indefinitely by paying the seven per cent. interest annually in advance. The creditor, therefore, had no action (distinct from his demand to enforce payment of the capital) to recover the annual interest upon the price of the sale, for the moment the interest was not paid in advance, the condition upon which the capital was to be exigible, had happened, and the debt (and seven per cent. interest, which it seems could not be recovered separately,) was demandable. 10 Mart. 116.

Now, the contract of rent (where it exists) is a real contract, and follows the property. The holder of the property, and not the one who acquired it under the contract, if he has sold it, is responsible for the rent. C. C. 2758. And this rent charge being inherent in the property, burthened with it, is itself susceptible of being mortgaged, except when gratuitously established. C. C. 2763. Now, in the case before us, what right did the vendor acquire by the sale which he could mortgage? He could not demand the rent by suit, for it was entirely optional with the debtor, whether he would pay it in advance or not.

There was, therefore, *no right*, in the language of the Code, "inherent to the property," which could be mortgaged. The contract of rent charge, therefore, did not exist.

SARRE  
v.  
DUCHAMP.

The contract of annuity, *la rente constituée*, is defined by the Code, to be a contract by which one party delivers to another, a sum of money, and agrees not to reclaim it so long as the receiver pays the rent agreed upon. Art. 2764.

Now, the contract sued upon, is precisely the contract above defined, except in the single particular, that it has been brought about by the sale of land. The sum of money delivered, has been produced by the sale of a tract of land. This appears to us in no manner material, for the land is supposed to be converted into money in all sales of the same, and the notes given for the price circulate as commercial paper before maturity, without reference to the original consideration. We can see, therefore, no objection to the manner in which the capital was raised, which formed the *rente constituée*. Trop. vente, No. 647; 5 Martin, 312. Nor can it any manner prejudice the contract, because it is accompanied by a mortgage and the vendor's privilege. For a mortgage may be given to secure the fulfilment of any obligation whatever. C. C. 3258. And on the non-payment of the interest in advance, after the expiration of one year, the price was demandable, and, therefore, secured by the vendor's privilege.

No prescription could run, for the plaintiff had no cause of action until the breach of the condition.

The demand in warranty is well founded against those parties who have promised to fulfil the obligations of the original vendee. C. P. 379; *Keane v. Goldsmith, Haber & Co.*, 12 An. 560.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed; and now proceeding to pronounce such judgment as ought to have been rendered by the District Court: It is ordered, adjudged and decreed, that the plaintiff do have and recover of the said widow and heirs of *Bernard Duchamp*, deceased, the sum of five thousand, five hundred dollars, with seven per cent. interest thereon per annum, from the 10th day of February, 1857, until paid, the one-half of said sum and interest to be paid by said *Widow Rosalie Pedesclaux (Duchamp)*; and one-sixth part thereof to be paid by each of said heirs of *Bernard Duchamp*, viz, one-sixth of said debt and interest, by said *Caroline Durel*, one-sixth by *Clarissa Duchamp*, and one-sixth by *Adèle Duchamp*, the same being their virile portions of said debt and interest. And it is further ordered, that the plaintiff recover judgment against *Delphine Eugénie Macarty*, for the same debt of five thousand five hundred dollars, with seven per cent. interest thereon, from said 10th day of February, 1857, until paid, upon the stipulation pour autrui, the plaintiff being entitled only to one satisfaction of said debt and interest; and in the event said debt and interest, or costs, or any part thereof, shall be paid by said widow and heirs of *Duchamp*, to the plaintiff: it is ordered, that they have judgment, and are hereby authorized to issue execution for the same amount on their demand in warranty against said *Macarty*. And it is further ordered, that said *Macarty* do have judgment for said \$5,500, and interest thereon, at the rate of seven per cent. per annum, from said 10th day of February, 1857, until paid over, against said *Adelaide Blondeau* and *Henriette Blondeau*, each for their virile share of the same. And it is further ordered, that the plaintiff recover of the defendants his costs in both courts, and that the defendants in warranty pay the costs incidental to the demand in warranty respectively.

SAINET  
v.  
DUCHAMP.

COLE, J., dissenting. In 1832, the father of the plaintiff sold to *Bernard Duchamp* a house and lot for the sum of \$5,500, with the stipulation that the purchaser, his heirs or assigns, should have the right to prolong the payment of the price indefinitely and at their will, on paying the vendor, his heirs or assigns, interest in advance, at the rate of seven per cent. per annum. The following is the clause referred to :

" La présente vente est faite pour et moyennant la somme de cinq mille cinq cents piastres, que l'acquéreur s'oblige de payer au vendeur dans un an à partir de ce jour, étant expressément convenu entre les parties que l'acquéreur aura le droit de prolonger indéfiniment et à sa volonté, lui, ses héritiers ou ayans cause, le remboursement de la dite somme de cinq mille cinq cents piastres, en payant au vendeur ou à ses héritiers ou ayans-cause, et annuellement, les intérêts de la dite somme sur le pied de sept pour cent par an, payable d'avance, en la demeure du vendeur ou de ses héritiers dans l'étendue de cette paroisse, le tout ainsi que l'acquéreur s'oblige."

In 1836, *Charles Claiborne*, who had acquired the property by mesne conveyances, from the succession of *Duchamp*, sold it to *Ezémie Macarty*, herein called in warranty by defendants, for the price of \$7,800, in deduction of which she paid cash \$2,300, and for the balance entered into the following engagement, to-wit : " The balance of said price, to-wit, \$5,500, is to be paid in the obligation which the present purchaser takes, to assume, as she hereby does, the reversion of the before recited mortgage in favor of *Emile Sainet*, and to pay unto the latter, his heirs or assigns, to the acquittance of *Claiborne* and the heirs of *Duchamp*, the full amount of the said mortgage in capital and interest, according to the tenor and true intent and meaning of said act of mortgage from the late *Bernard Duchamp* in favor of the late *Emile Sainet*, of the 10th of February. 1832."

The interest not having been paid in advance for the year 1857, according to the terms of the contract, this suit is brought against the widow and heirs of *Duchamp* and *Ezémie Macarty*, to recover from them the whole amount of the capital above mentioned, to-wit, \$5,500.

The principal question is, the nature of the contract declared on : is it a " contract of rent " (*rente foncière*), or a " contract of annuity " (*rente constituée*) ?

The first description of rent did not exist in the Code of 1808, and is derived mainly from Pothier's *Contrat de Bail à Rente Foncière*. Code of 1808, p. 408, Art. 33, chap. 3 ; Pothier, *Contrat de Bail à Rente*, cap. 1, secs. 1 to 5.

The learned jurists of the Louisiana bar who were commissioned in 1822, for the purpose of proposing additions and amendments to the Civil Code of 1808, say, at page 92 of their report :

" The contract of rent (*rente foncière*), which is now pretty common among us, has not found a place in the Code, (that of 1808). We have thought it necessary to supply this omission, and to include under a single title both rents and annuities."

They accordingly proposed the adoption of the whole title of " Rents and Annuities," which was, on their suggestion, incorporated in the Code of 1825, as may be seen from Article 2749 to 2771 inclusive.

The essential characteristics of the contract of " *rente foncière*," or rent of lands, are, that one of the parties conveys and cedes to the other, in perpetuity, a tract of land, or any other immovable property, and stipulates that the latter shall hold it as owner, but reserving to the former an annual rent of a certain sum of money, or of a certain quantity of fruits, which the other party binds himself to pay him. C. C., Arts. 2750, 2751.

The act passed in 1832, between *Emile Sainet* and *Bernard Duchamp*, contains these essential provisions of the contract of rent of lands, and although bearing the name of a sale, is therefore a contract of "rent of land."

SAINET  
v.  
DUCHAMP.

The law of this contract is, that the property remains perpetually subject to the rent, into whatsoever hands it may pass, and the person alienating it is only answerable for the arrears which became due while he was in the possession. C. C., Arts. 2757, 2758.

As the property which was transferred by the act of 1832 to *Duchamp* is not in the possession of any of the parties now sued, the action ought to have been instituted against the present possessors of the same, as the present defendants are only answerable for the arrears of rent which became due while they were in possession, and there is no allegation that they did not fulfill their obligations in this respect. C. C. 2758.

Plaintiff relies on the case of *Mayor v. Duplessis*, 5 M. p. 309. This is not applicable, for it was decided in the year 1818, previous to the new Code of 1825, which has modified and added to the law analogous to the action at bar.

It is objected, that the contract under consideration has but one of the qualities called for by the definition of Article 2750 of the Civil Code, to-wit, the conveyance of a tract of land. Such does not appear to be the case. Article 2750 declares, "that the contract of rent for lands is a contract by which one of the parties conveys and cedes to the other a tract of land, or any other immovable property, and stipulates that the latter shall hold it as owner, but reserving to the former an annual rent of a certain sum of money, or of a certain quantity of fruits, which the other party binds himself to pay him."

This Article reserves to the obligee "an annual rent of a certain sum of money."

If, then, a certain interest upon the estimated value of the property conveyed be specified, it is as much a payment of rent, as if a particular amount were specified as rent. And indeed, as a general rule, the rents of houses and other property represent the interest of the capital invested in such houses or property.

Besides, Article 2750 is not the sole one that treats of the contract of rent, and other Articles must be examined to comprehend fully the subject.

Art. 2752 declares, "that a contract made, bearing the name of a sale, in which the seller does not stipulate the payment of the price, but a capital bearing interest forever, is a contract of rent."

The sale now under consideration appears to be embraced in this Article, for the property is valued at a certain price, which represents the capital, and it bears interest forever.

It is also objected, that there is no obligation on the part of the vendee to pay the rent, which the other party could enforce by an action distinct from his demand to enforce payment of the capital.

It is true, that the vendor in this contract has the right of demanding the capital as well as the interest, in default of payment of the interest, and that the interest is payable in advance; but the parties, by thus changing the features of their contract, on immaterial points, from those of the contract of rent in the Civil Code, have not destroyed the material characteristics of the contract of rent which are impressed upon their act.

Besides, the vendor would have the privilege of waiving the right of demanding the capital, and might sue for the interest alone.

SAINT  
v.  
DUCHAMP.

The clause in the sale making the capital due at once, in the event the interest be not paid, is made for the benefit of the vendor, and may be waived by him.

The essential parts of the contract of rent are, that one party cedes to the other in perpetuity a tract of land, or any other immovable property, and agrees that the latter shall hold it as owner, but reserving to the former an annual rent. The Civil Code does not make it essential that the rent should not be made payable in advance, nor that, in default of payment of the rent, the capital should not be exigible at once, as well as any rent that might be due at the commencement of the suit. C. C. 2750, 2751.

Art. 2762 declares that, "the rentor has for the payment of his rent a right of mortgage on the property, commencing from the date of the contract, but he cannot have it seized and sold, unless there be at least one entire year's rent due."

The last clause is a mere provision of the law, which governs in the absence of any modification by the contracting parties; it is not a prohibition, and like any other right, may be dispensed with by the lessee, in whose favor it was enacted.

It is also objected, that the rent charge being inherent in the property burdened with it, is itself susceptible of being mortgaged, C. C. 2763, and as the rent was payable in advance, there is nothing to mortgage.

The right of mortgage given by this Article is for the benefit of the vendor, and if he thinks proper to mould his contract so that it cannot be enforced, there is nothing in the law to prevent him from so doing.

It is also said, that this is a contract of annuity. Such does not appear to be the case, for the contract of annuity is that by which one party delivers to another a sum of money, and agrees not to reclaim it so long as the receiver pays the rent agreed upon. C. C. 2764.

In the present case, neither money nor notes were given. By the sale, a house and lot were sold for a certain sum, which was not payable as long as the vendee would pay a certain interest in advance. C. C. 2752.

The essential distinction between the contract of annuity and that of rent is, that in the former a sum of money is delivered, in the latter a tract of land or any other immovable property is conveyed. C. C. 2764, 2750.

In the present case, the vendor ceded the land, and the vendee was, in a certain event, to pay in money the price of the land. The vendor did not deliver any money upon which he was to receive interest, and the vendee agreed to pay interest, not upon money, but upon land.

The argument, that the land ceded was in reality money, because it represented a certain value in money, would, if it were valid, prevent a contract of rent from ever being made, for the value of the property is specified in the contract of rent, or if there has been no valuation, the rent is considered as fixed at the rate of six per cent. on the value. C. C. 2760, 2761.

I am also of opinion, that in the sale by *Claiborne to Ezémié Macarty*, she did not render herself personally responsible in such a manner, that if she alienated the property, she would still be liable for the mortgage, but only bound herself whilst in possession of the property to fulfill the obligations incumbent upon her, under the law of the contract of "rent of land," for in the act of sale it is expressly specified, that she assumes the reversion of the mortgage, and agrees to pay the same "according to the tenor and true intent and meaning of said act of mortgage from the late *Bernard Duchamp* in favor of the late *Emile Saint*, of the 10th of February, 1832."

Her intention was, therefore, to submit herself to the same obligations as to

SAINET  
v.  
DUCHAMP.

the mortgage, as *Duchamp* was under to *Sainet*; and as *Duchamp* was only bound for the same in the event of not paying the rent, and only whilst he was in possession of the property, except for the arrears which became due while he was in the possession, so in like manner is she subject to similar obligations. C. C. 2758; 1 An., *Succession of Canonge*.

The intention of the parties to this sale is also shown by the declaration therein, that the "reversion of this mortgage had been assumed by the several purchasers under the said *Bernard Duchamp* down to the present seller."

In the sale from *Ezémie Macarty* to the widow, *Blondeau*, the latter also assumed the same obligations to assume and to pay the said mortgage to the acquittance of the present seller and all other preceding parties that the former assumed and promised to pay in her purchase from *Claiborne*. An examination of the various acts of sale shows clearly that she did not subject herself to any other personal obligation than that of paying the mortgage, in the event she did not pay the rent whilst the property was in her possession.

The contract under consideration cannot be considered a sale, for it is essential to a sale that there should be a fixed price. But if this price may never be exigible, then it is the same as if there were no price. In this case, as long as the interest was paid in advance, the five thousand five hundred dollars were not demandable. It seems to me, that the nature of a sale requires that the price should become due at some period of time, however remote. But in this case, the price may never become due, if the interest be punctually paid.

Besides, if a contract of this nature could be considered a sale, it could act with much hardship upon parties. *A* buys a house for ten thousand dollars, which are not to be paid as long as seven per cent. interest upon that sum is paid every year in advance. He keeps the house and has the use of it for one year, then sells it to *B*. The latter pays the interest in advance annually, for thirty years, and then, when the property has decayed, and is comparatively worthless, he refuses to pay the annual interest.

It would be very hard, at the expiration of thirty years, to make *A* liable for the whole price of the house, when he had enjoyed it but for one year, and when he might never be able to get back the money from *B*, who might be insolvent.

In the present case, *Ezémie Macarty* bought this property on the 7th of April, 1836, and sold it on the 29th November, 1837, and this suit was brought on the 20th April, 1857.

When, therefore, the nature of the contract under consideration and the intentions of the parties are weighed, it appears to me that this contract can with more propriety be declared one of rent, than either a sale or annuity.

The judgment of the District Court was for defendants, reserving to the plaintiff his right against the present possessors of the property.

I am of opinion, the judgment ought to be affirmed.

BUCHANAN, J., concurs in this opinion.

#### SAME CASE—ON A RE-HEARING.

*Julien Seghers*, on a re-hearing, argued as follows :

It is to be remarked, that in the Code of 1825, the contract of *rente foncière* was made on purpose to be in conformity with the usages of Louisiana, and differs from the doctrine of Pothier by the introduction of Articles 2752 and 2759,

SAINTE  
V.  
DUCHEMIN.

which make it a contract *sui generis*, peculiar to our laws and usages, and not exactly in accordance with the old French law, which existed anterior to the French revolution.

An annuity or *rente constituée* exists only when a sum of money is delivered; but where *real estate* is conveyed, and, by express agreement, the price is converted into a capital bearing interest forever, as in this case, then the contract is, to all intents and purposes, a contract of rent (*rente foncière*), and the debtor not liable for the rent that becomes due after he has alienated the property.

But it is contended, that the contract under consideration has but one of the qualities called for by the definition, viz: the conveyance of a tract of land; and that it is wanting in this essential particular, viz: there is no reservation of the annual rent of a certain sum of money, *which the other party has bound himself to pay.*

In my humble opinion, this statement is clearly *erroneous*, and in open contradiction with the very wording of the original act, which reads as follows:

“ La présente vente est faite pour et moyennant la somme de \*\*\*; étant expressément convenu entre les parties que l'acquéreur aura le droit de prolonger indéfiniment et à sa volonté, lui, ses héritiers et ayans-cause, le remboursement, en payant au vendeur ou à ses héritiers ou ayans-cause, annuellement, les intérêts de la dite somme, sur le pied de sept pour cent par an, payable d'avance \*\*\*; *le tout ainsi que l'acquéreur s'oblige.* (To all which stipulations the purchaser binds himself.)

Of course, it is very plain to me, that all the reasoning based upon the want of obligation on the part of the vendee, falls to the ground.

Besides, Article 2750 is not the sole one that treats of the contract of rent, and other Articles must be examined to comprehend fully this object.

Article 2752 declares that a contract made bearing the name of a sale, in which the seller does not stipulate the payment of the price, but a capital bearing interest forever, is a contract of rent.

The sale now under consideration appears to be embraced in this Article, for the property is valued at a certain price, which represents the capital, and it bears interest forever.

It is also objected, that there is no obligation on the part of the vendee to pay the rent, which the other party could enforce by an action distinct from his demand to enforce payment of the capital.

It is true, answers Mr. Justice Cole, that the vendor in the contract has the right of demanding the capital as well as the interest, in default of payment of the interest, and that the interest is payable in advance; but the parties, by thus changing the features of their contract, *on immaterial points*, from those of the contract of rent in the Civil Code, have not destroyed the material characteristics of the contract of rent which are impressed upon this act.

Besides, the vendor would have the privilege of waiving the right of demanding the capital, and might sue for the interest alone.

The clause in the sale making the capital due at once in the event the interest be not paid, is made for the benefit of the vendor, and may be waived by him.

The essential parts of the contract of rent are, that one party cedes to the other in perpetuity a tract of land, or any other immovable property, and agrees that the latter shall hold it as owner, but reserving to the former an annual rent. The Civil Code does not make it essential that the rent should not be made payable in advance, nor that in default of payment of the rent, the capital should not be exigible at once, as well as any rent that might be due at the commencement of the suit. C. C. 2750, 2751.

It has been finally objected, that the rent charge being inherent in the property burdened with it, is itself susceptible of being mortgaged, O. C. 2763, and as the rent was payable in advance, there is nothing to mortgage.

The right of mortgage given by this Article is for the benefit of the vendor, and if he thinks proper to mould his contract so that it cannot be enforced, there is nothing in the law to prevent him from so doing.

In conclusion, I beg leave to quote a few passages from a very old book, viz: “Dictionnaire de Droit et de Pratique, par Claude-Joseph De Ferrière. Paris, 1754.” Both this author and Pothier agree with the Civil Code of 1825; but our Code differs from their doctrine by the introduction of Articles 2752 and 2759, which add some new features to the *rente foncière*.

Ferrière, speaking of the *bail à rente*, says: “c'est un contrat par lequel le pro-

SADNET  
V.  
DUCHEME.

propriétaire d'une maison ou d'un héritage se démet et se dessaisit entièrement à perpétuité de toute sa propriété, et la transfère en la personne du preneur, pour en jouir, comme il fesait, moyennant une certaine pension payable par chaque année, soit en argent, ou en grain, ou autres espèces."

" Cette rente est appelée foncière, parce qu'elle est due pour raison du fonds, et en tient lieu au bailleur; à la différence de la rente constituée, qui est simplement constituée à prix d'argent."

" Cette rente de bail d'héritage est plus réelle que personnelle, parceque c'est une charge qui est imposée sur la chose; ensorte qu'elle suit le possesseur, ce qui fait que la chose ne peut être transférée qu'à la charge de cette rente. De ce même principe il s'en suit que le preneur n'est tenu de payer cette rente que tant qu'il est détenteur de l'héritage."

The principal changes introduced by our Code are, first, that the rent charge which by the old French law was perpetual, is *now* essentially redeemable, Art. 2759; and 2dly, that a contract made bearing the name of a sale may be *now*, nevertheless, a contract of rent. " C'est un contrat fait sous le nom de vente, dans lequel un prix est mentionné, mais l'on n'exige point le paiement de ce prix; au contraire, on en fait un capital portant intérêt à perpétuité. C'est donc un bail à rente d'après le Code, et non pas un contrat de rente constituée. La cour doit faire attention que notre Code est plus clair et plus explicite que les anciennes coutumes françaises, commentées par Pothier et Ferrière. L'article 2752 est positif."

VOORHIES, J. In our former opinion given in this case, we held that the contract under consideration was an annuity, whilst the minority of the court treated it as a rent of land,—*rente foncière ou bail à rente*.

This was a sale of real estate made for the sum of \$5500, payable one year after date, it being stipulated that the vendee had the right, at his option, to postpone the payment of this sum indefinitely, upon accounting for the interest at the rate of seven per cent. yearly in advance.

There was no *delivery of a sum of money* by the creditor to the debtor; nor any stipulation not to *reclaim it*, so long as the *receiver* paid the rent, consequently the contract in question is not one of annuity. C. C. 2764. Even had a note been delivered by the vendee to the vendor, the result would not have been different in this respect. But, at all events, no note was produced; and, in fact, none was ever given.

Under the Articles 2750, 2751, 2752 and 2759 of the Civil Code, the contract was one of rent,—*rente foncière*. There was an *immovable property conveyed*; and it was stipulated that the transferee should hold *as owner*; that a *certain quantity of fruits* should be paid annually, and that the conveyance was made *in perpetuity*. It is true that it was agreed that the price should be paid in one year, but at the same time the parties agreed that the vendee had the right to decline forever paying this amount, on condition of paying interest in advance, thereby establishing a capital bearing interest forever.

The Code says: " A contract of sale, in which it is stipulated that the price shall be paid at a future time, but that it bears interest from the day of sale, is not a contract of rent. On the contrary, a contract made, bearing the name of a sale, in which the seller does not stipulate the payment of the price, but a capital bearing interest forever, is a contract of rent." C. C. 2752.

The stipulation to pay the principal, in case the interest remained unpaid, is merely a mode adopted by the parties to redeem the rent charge; for, says the Code: " The rent charge, although stipulated to be perpetual, is essentially redeemable; but the seller may determine the terms of the redemption, and stipulate that it shall not take place until after a certain time, which can never exceed thirty years." C. C. 2759.

The objection raised, under the provisions of Articles 2762 and 2763 of the

SADLER  
v.  
DUCHAMP.

Civil Code, that in the case at bar, the rent charge would not be susceptible of mortgage, or liable to seizure and sale, because the interest was required to be paid in advance, involves a confusion of ideas and a petition of principle. It is the rent charge, which is an *immovable*, that is susceptible of mortgage, and not the revenues accruing annually. C. C. 2763. In the second place, although it be true that the rentor cannot have the property seized and sold, unless there be due at least one entire year's rent, it does not follow that he is bound to wait for the expiration of the year to do so, if the yearly rent falls due in advance. It is no answer to say that the plaintiff could not seize the property in question for the payment of the yearly rent, because the owner of the land might put an end to the contract of rent,—*rente foncière*, by paying the capital. The right of redemption is not incompatible with the existence of the rent charge; on the contrary, the Code says this contract, "although stipulated to be perpetual, is *essentially* redeemable." C. C. 2759. 8 L. 286, *Clark's heirs v. Christ's Church*.

It is suggested that there is, on the part of the vendee, no legal obligation to pay interest to the vendor, because its payment being left at the will of the obligor, the condition is potestative, and therefore null and void under Art. 2029 C. C.

The plaintiff in his petition, however, does not take this view of the case; he prays that the stipulated interest be allowed by the court. In this respect, he has given a correct interpretation to the contract; it is proper to state that it was not the payment of interest, that was left at the will or option of the vendee, but the indefinite postponement of the payment of the capital on condition of paying in advance the yearly interest. The contract states express that it is agreed between the parties: "que l'acquéreur aura le droit, de prolonger, indéfiniment et à sa volonté, lui, ses héritiers ou ayans-cause, le remboursement de la dite somme de \$5500, en payant au vendeur, ou à ses héritiers, ou ayans-cause, annuellement, les intérêts de la dite somme sur le pied de sept pour cent payable d'avance." In the absence of any stipulation to pay interest, the property being productive of fruits, the vendor would be entitled to legal interest; but the parties have stipulated a rate of interest, and such is their own interpretation of it in the pleadings.

It is out of the question to hold the contract to be an annuity, and at the same time raise the objection to its being a *rente foncière*, that there is no legal obligation to pay the interest. If the objection be well founded, it is fatal as much to the one as to the other. The truth is that there is but one alternative; it is either a rent charge or an ordinary contract of sale. In either hypothesis, the doctrine held by this court, in its former opinion, is evidently erroneous.

After a thorough investigation of this case, we have come to the conclusion to reverse our former opinion, in order to adopt the views developed in the dissenting opinion of Mr. Justice Cole.

It is, therefore, ordered and decreed, that our former judgment be avoided and annulled, and that the judgment of the District Court be affirmed, with costs.

LAND, J., dissenting. The ancestor of the plaintiff, sold to *Bernard Duchamp*, a house and lot for the price of \$5500, which the purchaser obligated himself to pay to the vendor, *at the end of one year from the date of the sale*. And it was agreed between the parties, that the purchaser should have *the right* to prolong the payment of the price *indefinitely and at his will*, on paying to the vendor interest in advance at the rate of seven per cent. per annum. This stipulation was made to extend to the heirs and assigns of the party. Without this stipulation the contract would be a pure and simple sale, at the price of \$5500, payable at

the end of the year. The difficulties of the case, therefore, spring out of the stipulation as to the payment of interest, which has been made a part of the contract.

The difference between *the sale*, and the *agreement* to pay interest, is very radical. The sale is absolute, and conveys the title unconditionally, and binds the vendee to pay the price. The agreement to pay interest does not affect the title conveyed to the vendee, nor does it affect his absolute obligation to pay the price—but granted to him a right to postpone the payment of the price, on the condition of the payment of interest in advance—which right he could exercise, or not, at his own will or pleasure, under the express stipulations of the agreement.

The agreement to pay interest was, therefore, contracted on a potestative condition, and gave to the vendor no right of action for its recovery, and was in itself void. C. C. 2029.

Pothier says: "It is of the *essence* of agreements, which consist in promising something, that they should produce an obligation in the party making the promise to discharge it; hence it follows, that nothing can be more contradictory to such an obligation than an entire liberty in the party making the promise to perform it, or not, as he may please. An agreement giving such entire liberty would be absolutely void for want of obligation. If, therefore, I agree with you to give you something, in case I please, such an agreement is absolutely void." Pothier on Obligations, sec. VII. No. 47.

Article 2019 of the Civil Code, is in these words:

"The potestative condition is that which makes the execution of the agreement depend on an event, which it is in the power of the one or the other of the contracting parties to bring about, or to hinder. And Article 2029 declares that every obligation is null that has been contracted on a potestative condition on the part of him who binds himself."

Now, on what event was the postponement of the payment of the price made to depend? It was on the payment of interest in advance by the vendee, and this payment of interest was, under the express terms of the agreement, at his entire will and pleasure, (*à sa volonté*). Such an obligation or agreement is not only declared by Pothier, but by our Civil Code, to be absolutely void.

Can it then be said that the vendor had a right of action for the recovery of the interest? Can a void obligation be made the foundation of an action, and become the basis of a judgment of a court of law, or can a party be bound by an obligation, which the law declares void?

The agreement to postpone the payment of the price, being contracted on a potestative condition and consequently void, created no legal obligation to pay the interest, nor gave any right of action for its recovery. C. C. 1750, 1753. To constitute the contract of rent, it is essential that the rentee should legally bind himself to pay the interest, or rent. Article 2750 of the Code, declares that the contract of rent for lands, is a contract by which one of the parties conveys and cedes to another a tract of land, or other immovable property, and stipulates that the latter shall hold it as owner, but reserving to the former an annual rent of a certain sum of money, or of a certain quantity of fruits, which the other party binds himself to pay to him.

If, therefore, the contract in this case is one of rent, we have before us a rentee in possession of the land conveyed, who has contracted no legal obligation to pay the rent, and against whom no action lies for its recovery.

Again. As a consequence of a contract of rent, the rentor has a right of mort-

SARRET  
v.  
DUCHAMP.

gage on the property conveyed, for the payment of his rent, and the *rent itself is susceptible of being mortgaged by him.* C. C. 2762, 2763.

Now, if the obligation to pay interest in the contract before the court, is void, as a *principal obligation*, how can the accessory right of mortgage attach to it, or the rent stipulated to be paid by it, be susceptible of mortgage?

The contract, therefore, viewed as one of rent, is *wanting in an essential requisite*, to-wit: a legal obligation on the part of the rentee to pay the rent, and a right of action, as a consequence on the part of the rentor. In the absence of *these essential requisites*, the contract cannot be interpreted or construed to be one of rent, and as such enforced.

It is to be observed that the purchaser did not even *bind himself to pay the interest*, but that it was agreed between the parties, that he should have *the right to do so if he pleased*, and thereby postpone the payment of the price. It is, therefore, difficult to affirm as a legal proposition, that the non-payment of interest would be a violation of his contract.

Whether the contract is one of annuity or sale, with a privilege granted to the vendee of postponing at his pleasure the payment of the price by the payment of interest in advance, it is unnecessary now to consider, as the agreement has been considered in argument as an annuity or rent charge. In my opinion, it is not one of *rent*, and therefore see no reason to reverse the judgment of the court heretofore pronounced, and to declare the contract *one of rent, and not a contract of annuity.*

MERRICK, C. J., dissenting. In addition to what is said by Mr. Justice Land, and was formerly said by a majority of the court, there is another view which may be taken of this case. If the suit presents a case of *rente foncière*, then the vendee incurred no personal obligation to pay the interest upon the \$5,500, the price of the sale, independent of his possession of the property, but the obligation to pay the interest was impressed upon the thing itself, and the vendor retained in its place a right upon the thing, a *jus in re*. Now, when we look at the contract, we shall find, that the vendee personally assumed the price of the sale. The language is:

"The present sale is made for and in consideration of \$5,500, which the purchaser binds himself to pay to the vendor in one year from this date, it being expressly agreed between the parties, that the purchaser shall have the right of prolonging indefinitely at his will, to him, his heirs or assigns, the reimbursement of the said sum of \$5,500, by paying to the vendor, his heirs or assigns, and annually, interest at the rate of seven per cent. per annum, payable in advance, at the domicile of the vendor, or his heirs, any where in the parish; for all which the purchaser hereby binds himself."

Now, who bound himself to pay the price? The answer of the contract is, *the vendee in person.* When did he bind himself to pay the price?

The contract says, in one year, or at farthest, whenever after that period, the interest shall not be paid in advance.

Then here, is unquestionably a personal obligation binding upon the vendor to pay the price of the property. He does not undertake to bind the land. Nothing is reserved out of the land. There is no partial dismemberment of the property, but the whole, the *dominium*, passes to the vendee. Hence, the vendor has retained no *real* right in the property, which he can sell or mortgage. All that he has is the personal obligation of the vendee to pay, (as he has promised,) and a mortgage and vendor's privilege to secure the payment of the price.

SAINTE  
F.  
DUCAMP.

A comparison of the contract under consideration, with each and all of the Articles of the Code on the subject of the *rente foncière*, has failed to enable me to discover the essentials required for such contract.

Pothier says, that "it is of the *essence* of the *rente foncière*, that the vendor (bailleur) shall *reserve* in the property a right of annual and perpetual rent, if the contract is in perpetuity; or for the time it ought to continue, if it is only made for a certain time."

In another place, he says: "As in the contract of sale, the price must be certain and determinate. So in the contract of rent charge, the rent which the vendor (bailleur) *reserves* in the property, must be certain and determinate. It is for this reason, that if it is said by the contract that such a piece of land is charged with a rent without saying for how much; or if it is said that the property is charged with the same rent as it was formerly charged, and formerly it had not been charged with any rent; it is evident that there would be no contract of rent charge, in the one case or the other, and the contract would produce neither an alienation of the property, nor any obligation of the parties."

"The differences" (between rent charge and sale) "are first, in this, in the contract of sale, the price can consist only in a *certain sum of money*, otherwise it would not be a sale. but some other contract, as we have seen in the contract of sale. On the contrary, it is not important that the rent should be of a sum of money. It may be a certain quantity of fruits or provisions. For example, so many quarters of wheat; so many puncheons of wine; so many pounds of butter," &c.

"The rent charge can also consist in a proportion of the fruits; as the charge of giving to the lessor (bailleur) every sixth sheaf of wheat which shall be harvested, or so many gallons of wine for each puncheon which shall be secured. This kind of rent is called *champart*; it is a peculiar kind of rent of which we shall not treat in this place."

"A second difference is, that in the contract of sale the price consists in a single sum of money which is due, (or contracted for,) as a whole, at the instant of the contract, when even by the agreement of the parties, the payment has been deferred and divided into several terms. On the contrary, in the rent charge, the rent only takes its rise and is due by portions corresponding with the time which has elapsed from the possession of the tenant or his successors."

"In fine, the third difference, which is the main one, is that in the contract of sale, the *price is the debt of the person and not of the estate* which is sold. On the contrary, in the contract of rent charge, the rent which the landlord (bailleur) retains, is a charge *in rem* (charge réelle), which is imposed upon the estate, subject to the rent, and which is due principally by the estate, although the tenant and his successors may be also, by reason of the estate which they possess, personal debtors of the arrearages." Pothier, Bail à Rent, Art. 2, sec. 1.

As the definitions and distinctions of Pothier are principally adopted by our Code, the explanations of this author show clearly what is intended by the Code in reference to the *rente foncière*.

Again: Suppose the first or second year after this contract was entered into, that the property had been subject to a crevasse or some other calamity by which the value had been reduced to one-third, could the vendee have refused to pay the interest in advance, and then have escaped the payment of the price, which he had bound himself to pay, and have turned the vendor over to the depreciated estate for the price? Suppose the vendee had divided the estate and

SAINT  
v.  
DOCHAMP.

made sale to several persons, and they had failed to pay the rent, would the vendor have been driven to several real actions against each sub-vendee?

It seems to me, as explained in the former opinion of the court, that the vendee assumed a personal obligation, and that the annuity was formed from the price due in money for the sale of a tract of land.

I cannot forbear quoting another passage from Pothier, which explains the object of retaining the mortgage, as in this case. He says:

"The *rente foncière* is also a real charge very different from a mortgage with which an estate is encumbered, upon which an annuity established in consideration of money, or by gift or legacy, has been assigned. This mortgage is only an accessory obligation on the property, the better to assure the personal obligation of him who has constituted the annuity, or who has been charged with it by the testament. On the contrary, the charge of the *rente foncière* with which the estate is charged, is a *principal obligation of the estate*; it is the estate which is the principal debtor, rather than the person of the tenant, who is bound for the rent only, *because he possesses the property*, and because the charge of the property is of such a nature that the property can only be relieved of the rent by the act and agency of the possessor, who must pay the arrearages for the property." *Ib.*, chap. 2, sec. 3, No. 19.

Turning again to the contract, we find, as we said at the outset, the *personal obligation* of the vendee; but where do we find any words equivalent to the reservation of rent? Or any stipulation that the property should pay any rent? Where are any words equivalent to a dismemberment of property or the reservation of any of the *jura in re* to the vendor? What property then did he retain in the thing which he could sell or mortgage?

I see no reason to doubt the correctness of the former decree, and as the vendee bound himself personally and expressly, and as the term for the payment of the price has recently terminated by the condition, I think the former decree ought to remain undisturbed.

#### HEIRS OF MARIE J. DESLONDES v. THE CITY OF NEW ORLEANS.

The formal probate of a will cannot be disregarded by parties claiming as heirs of the testator, but never in possession, and they cannot institute a petitory action without seeking to annul such probate.

When heirs-at-law have once acquiesced in a will, by accepting some bequest under it, neither they, nor those claiming under them as heirs, are at liberty afterwards, to contest its provisions or assert its nullity.

**A** PPEAL from the Third District Court of New Orleans, *Duvigneaud, J.*  
*Henry St. Paul, Miles Taylor, H. H. Taylor, Thomas H. Lewis, and G. Le Gardeur*, for plaintiffs and appellants. *J. J. Michel, Randall Hunt, and Louis Janin*, for defendant.

MERRICK, C. J. This suit is brought to recover of the defendant, "all the batture now in its possession and unsold, lying in front of faubourg St. Mary, and between New Levee street and the river, and between Common street and the line dividing the batture in front of faubourg Delord, from the batture in front of faubourg St. Mary, and all the batture lying in front of Delta and Front streets, to the water's edge."

DESLONDRES  
v.  
NEW ORLEANS.

Counsel inform us, that the questions which they present to our consideration under the plaintiffs' title, involve property to the amount of several millions of dollars. In the examination of the case, they have exhibited a research and learning worthy of the magnitude of the interest at stake.

As we shall dispose of this case upon a single point, it is not our intention to follow the counsel through the numerous questions which they have illustrated and exhausted.

Both parties claim through *Marie J. Deslondes*, who died in 1792. The plaintiffs claim as her heirs-at-law. The defendants, through a donation made by her in her marriage contract with *Bertrand Gravier*, her husband, and a will made in his favor, as sole and universal heir and legatee, and admitted to probate under the Spanish law, 21st November, 1792. The plaintiffs object that the marriage contract was not recorded as was required, by the laws then in force, and oppose the will on various grounds.

The will which, if valid, covers the case independent of the marriage contract, was not signed by the testatrix, or read to her, and the following note preceded the signatures of the witnesses and notary receiving the same, viz :

"After writing out this will, it could not be read to the party authorizing the same, in consequence of her being deprived of consciousness," (or a temporary suspension of the faculties or senses,) "but the witnesses were present at the declaration she made of her will, of the nomination of an executor, heir, and all the rest contained in this instrument of writing. In testimony," &c.

The Alcalde, to whom the instituted heir applied for probate of the will, was assisted as required, by a juriconsult, called the Assessor of this Intendency, and, before hearing the witnesses, he referred the matter to the Governor of the province, the highest judicial officer thereof, who ordered the witnesses to be heard. After the testimony was received, and the case taken under advisement, the Alcalde assisted as above mentioned, decreed the will to be valid, and ordered it to be kept and executed.

*Bertrand Gravier* went into possession under the will, and he and his vendees have held possession ever since. By the will, two thousand dollars were given to the children of *James Deslondes*, a brother; one thousand dollars were given to *George Deslondes*, another brother of the testatrix; and the like sum to the children of her brother-in-law *Ainie*. The plaintiffs claim through them as heirs.

We have no reason to doubt the correctness of the conclusion of the Supreme Court of the United States, in regard to the decree of the Alcalde. In the case of *Fouvergne*, one of the present plaintiffs against the defendant, the Supreme Court of the United States said, in reference to the allegations of the bill in chancery impugning the will of *Marie J. Deslondes*, as a legal instrument, as follows :

"That question, in our opinion, is closed by the decree of the Alcalde. That decree declares the will to be valid and subsisting, and directs its execution. We are obliged to treat the decree as the judicial act of a court of competent jurisdiction. In fact, it was the only judicial authority in the province of Louisiana, except that exercised by the Governor. This decree remains in full force, never having been impeached, except in this collateral way." 18 How.

The objection which was fatal to plaintiffs' action in the Supreme Court of the United States, has not been avoided by the form in which the present action has been brought. The formal probate of a will cannot be disregarded by parties claiming as heirs of the testatrix, but never in possession, and they cannot insti-

DESLOTTES  
v.  
NEW ORLEANS.

tute a petitory action without seeking to annul such probate. *Haydel v. Roussel*, 1 An. 38; see authorities cited in *Delespaze v. Warner*, ante 413.

But waving this objection, we think the proof adduced by the defendant, sufficient to show a ratification of the will. The receipt of *George Deslottes* has been produced for the \$1,000 bequeathed him by his sister, and the dealings and intimate relations of the ancestors of the plaintiffs with *Bertrand Gravier* and his heirs, leaves no reasonable doubt that the other legacies were also paid, and that the heirs-at-law acquiesced in the will. The defendants, after a lapse of more than sixty years, cannot be expected or required to produce positive proof of the facts on which they rely, to show such ratification. But as possession has followed defendant's title for this long period, the presumption arising from the dealings and intimate relations of the parties in its favor, are sufficient.

We, therefore, concur with the learned Judge of the District Court, in relation to the facts of the case, and are of the opinion that the judgment of the lower court ought to be affirmed.

Judgment affirmed.

### SOUTHERN BANK v. WOOD & CHAMPLIN.

An assignment of a vessel on the high seas in trust for the payment of particular creditors, by preference, made in another State, under whose laws it is valid between the parties, all of whom reside in that State, will protect such vessels when they arrive in a port in this State from attachment here, at the suit of a creditor of the assignor, whose debt was payable in the State where the assignment was made.

The validity of the assignment, must be determined by the laws of the State where it is made.

**A**PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*Waples & Eustis*, for plaintiff and appellant. *Clarke & Bayne*, for defendants.

**COLLÉ, J.** On the 6th of March, 1857, in the State of New York, the defendants, *Wood & Champlin*, copartners and residents of the city of New York, executed an Act in which they represented they were indebted to "sundry persons in sundry considerable sums of money," and being unable to pay the same in full, were desirous of making a fair and equitable distribution of their property and their effects, among their creditors, wherefore, for the sum of one dollar to them in hand paid, they sold, assigned and transferred to *Van Blascoom & Hayes*, of the city of New York, in trust for certain purposes, all their property. The objects of this trust were:

1st. The sale of the property.

2d. The payment with the proceeds thereof of certain preferred creditors of the partnership.

3d. If sufficient remained, then payment was to be made of the remaining copartnership debts of the assignors.

4th. Afterwards, if the funds permitted, the individual creditors of the assigning partners were to be paid.

Schedules were annexed to the act, which described the property and gave the names of the preferred creditors.

On the 9th of March, 1857, bills of sale were made to the present intervenors of the bark or vessel, the "Mary & Susan," and of the ship "Chicora."

SOUTHERN BANK.  
v.  
WOOD.

In the schedule annexed to the assignment, the bark and ship were also mentioned.

At the time of the assignment and sale of the bark and ship aforesaid, the said vessels were on their way from France to New Orleans.

Upon the arrival of the bark "Mary & Susan," at New Orleans, *W. J. Dewey* took possession of her, as agent of the intervenors, in accordance with instructions previously received. The ship "Chicora" arrived at New Orleans about one month after the bark, and *Dewey* gave notice to the captain to give him possession of her, according to instructions received from the assignees to take possession for them of the vessels and of all property belonging to *Wood & Champlin*.

Upon the arrival of the vessels, they were attached by the plaintiff, the Southern Bank, to satisfy the claims held by them against the assignors, *Wood & Champlin*. The attachment of the bark was subsequent to the possession taken of her by the agent, *Dewey*, and that of the ship was anterior thereto, she having been attached before her arrival.

*Van Blacom & Hayes*, the assignees, intervened in the suit, and claimed the vessels, in virtue of the assignment and sales aforesaid.

There were also other interventions, but the only contest now is as to the rights of the intervenors and those of the Southern Bank.

There was judgment for the intervenors, and plaintiff has appealed.

It is admitted that the deed of assignment, and the bills of sale of the bark and ship, were executed as they purport, and acknowledged and recorded as they purport; that the assignees, *Champlin & Wood*, were at the time of the assignment, indebted as stated in the schedule annexed to the assignment, which contains the names of the preferred creditors. It is also admitted that the common law prevails in New York.

The counsel for plaintiff, in his brief, admitting that the assignment was executed in New York prior to the attachment, and is in the usual form of such instruments made in the common law States, where voluntary assignments for the benefit of preferred creditors are not prohibited, present the question involved in this suit to the court, as follows: Will an attachment by a Louisiana creditor be defeated by an assignment of vessels at sea, legal under the laws of New York, fraudulent and void under the laws of Louisiana, by reason of preferences given to certain creditors?

In order to determine the rights of the parties in this case, it must first be settled whether the assignment and sales transferred at once the title of the vessels to the assignees.

The law seems to be clear upon this point.

Abbot, in his work on Shipping, says: "It has been observed that the property of a ship is now always evidenced by written documents. And these documents not only furnish the owner with proof of his property, but also enable him to dispose of it when the ship is at sea, or in a foreign port.

"When a ship is abroad, a perfect transfer of the property may, at the common law, be made by assignment of the grand bill of sale, and delivery of that and the other documents relating to the ship, as the delivery of the key of a warehouse to the buyer of goods contained therein, is held to change the property of the goods, according to the rule of the civil law; such delivery in each case being not merely a symbol, but the mode of enabling the buyer to take actual

SOUTHERN BANK  
v.  
WOOD.

possession, as soon as circumstances will permit. Abbott on Shipping, pp. 35, 37, § 28, 30.

In the present case, the assignors did not, by keeping possession of the vessels, cast a shade of simulation about the assignment; on the contrary, the agent of the assignees took possession of one of the vessels upon her arrival at her destined port of New Orleans, and would also have done the same with the other, if he had not been prevented by the attachment.

The title to the vessels passed to the assignees by the assignment confirmed by the sales, and the good faith of the parties was manifested by the action of the assignees in trying to get possession of the vessels.

A party ought not to be incapacitated from selling or transferring his property, because it is upon the sea, and he cannot give actual delivery. If he were, he might go to protest with immense amounts invested in ships at sea.

In *Thuret et al. v. Jenkins et als.*, 7 M. p. 353, Judge Martin delivering the opinion of the court, said: "In the present case, the ship, the subject of the sale, was at sea, was a New York ship, and the vendors and vendee resident in New York. If, therefore, according to the *lex loci contractus*, that of the domicile of both parties, the sale transfers the property without a delivery, it did so *instanti*, or not at all."

The facts of this case are, then, that the law of New York permits a debtor to favor certain creditors by an assignment of his property in trust, as has been done in this case; that the assignment and sale of the vessels upon the high seas at the time, were valid by the laws of New York, and by the same laws transferred at once the title of the ships to the assignees.

Under these circumstances, we are of opinion that the plaintiff had no right to attach the vessels as the property of the assignors.

It is true that the assignment and sale were for the benefit of third parties, the preferred creditors, and not for that of the assignees, but the former had acquired rights by the assignment and by the laws of New York where the assignment was made, they had the right to claim a performance of the purposes of the trust.

At the time of the assignment and sales, the State of Louisiana had neither jurisdiction over the parties to the deeds, nor over the vessels. The assignment and sales of the vessels were perfect, and vested title thereof in the assignees, in trust for the preferred creditors, before the vessels arrived within the jurisdiction of the State of Louisiana. *Bernard v. Scott*, 12 An. 490.

However desirous we may be to protect the claims of our own citizens, we cannot disregard that comity which ought always to be exhibited to the laws of foreign States and to the contracts of their citizens under those laws, when they do not clash with our own. The assignment and sales of these vessels did not, and could not conflict with our laws, because the vessels and the parties to these deeds, were not within the dominion of the State, when they were executed and the transfer took place; and the parties to the acts were citizens of New York, where such acts are lawful.

Besides, the indebtedness sued upon by the plaintiff in this case, consists of thirteen bills of exchange, drawn by *Benjamin Bernard* to his own order and by him endorsed, upon one of the defendants, *Christopher Champlin*, a resident of the city and State of New York. *Wood* is alleged to have been his commercial partner and to be thus also liable. Twelve of these bills were accepted by *Champlin*, and by him made payable at the Broadway Bank; one of them

has no acceptance endorsed upon it. The whole of them were protested for non-payment at the city of New York.

SOUTHERN BANK  
v.  
WOOD.

The indebtedness further consists of three drafts drawn by said *Bernard*, by virtue of certain letters of credit, given by *Champlin*, by which he bound himself to honor and accept these three drafts. They were, however, protested in New York; *Champlin* having refused to accept the same.

The whole of said sixteen bills of exchange were drawn upon "*C. Champlin, Esq., 174 Front street, New York.*"

It is clear, then, that in the contemplation of the parties to these bills of exchange, that they were to be paid in the city and State of New York, and, therefore, that the contract between the parties, was to be executed in the State of New York, and not in that of Louisiana. Plaintiff, in purchasing these drafts, could see by their face, that they were to be paid in New York, and knew, therefore, that their right of being paid, would materially depend upon the laws of New York. It is, therefore, with a bad grace that plaintiff asks us to disregard this assignment and these sales, executed in New York according to its laws of property upon the high seas, in order to secure the payment of drafts, which, in the contemplation of the parties thereto, were to have been paid in the State of New York.

If contracts of this character could be disregarded by sister States, then there would be no safety in the most lawful transactions beyond the borders of the State where they were entered into.

Our laws do not allow a debtor to show a preference to his creditors, and any act passed in this State giving such preference, would clash with our laws, but a preference given by foreign creditors in their own country over our own citizens, does not conflict with our laws, because the act of preference takes place beyond their dominion.

If, indeed, the vessels had been at the port of New Orleans at the time of the assignment, then, as they would have been within our jurisdiction, the plaintiff would not have appealed in vain to the tribunals of Louisiana for protection, for then the citizens of New York could not expect to make property within our jurisdiction subject to the laws of New York, and in like manner plaintiff cannot expect to render property not subject to our jurisdiction at the time of its sale, to become subject to it by entering into our ports after the assignment and sales.

The case of *Norris v. Mumford*, 4 M., p. 12, is not adverse to this decision, for in that case, the sale took place in New York, but the cotton at the time of its sale was in New Orleans, and therefore the court properly decided that the sale did not vest the cotton in the purchasers, and was, therefore, subject to attachment by the creditors of the vendor.

In *Thuret et al. v. Jenkins et al.*, 7 M. 353, this court held valid the sale in New York of a ship at sea.

The case of *Beirne & Burnside v. Patton et al.*, is cited by plaintiff, but that differs in many features from the one at bar. For instance, the court said there was no legal evidence that the assignment was valid by the laws of Tennessee, where it was passed; and a part of the argument of the court is based upon the hypothesis that the property being personal, is to be governed by the laws of Louisiana, where it is situated. The assignment also was to have its effect, according to the contemplation of the parties in Louisiana, and the assignment did not purport to convey all the property of the assignors. In this case, there is evidence that the assignment is valid by the laws of New York, the vessels as-

SOUTHERN BANK  
v.  
WOOD.

signed were not, at the time of assignment, within the jurisdiction of any particular country, but upon the high seas. They were indeed on their way from Havre to New Orleans, but it was not in the contemplation of the parties, that the contract should be carried into effect in New Orleans, but at New York, where all the parties had their domicile. It is true, that the assignees directed their agent at New Orleans to assume possession for them of the vessels, but this was to effect the objects of the trust and to hold the vessels and cargoes at their port of destination, subject to the rights of the preferred creditors.

New York being the home port of the vessels and also the domicile of the parties, it was the place where, in contemplation of law, the assignment and sales were to be carried into effect. But the vessels were prevented from arriving there by the attachments. In this case also, it is not pretended that the property transferred, bears an unjust proportion to the debts of the preferred creditors; on the contrary, the assignors transferred the whole of their property, and all their partnership and individual creditors were to be paid, but in a certain rank.

The case of *Tatum v. Wright, Williams & Co.*, 7 An. 358, has also been referred to.

*Tatum* had sold his cotton in Arkansas, to a purchaser, who paid the greatest part of the price in counterfeit bank notes; the purchaser brought the cotton to New Orleans and defendants advanced on it. *Tatum* sued defendants for the value of the cotton. It was held, that he could not recover, notwithstanding the statute of Arkansas provides that the owner may recover the property out of which he has been swindled, from any subsequent holder, because *Tatum*, by putting his cotton in the possession of the purchaser, as owner, reposed confidence in him, gave him credit and enabled him to commit a fraud on the defendants, and the equity of the original owner is not equal to that of the defendants, who have parted with their money, on the faith of a state of things which the plaintiff himself was the cause of being created.

The case of *Richardson et al. v. Leavitt et al.*, 1 An., p. 431, is somewhat similar in its features to that at bar, and the court held the assignment in New York to be valid. This decision was re-affirmed in the *Merchants' Bank of Baltimore v. The Bank of the United States*, 2 An. 659.

We would not pretend to affirm, that the assignment and sales would be valid if the assignors, knowing the vessels to be on their way to New Orleans, executed the assignment and sales with the intention of defeating the claims of the Southern Bank. This cannot, however, be presumed in this case, because there is nothing to justify the presumption, but that the vessels were on their way to New Orleans; whereas, against the presumption, there are the legality of the acts in New York, the actual indebtedness of the assignors to the creditors preferred, and a total abandonment of their property to their creditors.

Even if, as it has been argued, the assignees were nothing more than trustees, yet they held the property assigned in trust for the benefit of certain persons. These persons had, by the assignment, therefore, acquired certain rights, and parties have the prerogative of enforcing rights, whether they be derived from assignments or sales. And even if the preferred creditors can only enforce their rights in a court of chancery, these rights are not thereby destroyed.

It has also been objected, that the transfer of a ship at sea requires its completion by delivery or taking possession. This does not appear to be the recognized doctrine. Abbott declares that a perfect transfer of the property may, at the common law, be made by assignment of the grand bill of sale, and delivery of that

and other documents relating to the ship. (See previous quotation from Abbott on Shipping; also, *Thuret v. Jenkins*, 7 M. 353.)

SOUTHERN BANK  
v.  
WOOD.

Abbott also says, that such delivery transfers the property of a ship, the same as the delivery of the key of a warehouse to the buyer of goods contained therein is held to change the property of the goods, according to the rule of the civil law; "such delivery, in such case, being not merely a symbol, but the mode of enabling the buyer to take actual possession, as soon as circumstances will permit." He also declares (p. 35), that delivery of actual possession is only necessary when it is possible, as for instance, when the ship is in the country of its owner at the time of sale.

Abbott does not mean, that the taking of actual possession is necessary to transfer the property of a ship; for he had antecedently declared, that a *perfect transfer* of the property of a ship may be made by the assignment and delivery of the bill of sale and other documents relating to the ship. His signification is, that the bill of sale and other documents present such proof as authorizes the purchaser to take actual possession as soon as he can, and which will also justify him in a judicial tribunal in enforcing his right of possession.

It is true, if after the arrival of the ship at the home port, the purchaser does not take possession of her, this may be considered as a presumptive proof of simulation, but the taking possession does not perfect the title to a ship sold whilst upon the high seas; it is only evidence that the transfer was real, and not simulated.

Before, then, the vessels arrived at New Orleans and were attached, a perfect title existed in the trustees for the benefit of the preferred creditors, so that no conflict of laws could arise between the laws of Louisiana and those of New York.

After a careful examination of this cause, we can see no sufficient reason to differ from the conclusion to which the District Judge arrived after an able and elaborate investigation.

Judgment affirmed, with costs.

MERRICK, C. J., dissenting. The assignment to trustees was made on the 6th day of March, 1857, and transferred to the trustees all the rights they have acquired. The subsequent transfers of the two ships, on the 11th day of March, did not change the previous title of the trustees. These two sales were intended only as a compliance with the Act of Congress of the United States.

*Van Blascum & Hayes* paid nothing, in the eye of our law, for the ships; for two dollars cannot be viewed as a serious consideration for two ships estimated at \$20,000. C. C. 2439.

The intervenors were, therefore, nothing more than trustees, and they had incurred obligations towards the New York preferred creditors which could only be enforced in a court of chancery.

Now, by the law of England and New York, as well as most countries, the transfer of a ship at sea can be made by writing, provided delivery be obtained as soon as convenient on the return of the ship. The transfer, therefore, requires its completion by delivery, or taking possession.

But at the time it was sought to perfect this contract by delivery the ships were within the jurisdiction of Louisiana, and in all matters not national subject to her laws.

By the laws of Louisiana, the deed of trust thus sought to be perfected is deemed in fraud of creditors. Moreover, as to one of the ships, it was in the custody of the law before the agents of intervenors attempted to take possession, and

SOUTHERN BANK  
v.  
WOOD.

in the other the possession assumed within the limits of Louisiana has been disregarded, and the ship has been seized notwithstanding. Here arises, then, a conflict of laws, and the question is, which shall prevail? Will our courts, which look with disfavor upon trusts, and regard all assignments for the benefit of preferred creditors as fraudulent, enforce, to the prejudice of their own citizens, an instrument which only became perfect by an act done within our own territory, and, in one instance, after the property had been placed in the custody of their officers?

If the trustee had obtained possession prior to the ships arriving in Louisiana, there would be reason to maintain his possession as bailee. In this case, however, the intervenors are compelled to ask the courts for assistance to obtain actual possession of property which they never had in their possession out of Louisiana, and for which they paid no value, in order that they may sell and distribute the same to the citizens of other States, and to the exclusion of our own. I am not aware of any instance in which the comity of nations has been carried to this extreme. I would respect the rights of trustees which were absolutely perfect before the property arrived in Louisiana, but imperfect rights should not be consummated within our territory to the detriment of our own citizens.

LAND, J., concurs in this opinion.

Re-hearing refused.

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PAUL G. GLEISES v. McHATTON—Same v. ROMAGOSA.

Where it appeared that a sale was made for cash but it is shown that no money was paid, and it was understood between the parties that the property was conveyed in trust to the apparent vendee, he assuming to pay the debts due on the property, and it was agreed that when these debts were paid the property was to be reconveyed. *Held*: that such a sale was a mere simulation, and that creditors of the vendor seizing such property under execution, have a right to maintain the seizure by showing the simulation.

*Held*, also, that where there is a delivery of the property under such a contract, it is a contract of pledge, and the party in whose favor it is made, has no right to enjoin the sale of the property under execution, but should proceed by way of third opposition to claim a priority of privilege upon the proceeds of the sale.

**A**PPEAL from the Fourth District Court of New Orleans, *Price, J.*  
*Durant & Horner*, for plaintiff and appellant. *Mott & Fraser and C. Roselius*, for defendants.

BUCHANAN, J. The sale of the 17th October, 1857, under which plaintiff claims, appears to be a simulation, as decided by the District Judge.

It professes to have been made for the consideration or price of \$18,500 cash in hand, paid by the purchaser to the seller.

Now, it is proved and admitted that no money whatever was paid.

An obligation with a false cause or consideration can have no effect. C. C. 1887.

But Article 1894 says, that if the cause or consideration expressed in the contract does not exist, yet the contract is good, if the party can show the existence of a true and sufficient consideration.

What is the consideration that the party has shown in this instance?

The assumption of a debt to *Alexander Bonneval*, secured by mortgage on the property mentioned in the sale under consideration, and other property, to-wit: a

GLENN  
McHATTON.

tract of land on the Bayou St. John, in this parish. To warrant him against the consequences of this assumption, plaintiff ostensibly became the purchaser at Sheriff's sale of the land on the Bayou St. John, seized under *Bonneval's* mortgage which had been assigned to plaintiff for a nominal sum of eight thousand dollars; and at private sale of the Mississippi land and slaves, the sale now under consideration for a nominal price of \$18,500, the total amount of the *Bonneval* debt, as stated by plaintiff, including interest, costs, lawyer's fees, &c., was \$17,436 93.

The evidence shows that all this property was thus conveyed in trust for the payment of the indebtedness of *Ducayet* thus assigned, and with the understanding that it was to be reconveyed when the debt should be extinguished.

The contract was therefore under the consideration proven not a sale, but (granting that it was followed by delivery,) a pledge.

It was a simulated sale, that is to say, it had the appearance, but not the reality of a sale. And the defendants, as was said in *Erwin v. The Bank of Kentucky*, 5 An. p. 4, have a clear right to maintain their seizure, by showing that simulation. Considered as a pledge of the property, the plaintiff had no right to enjoin its sale under the executions of the defendants. He should, in strictness, have proceeded by way of third opposition, to claim a priority upon its proceeds. But it is not necessary to put the plaintiff out of court upon this technical ground, for we have evidence in the record that enables us to dispose of his claim, considered as a third opposition of a pledgee. The evidence shows that the liabilities, to secure which the pledge was given, have been extinguished, or at least that they ought to be, funds having been realised from sales of the pledged property, made by plaintiff, sufficient in amount to cover, and more than cover those liabilities.

1. Plaintiff sold to *James Arthur Blanc*, on the 27th January, 1858,  
a portion of the Bayou St. John property, for..... \$8,461 25
2. He sold to *J. L. Tissot*, on the 29th April, 1858, the remainder  
of the said property, for..... 6,000 00
3. He sold to *Charles M. Simpson*, on the 6th February, 1858, the  
tract of land in Jackson Co. Miss., (*Pascagoula*.) for..... 11,000 00

Total..... \$25,461 25

The *Bonneval* debt, assigned to plaintiff, we have seen, was..... 17,436 93

Excess, after satisfying plaintiff,..... \$8,024 32

It is said by the witness *Simms*, that plaintiff had endorsed for *Ducayet*, to the extent of \$8000. It is not shown that plaintiff has paid any of those endorsements; on the contrary, it is proved by *Hepp*, that he refused to pay one of them, \$4000, on the plea of usury. But even had plaintiff paid those endorsements, they were no part of the consideration of this sale or pledge, and consequently confer no privilege upon the pledged property. Indeed, the amount of that pledge could not, legally, exceed the amount mentioned in the Act, viz: \$18,500. Lastly, supposing the endorsements paid, and they were covered by the pledge, plaintiff has sold for enough to reimburse himself in full. Plaintiff is therefore without any claim, either legal or equitable, upon the six slaves seized under the executions of the defendants.

As to the possession of plaintiff under the bond, said to have been given in Mississippi for the forthcoming of some slaves, it is irrelevant to this case. In the first place, neither in his petition against *McHatton*, nor in that against *Roma-*

GLEISES  
v.  
McHATTON.

*gisa*, does plaintiff set up title to the slaves seized, under his forthcoming bond, nor is that bond so much as mentioned therein. •

In the next place, there is no such bond, nor the record of any Mississippi suit in evidence, and the witness, *Blocker*, who testifies that there was such a suit and and such a bond, does not tell us the names of the negroes who were claimed by the present plaintiff in that suit. He says, "*Mr. Gleises afterwards gave bond for four of the slaves. Five slaves had been seized, but only four were claimed by Gleises. Moses was left over there in Mississippi, and was not claimed by Gleises.*"

This testimony was taken, like all the rest, in the two injunction suits, which were tried together. Now, in that against *McHatton*, it is alleged that two slaves named *Sam* and *Octave*, had been seized by defendant; and in that against *Romagosa*, it is alleged that defendant had caused to be seized four slaves, named *Webb*, *Charles*, *Silas* and *Alfred*; all of whom, being six in number, are claimed by plaintiff, by virtue of the conveyance from *Ducayet*, of the 17th October, 1857. There is nothing in the record to show, which of these negroes named, are the negroes bonded by *Gleises* in Mississippi. It is, therefore, needless to enquire what kind of title or right to the negroes, the Mississippi forthcoming bond may have vested in plaintiff, inasmuch as there is neither allegation nor proof, to support any claim upon that ground.

The judgment of the District Court is therefore affirmed, with costs.

LAND, J., dissenting. The defendants, judgment creditors of *Felix Ducayet*, having caused certain slaves to be seized as his property, under executions issued on their judgments, the plaintiff enjoined the sales on the ground that he was the legal owner and in possession at the time of the seizure.

The answers of defendants deny the ownership of plaintiff, and aver that his title is a simulation, accepted by him for the purpose of defeating the just pursuits of the creditors of *Ducayet*, and that his possession was for the same purpose, and commenced only on the day preceding the seizure under the executions.

The questions presented by the pleadings, and the one decided by the court below, is whether the *title*, under which plaintiff claims the slaves, is a simulation.

The facts on which the District Judge rendered judgment in favor of defendants, are thus stated by him :

"Plaintiff claims certain slaves seized by the Sheriff of the parish under executions issuing in favor of defendants against *F. Ducayet*, which were about being sold to satisfy said executions when plaintiff enjoined the sale. The plaintiff claims under an act of sale from *Ducayet and wife*, of the date of 17th October, 1857, and the consideration of the sale is stated in said act to be \$18,500. Defendants aver this act of sale is simulated. The evidence shows that *Ducayet* being largely in debt to *Bonneval, Schreiber & Co.*, mortgaged to them certain property situated on the Bayou St John, and seven slaves, (part of whom are the subject-matter of this suit,) and executed a deed of trust on certain property in Jackson County, Miss., to secure the said indebtedness. By an agreement between plaintiff and *Bonneval*, plaintiff assumed *Bonneval's* position towards *Ducayet*. *Bonneval* transferring to plaintiff all his securities, and plaintiff executing his obligations in favor of *Bonneval* for the amount of *Ducayet's* debts to *Bonneval*, so that *Ducayet* became the debtor of plaintiff to this amount. Plaintiff had also endorsed notes for *Ducayet* to the amount of \$8000, and in order to secure plaintiff on account of these two indebtedness, *Ducayet* made the sale of the negroes seized and the Jackson County property. The witness, *Simms*, speaks of this sale as a security and not as a veritable sale."

GLEISES  
v.  
McHATTON.

In addition to these facts, it may be stated, that the property conveyed by *Ducayet* to the plaintiff consisted of two tracts or parcels of land situated in Jackson County, State of Mississippi, and seven slaves, also in said county and State, the place of domicil of *Ducayet*. That the slaves were left by plaintiff in the possession of *Ducayet*, and that four of them were attached by the creditors of the latter in the State of Mississippi, and that the plaintiff upon a claim of ownership, under his title from *Ducayet*, was permitted under the laws of that State to bond them. That he removed the slaves from the State of Mississippi to this city, where they were seized by the Sheriff, under the execution of *Romagosa*, as the property of *Ducayet*. And that the two slaves seized under the execution of *McHattton*, had been removed from the State of Mississippi only a few days before by *Ducayet*, but that they were, as the other four slaves, in the possession of the plaintiff at the time of the seizure..

The consideration of the contract between plaintiff and *Ducayet*, which they put into the form of a contract of sale, was, first, an indebtedness of *Ducayet* to *Gleises*, and secondly, the liability of *Gleises* as the accommodation endorser of *Ducayet*.

The District Judge came to the conclusion upon the evidence that there was a real contract between the parties,—but that as the real contract was one of mortgage or suretyship, that the apparent contract of sale was therefore a simulation.

To form a real contract of sale, it is not essential that the consideration should be paid in money,—the indebtedment of the vendor to the vendee, will constitute, in the sale of a slave, a legal and sufficient consideration. *Weld v. Peters*, 1 An. p. 432. In that case, the consideration of the sale was very similar to the consideration shown by the evidence in this case. In the case cited, the vendee had possession of the slave from the date of the sale, and the court held that the conveyance to him could not be treated by a judgment creditor of the vendor as null, and that a direct action was necessary to avoid the contract.

In the case before the court, the possession of the plaintiff, under his act of sale, commenced only a day or two prior to the seizures of defendants, and then in consequence of the pursuit of *Ducayet's* creditors in the State of Mississippi.

The plaintiff, however, brings himself within the well settled rule which requires creditors to institute the revocatory action to set aside contracts having a real existence, but which have been made in fraud of their rights,—*he has a title absolute on its face, translativ of property, was in possession at the time of the seizure, and has shown that his title was based upon considerations which passed between Ducayet and himself.*

Whilst the evidence shows that the conveyance to the plaintiff was in fraud of *Ducayet's* creditors, it also shows a real contract between the parties in the form of a sale, and possession by the plaintiff. Under these circumstances the law requires the creditors to resort to the revocatory action. *Kirkland v. New Orleans Gas Light Co.*, 1 An. 299. *Weld v. Peters*, ib. 432. 2 An. 913

It is, therefore, my opinion, that the judgment should be reversed.

MERRICK, C. J., concurred in this opinion.

## JOHN COLEMAN v. MARY E. HAIGHT et al.

The failure of a lessor to maintain premises leased in a tenantable condition dissolves the lease, although such lessor be not at fault.

**A** PPEAL from the Third District Court of New Orleans, *Duvigneaud, J. Collens & Woolridge*, for plaintiff. *J. Q. Bradford* and *P. H. O'Neal*, for defendants and appellants. *J. S. Whittaker*, for intervenor.

MERRICK, C. J. This is an action for the recovery of rent. On the 27th of January, 1857, the plaintiff leased to the defendant certain premises, from 18th of February to the 31st of October, 1857, at sixty dollars per month, payable monthly, with *J. G. Goodall* as security.

In the month of March following, it became necessary to take down a wall of the house leased for the purpose of constructing a large building on the adjoining property, called the Seaman's Home, and about the middle of the month the premises were abandoned by the defendant as uninhabitable. This suit is brought to recover of the defendant the rent of the whole term.

The District Judge was of the opinion that there was no fault on the part of the plaintiff; that the pulling down of the party wall was no act of his; that the proprietor of the adjoining lot had an undoubted right to pull down the wall held in common in order to secure the building he was about to erect, and that neither the owner of the house, the wall of which was to be pulled down, nor his tenants could raise any complaint, and he cites Arts. 677 and 678 of the Civil Code in support for his conclusions.

It appears to us that the learned Judge of the court *a quo* has fallen into an error in supposing that the lessor when not in fault is exempt from the obligation to maintain the thing leased in a tenantable condition. This obligation is to guarantee to the lessee the enjoyment, *ut conductori re frui liceat*. In the language of the Code, he is bound by the very nature of the contract to maintain the thing in a condition such as to serve the use for which it is hired, and to cause the lessee to be in peaceable possession during the continuance of the lease. (C. C. 2662) and this guaranty extends to vices and defects which prevent the thing from being used even if it appear that the lessor knew nothing of their existence, (C. C. 2665), and the lease may be annulled, or the rent diminished, even if the thing be partially destroyed or taken for public utility. C. C. 2667. So too, "if without the fault of the lessor, the thing ceases to be fit for the purposes for which it was leased, or if the use be much impeded, as if a neighbor, by raising his walls shall intercept the light of a house leased, the lessee may, according to circumstances, obtain the annulment of the lease, but has no claim for indemnity." C. C. 2669. So too, in regard to repairs; the whole rent is to be remitted if the repairs have been of such a nature as to oblige the tenant to leave the house, or the room, or to take another house, while that which he had leased was repairing. C. C. 2670.

In this case, it has been proven by one witness that the defendant consented to the pulling down of the wall, but we cannot think, in the absence of testimony to that effect, that the tenant intended to make the lessor a donation of the rent during the building of the new wall, or to do anything more than release him from his obligation of lessor.

COLEMAN  
v.  
HARGRE.

The house became untenable; the work drove away defendant's boarders, destroyed her furniture, and compelled her to obtain another house.

Three witnesses testify that plaintiff told defendant to occupy the back building until she could suit herself, or do better, and after she left he took possession of the property, and subsequently leased the same to a tenant under a protest that he did it for the benefit of the defendant, and to hold her responsible for the residue of the rent.

The rent for the month of February appears to have been paid, and the proof shows that subsequently the defendant was more injured than benefited by the short occupancy of the premises with her furniture.

The intervenor has not appealed from the judgment, which takes no notice of his demand.

It is, therefore, ordered, adjudged and decreed, by the court, that the judgment of the lower court be avoided and reversed, and that there be judgment against the plaintiff's demand and in favor of defendants, with costs of both courts.

STATE OF LOUISIANA, on the relation of Mrs. M. E. BOISSAC, v. A. PETIT,  
Recorder of the Parish of Iberville.

On the removal of a tutor from one parish to another, the Judge of the *new domicile* of the tutor is the one having jurisdiction over the affairs of the minor.

**A** PPEAL from the Sixth District Court of East Baton Rouge, *Beale, J.*  
*E. Phillips*, for plaintiff. *Zenon Labauve*, for defendant and appellant.

MERRICK, C. J. "On the 2d day of March, 1857, *Mrs. Boissac*, the plaintiff, assisted by her husband, *T. M. Boissac*, sold to *E. L. Sigur*, a plantation and slaves, situated in the parish of Iberville, and in the act of sale there was inserted the following clause: 'And here it is distinctly understood by the parties to this act, that as there exists a tacit mortgage on all the property of the present vendress in favor of her minor children, issue of her marriage with her first husband, *Robert Sewall*, deceased, the full amount of which tacit mortgage is not known at present. It is therefore agreed between the parties, that the five notes herein described, shall remain deposited in the hands of the Recorder of the Parish of Iberville, until the full amount of said tacit mortgage be legally known, and when known, a sufficient number of said notes amongst those that will be the last due, shall remain in the hands of said Recorder, until said tacit mortgage be duly cancelled.'"

"The plaintiff now claims the notes from the Recorder, upon the ground that the legal mortgage spoken of in the act of sale has been cancelled and released, and a special mortgage given in its stead. All the parties in interest have been made parties, and have appeared and filed their answers, to-wit: *E. L. Sigur* and *J. J. B. Kirk*, under-tutor to the minors."

"The answer of *Sigur* alleges that the proceedings had to give the special mortgage, and release the legal mortgage, were irregular and illegal from the commencement to the end, and that the tacit and legal mortgage is still in force in favor of the minors."

STATE  
v.  
PETIT.

"*P. O. Hébert*, the under-tutor, being unable to discharge his duties in consequence of the removal of the minors to another parish, resigned his office, and *Mr. Kirk* was appointed in his place."

The removal of the tutrix was from the Parish of Iberville, in the Sixth Judicial District, to the Parish of Avoyelles, in the Thirteenth District. The resignation of the under-tutor was accepted and a new under-tutor appointed by the Judge of the Thirteenth Judicial District, the new domicile of the tutrix. Such proceedings were had in the Parish of Avoyelles and authorized the tutrix by a decree of the court to substitute a special mortgage in favor of her minor children in the place of the tacit mortgage. The special mortgage having been executed was also accepted and approved by a decree of the court, and the tacit mortgage cancelled.

*E. L. Sigur* has appealed.

He presents two questions for our consideration.

I. Whether the District Court for the Parish of Avoyelles had jurisdiction, and whether the proceedings are regular and legal and the tacit mortgage cancelled.

So far as the question of jurisdiction is concerned, we have to say, that the Judge of the Sixth Judicial District properly declined to receive the resignation of the former under-tutor. The Judge having jurisdiction over the domicile of the tutrix was the one having jurisdiction over the affairs of the minors, for their domicile is attendant upon that of their tutrix. The proceedings were conducted before the right Judge, as has been heretofore determined by this court in several decisions. See *State v. Bermudez*, 14 L. R. 484: same v. *Judge of Probates of New Orleans*, 2 Rob. 418. *Succession of R. Winn*, 3 Rob. 303.

If there are any supposed irregularities in the proceedings of the family meeting and the decree of the court vitiating the same, it is the duty of the appellant to call them to our attention. As we find the District Court had jurisdiction, we shall presume that its proceedings were regular and obligatory, until we hear some specific objection made against them.

II. "*Louis A. Marchand* sold this plantation to the plaintiff the same day that he was appointed tutor to the minor *Babin*. Is not this property tacitly mortgaged in favor of said minor for an amount exceeding \$2000, received afterwards by said tutor."

This suit is not brought against the vendee to recover judgment for the price of the purchase, but to obtain notes not yet due amounting to \$22,500, deposited with the Recorder, and to be delivered up on a certain condition, which has happened.

If this be a case in which the vendee could require the vender to give security under Art. 2535, C. C., we think he should at least be held to make his proof certain. As correctly observed by the District Judge, it is not shown that *Marchand* was appointed tutor before he passed the act of sale; moreover, he may have ample means to pay off his ward.

Judgment affirmed.

LAND, J., absent.

## B. SALOY v. P. E. CHEXNAIDRE.

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The Act of 1844, which gives to the survivor the usufruct of the community property, does not dispense the party who claims the benefit of its provisions from having an inventory taken.

A widow in community who, before she has qualified as administratrix, or tutrix, stipulates in writing for the extension of a debt, and makes payments upon it, is presumed to have accepted the community, and her subsequent renunciation of it, on her qualifying as tutrix and administratrix, will not avail her in a suit brought upon the debt which she had acknowledged, to hold her liable for it as partner in the community.

The tutrix and widow in community administers the succession only so long as it is not entrusted to an administrator; and when her power over the succession is superseded by the appointment of an administrator, in order to bind the succession for a debt, the new representative of the same should be made a party.

A mortgage being indivisible and only accessory to the debt, a decree cannot properly be rendered for the sale of the property mortgaged, in an action *via ordinaria*, without parties before the court against whom a judgment may be rendered for the whole debt.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
*E. Fillevl*, for plaintiff. *H. R. Grandmont*, for defendant and appellant.

MERRICK, C. J. This is an action *via ordinaria*, to subject the mortgaged property to the payment of the debt of *P. E. Cheznaidre*, deceased, and to obtain judgment against the widow in community, in her individual capacity, for one-half, and against her, as tutrix for her minor children, for the other half. Judgment having been rendered against the defendant individually, and as tutrix, she appeals.

The mortgagor, *P. E. Cheznaidre*, died in February, 1855. The widow took no steps to procure an inventory or qualify as tutrix, until August, 1858. In the interval she appears to have retained possession of the property. She made an arrangement each year for the prolongation of the term for the payment of the note in question, and paid one hundred dollars in part satisfaction of the same, besides paying the annual interest.

Having subsequently obtained letters of tutorship and administration, and having renounced the community, the question is raised, whether her renunciation can now avail her, or whether she is personally bound for one-half of the debts of the community.

It is urged, that her neglect to take an inventory cannot prejudice her, because she was entitled to the usufruct of the property under the Act of 1844. Without undertaking to decide whether the mere neglect of a widow in community to take an inventory will render her chargeable for one-half of the debts, we observe that the Act of 1844 does not dispense the party who claims the benefit of that statute, from taking an inventory. C. C. 550; *Neely v. Stokes*, 13 An.

In this case, the widow not only remained in possession of the estate without an inventory, but before she had qualified as tutrix, or as administratrix, she stipulated in writing for the extension of the debt of the succession, and made payments upon the same. She must therefore be presumed, in the absence of explanatory proof, to have acted in the only capacity in which she had authority to act, viz, as partner in community, and she is bound as such. C. C. 987, 988, 990, 995.

At the time the suit was commenced, the widow had qualified as tutrix, but had not been appointed administratrix. It was, therefore, properly commenced.

SALOY  
v.  
CHEXNAIDRE.

but in order to obtain a judgment against the succession, it became necessary subsequently that the administratrix should be made a party. The tutrix and widow in community administers the succession only so long as it is not entrusted to an administrator or administratrix. So soon as an administratrix is appointed, the tutrix's power over the succession is superseded, and in order to bind the succession for a debt, the new representative of the same should be made a party. C. P. 976; 2 An. 462; 3 An. 503; C. C. 1051; 12 An. 345.

The judgment against the defendant, as tutrix of her minor children, does not, therefore, bind the succession, and could only be enforced against such other property as the minors may happen to own. Now, as the law accepts the succession for the minors with the benefit of inventory, a judgment ought not to be rendered in this form, which will bind their estates generally, and which may be enforced by an execution.

The judgment also compels the widow to pay more than one-half of the debt, for she is not allowed a credit upon her one-half for the payment which she has made.

It is somewhat inconsistent to charge her, as widow in community, with one-half of the debts of the succession, because the payment made by her could only have been made in that capacity, and then not to allow her a credit for the payment in the same capacity.

We think the widow is entitled to the credit of one-hundred dollars on her proportion of the debt.

The action is *via ordinaria*, and plaintiff demands a judgment against his debtors, and also a decree that the mortgaged property be sold to satisfy the debt. In this respect, the case differs from the case of *McCalop v. Fluker's Heirs*, 12 An. 551, where executory process issued, and where the notices were served on the tutrix and widow in community before she had qualified as administratrix, but did not become void for that reason. The widow in that case took the appeal as administratrix, and the subsequent notices were doubtless served upon her as such. 12 An. 345.

The mortgage being indivisible and only accessory to the debt, a decree cannot properly be rendered for the sale of the property, in this form of action, without parties before the court against whom a judgment may be rendered for the whole debt. C. P. 67. It is in this sense that a mortgage is indivisible. C. P. 66, 67; C. C. 1382, 2108.

We think the case ought to be remanded for a new trial, with leave to the plaintiff to amend by making the administratrix a party defendant.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and the case be remanded to the lower court for further proceedings and a new trial, the plaintiff having leave to amend, and he paying the costs of the appeal.

## JAMES A. SCUDDY v. W. A. SHAFFER—McMASTER, Warrantor.

An appeal will not be dismissed because the warrantor has not been made a party to the appeal, where the defendant has abandoned all right of appeal against his warrantor.

The judgment of the lower court was not reversed, because the judge refused to compel experts to report after the expiration of the time appointed for them to report. In a case of this kind, it was a matter of discretion with the judge whether he would do so, or leave the parties to the benefit of the testimony of the experts before the jury.

**A**PPEAL from the District Court of the Parish of Terrebonne, *Roman, J. Beatty & Bush*, for plaintiff. *Connelly & Rightor*, for defendant and appellant.

MERRICK, C. J. The plaintiff has moved to dismiss the appeal taken by the defendant, *Shaffer*, because he has not made his warrantor a party to the same. The motion appears to be sustained by the authorities. See *Williams v. Courtney*, 9 An. 99; *Oliver v. Williams*, 12 Rob. 180; *Blanc v. Cousin*, 8 An. 72; *Hewson v. Creswell*, 10 An. 232.

It is, therefore, ordered, adjudged and decreed by the court, that the appeal in this case be dismissed at the costs of the appellant.

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SAME CASE—ON A RE-HEARING.

MERRICK, C. J. A re-hearing having been granted in this case, on a reconsideration of the question, we think the appeal may be maintained, as we understand the defendant has abandoned all right of appeal against his warrantor.

The case was before this court on the question of title in 1855, and is reported in 10 An. 133. The question now presented grows out of the improvements and rents.

There is a bill of exception to the refusal of the District Court to compel the experts to report after the expiration of the time appointed for their report. We cannot say that the judge erred. It was a matter of discretion with him whether, in a case of this kind, he would do so, or leave to the parties the benefit of the testimony of the experts before the jury.

On the merits, there is some conflict of testimony, and some of it appears to have been disregarded by the jury. But looking to the situation of the land and the proof, we can safely say that the improvements have benefited plaintiff's place in a sum equal to the value of the rent while in possession of defendant.

It is, therefore, ordered, that the judgment of the lower court be avoided and reversed, and that there be judgment in favor of the defendant in plaintiff's original demand, and in favor of the plaintiff on defendant's reconventional demand, and that the plaintiff pay the costs in both courts.

LAND, J., absent.

## STATE v. JAMES MULLEN.

In a capital case it is competent for the State to show the disqualification of a juror by interrogating the juror himself as to any conscientious scruples he may have against inflicting the punishment of death.

The Article of the Constitution which requires prosecutions to be by indictment or information, does not prevent the Legislature from prescribing the forms of such instruments.

The definition of the offence of murder, as known under the common law of England, is the true definition of the crime of willful murder, the punishment of which is provided for by the first section of the Act of the Legislature of 1855, relative to crimes and offences.

If *A* threatens to take the life of *B*, or to do him great bodily harm, and *B* being informed of the threat, arms himself for the true and sole purpose of self-protection, and the parties subsequently meet without design, and *A* draws a deadly weapon and approaches *B* with the apparent intention to assault him with it, and *B* believes that he is in danger of his life or great bodily harm, and has no way of avoiding his adversary, advances upon him and kills him, the killing is justifiable in self-defence.

But if *A* threatens *B* with personal violence, and the threat is communicated to *B*, and *B* thereupon arms himself with a deadly weapon, and meeting *A* kills him, while *A* is not making any hostile demonstration against *B*, the killing is willful, deliberate, malicious, and is murder.

Voluntary drunkenness, when no provocation has been given, furnishes no excuse for the act of killing another.

**A** PPEAL from the First District Court of New Orleans, *Hunt, J.*

*E. W. Moise*, Attorney General, for the State. *T. J. Durant*, for the appellant.

**MERRICK, C. J.** The accused having been convicted of the murder of one *James McGlone*, and sentenced to suffer the penalty of death, prosecutes this appeal.

He relies for a reversal of the judgment upon several supposed erroneous rulings of the District Court.

I. The first which he presents to our consideration is contained in a bill of exception taken to the interrogatory propounded by the Attorney General to the two jurors, *James Bradley* and *H. Collier*, "whether they had conscientious scruples against finding a verdict which might result in the death of the prisoner?"

The counsel for the accused does not controvert the right of the State to show *aliunde* the incompetency of the jurors in this respect, but contends that the question relates to a matter of conscience, for which the juror is not responsible nor compelled to answer in a court of justice; that virtually, the question appeals to the juror's conscience to ascertain whether he approves of the laws of his country and is calculated to bring him into discredit and contempt with his fellow-citizens.

The conscientious scruples against inflicting the punishment of death, is a good ground of challenge to a juror in a capital case, is now too well settled to be doubted. See *State v. Kennedy*, 8 Rob. 594; *State v. Melvin*, 11 An. 536; *State v. Costello*, 11 An. 284; *State v. Nolan*, 13 An. 276.

The general rule in regard to evidence is, that the best evidence of which the nature of the case admits, ought to be required. The juror, beyond all question, has a more certain knowledge of the condition of his belief, and can enlighten the court on that subject, better than any other person. Why should not the court apply to the juror himself to ascertain the condition of his mind precisely as it does where he is suspected of partiality or prejudice?

It is said, because it will degrade the juror and because it is a matter of con-

science and belief beyond the control of the juror, about which he ought not to be questioned.

The first of these objections appears to us to be unfounded in fact. We doubt whether it would produce any effect upon the juror in public estimation.

In respect to the other objection, it is true that the objection to disqualify a witness on the ground of a want of a religious faith, ought to be proven *aliunde*. But then the rule may have originated in the supposition, that if the witness were really unworthy of evidence on account of his atheism, he ought not to be trusted to declare what his religious faith is. That the party who makes a charge, carrying with it some degree of odium, ought to be held to be consistent himself, and required to prove his charge *aliunde*.

But the question propounded by the Attorney General to the jurors in this case, does not assume that they are wanting in a religious belief, or a respect to the laws of the land, but simply inquires, whether there is any mental obstacle which will prevent an impartial discharge of their duties as jurors in the particular case for which they are summoned. Moreover, it would occasion great inconvenience to establish the rule contended for, and a formal objection, supported by the oaths of other witnesses, would be much more objectionable to the feelings of the jurors, than to submit the question at once to the juror himself. If the juror does not object to answer, the accused has but little reason to complain, because the State has adduced the most satisfactory evidence on the point to be decided. See *People v. Damon*, 13 Wendall, 351; *State v. Jewell*, 3 Rob. 583; Main State Reports, *Pierce v. State*, 13; N. C. 537, 556; *Clare's case*, 8 Grattan, 606; *Gross v. State*, 2 Carter's Ind. 329; *Jones v. State*, 2 Blackf. 475; *Fletcher v. State*, 6 Humph. 249; *U. S. v. Fries*, 3 Dall. 517; *Com. v. Knepp*, 10 Pick. 480, note—for cases where the juror was interrogated.

II. It is next objected, that the indictment does not show that the deceased died within a year and a day after the wound was inflicted, as required at common law. The indictment is framed as required by the third section of the Act of 1855, p. 172, and charges, that on the 28th day of July, 1858, the prisoner, at the parish of Orleans, &c., did feloniously, and of his malice aforethought, kill and murder one *James McGlone*. The first paragraph of the third section of the Act of 1855, it is true, declares, that in an indictment for murder or manslaughter, it shall not be necessary to set forth the manner or the means by which the death of the deceased was caused, but we think this special provision does not limit what immediately follows, wherein the lawgiver declares: That "it shall be sufficient in every indictment for murder, to charge that the defendant did feloniously, willfully, and of his malice aforethought, kill and murder the deceased." The indictment having followed the statute is sufficient.

If the prisoner killed the deceased on the 28th day of July, 1858, he must, of course, have died the same day. The Article of the Constitution, which requires prosecutions to be by indictment or information, does not prevent the Legislature from prescribing the forms of such instruments. It only means that the charge against the accused shall be preferred by a Grand Jury in the form of an indictment, or in an information to be filed by the proper officer. Art. 103 Const.

III. The second section of the Act of 1855, p. 130, which declares that there shall be no crime known under the name of murder in the second degree, and authorizes the jury to find the prisoner guilty of manslaughter, does not confine the crime of murder to cases where the homicide is perpetuated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated

STATE  
v.  
MULLEN.

killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, as was provided by the Act of July 3d, 1805, but leaves the definition of the offence as defined and known under the common law of England. The first section of the Act of 1855, is almost a literal reenactment of the third section of the Act of 23d of January, 1805. It provides, that whosoever shall commit the crime of willful murder, on conviction thereof, shall suffer death. Act of 1855, p. 130; 2 Martin's Dig. 228; Bullard & Curry, 242.

By the Act of 1805, still in force, it is provided, that all crimes, offences and misdemeanors, shall be taken, intended and construed, according to and in conformity with the common law of England. To ascertain, then, what constitutes the crime of willful murder, we must have recourse to writers on the common law. The District Judge did not, therefore, err in refusing to charge the jury, that the word "willful," was used in the statute in the sense of "premeditated," and that the Legislature intended to modify the crime as known at common law.

IV. Neither can we say that he erred, to the prejudice of the accused, on the two other points, 5th and 6th, requested by the counsel for the accused, to be given in charge to the jury. We will copy the charge requested and charge as given.

The Judge was requested to charge, 5th: "That if the jury find from the evidence, that there had been treats of personal violence by the deceased towards the prisoner, which had been communicated to the prisoner before the killing, and the jury think that these threats were sufficient to cause *Mullen* to think that *McGlone* was about to assail his life, or thought that his life was in danger, then, in law, there was no malice in the prisoner and he cannot be found guilty of murder."

The Judge said: "The charge asked for on this point, is not sufficiently distinct. The court charges, if *McGlone* threatened to take *Mullen's* life, or to do him great bodily harm, and *Mullen* was informed of the threat, and thereupon armed himself for the true and sole purpose of self-protection, and *McGlone* and *Mullen* subsequently met, without design, and *McGlone* drew a deadly weapon and approached *Mullen*, with the apparent intention to assault him with it, and *Mullen* believed he was in danger of his life, or great bodily harm, and had no way of avoiding his adversary, and advanced upon *McGlone* and slew him, and the jury are satisfied of these facts, and are of opinion that *Mullen* acted upon a *bona fide* reasonable ground of apprehension as stated, then the killing was justifiable in self-defence, and the jury are bound to acquit the defendant. But if *McGlone* threatened *Mullen* with personal violence, and assault and battery, or great bodily harm, and the threat was communicated to *Mullen*, and *Mullen* thereupon armed himself with a deadly weapon and met *McGlone* and slew him, while *McGlone* was not making any hostile demonstration against him, the killing was willful, deliberate and malicious, and is murder."

The 6th point requested to be given in charge to the jury was: "That if the jury believe from the evidence, that *Mullen*, when he committed the act with which he is charged, was intoxicated, they must give due weight to this fact in determining not only the question of premeditation, but also in judging whether the prisoner acted from previous malice or from sudden impulse, and they must also judge whether this intoxication did not excite a belief in the mind of the prisoner, that he was about to be attacked, and that any of these circumstances will go to do away with the legal presumption of malice."

The District Judge charged on the 6th point, that: "The instruction asked for, refers to a doctrine on the subject of murder, heretofore partly considered," (viz, in defining willful murder,) and to be further treated of by the court, and is understood to look to the killing as resulting immediately from a state of voluntary intoxication.

"Voluntary drunkenness cannot excuse from the commission of a crime; and an offender, under the influence of intoxication, can derive no privilege from a madness voluntarily contracted, but is answerable to law, equally as if he had been in the full possession of his faculties at the time. In general, insanity is an excuse for the commission of every crime, because the party has not the possession of that reason which includes responsibility; an exception is, when the crime is committed by a party while in a fit of intoxication, the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct, to shelter himself from the legal consequences of such crime. 5 Mason, 29, J. Story."

"Drunkenness may be taken into consideration in cases where, what the law deems sufficient provocation, has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger, excited by the previous provocation, and that passion is more easily excited in a person when in a state of intoxication, than when he has the full possession of all his faculties. But where no such provocation has been given, drunkenness furnishes no excuse."

"A killing by the prisoner under a belief springing immediately from his voluntary drunkenness, that he was about to be attacked, when that belief was entirely unfounded in fact and in reason, and when the jury are of the opinion that he had no reasonable ground for the belief, is not a circumstance that can go to do away with the legal presumption of malice." See Bishop's Criminal Law, sec. 300, p. 238.

V. The seventh point excepted to, has already been considered by us under the second head in this opinion. We discover no error in the charge, even if the validity of the indictment be considered a proper matter to be given in charge to the jury.

Our examination of this case has not enabled us to discover any error of law to the prejudice of the prisoner.

The judgment must be affirmed.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be affirmed; and that the defendant and appellant pay the costs of the appeal.

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#### JOHN CLARK v. A. M. HOLBROOK et al.

When a supplemental petition is filed, in which a larger amount is claimed than was demanded in the original petition, such amendment is material, and should be served upon the defendant, and regularly put at issue; and when this is not done, it will be presumed that plaintiff has waived or abandoned it.

**A** PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*  
G. S. Lacy, for plaintiff. L. Madison Day, for defendants and appellants.

CLARK  
v.  
HOLBROOK.

LAND, J. This suit is for the recovery of damages for an alleged violation of contract. The defendants, through their treasurer, *R. Tenbroeck*, entered into a contract with the plaintiff, to build on the Metairie Race Course, a stand, two sets of stables, and a cistern, and obligated themselves to pay to him five hundred dollars, "*when there was work enough done to amount to seven hundred and fifty dollars,*" and for the balance of the price of the work stipulated, that plaintiff should have "*free use of the Race Course, stands, stables, gates, &c., for each week succeeding the regular meetings of the Metairie Jockey Club.*"

The regular meeting of the Club for the spring of 1855, commenced on Monday, the 9th day of April, and the defendants having refused to permit the plaintiff to have the free use of the course, stand, stables, &c., on the following Monday, April 16th, 1855, this suit was instituted to recover damages for the violation of contract on the day last mentioned.

We are satisfied from the evidence, that the first week of the regular spring meeting, ended on Sunday, April 15th, and that the plaintiff was entitled to the use of the course on the Monday following, when he was deprived of it by the defendants.

In his original petition, the plaintiff claimed the sum of twelve hundred dollars as the amount of damage sustained; to which the defendants filed an answer, denying all the allegations, except that of the execution of the contract, which was expressly admitted. The answer was filed May 11th, 1855, and on the 2d of May, 1856, the plaintiff filed a supplemental petition, in which he alleged, that the damage sustained by him, on account of the acts of the defendants, as set forth in the original petition, amounts to the sum of twenty-five hundred dollars, and prayed for judgment against the defendants *in solido*, for the same. The new demand of thirteen hundred dollars, contained in the supplemental petition, was never put at issue, either tacitly by a default or expressly by the answer of the defendants. The amendment was material, and should have been served on the defendants and regularly put at issue, and as it was not done, the plaintiff is presumed to have waived or abandoned it.

The judgment of the lower court was against the defendants for the sum of two thousand dollars as damages, with five per cent. per annum interest from the 1st of May, 1855. As the sum claimed in the original petition was only twelve hundred dollars, and as the supplemental petition was never put at issue, the judgment is erroneous.

It is, therefore, ordered, adjudged and decreed, that the judgment be reversed; and it is now ordered, adjudged and decreed, that the plaintiff do have and recover jointly from the defendants, *A. M. Holbrook, R. A. Porter, R. Tenbroeck, James Dunham, Duncan F. Kenner, and H. J. Ramsey*, the sum of twelve hundred dollars, as damages, with five per cent. per annum interest thereon, from the 1st of May, 1855, and the costs of the lower court. It is further ordered and decreed, that the plaintiff pay the costs of this appeal.

## W. A. SHAFFER v. J. A. SCUDDY.

In a petitory action, the defendant is bound to plead all the titles under which he claims to be owner, and a final judgment rendered in favor of the plaintiff may be pleaded as *res judicata* against any title which the defendant was possessed of at the time, but omitted to plead.

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| 14  | 575  |
| 106 | 582  |
| 14  | 575  |
| 109 | 586  |
| 14  | 575  |
| 112 | 1031 |

**A** PPEAL from the District Court of the Parish of Lafourche, *Roman, J.*  
*Connelly & Rightor*, for plaintiff and appellant. *Beatty & Bush*, for defendant.

COLR, J. On the 13th of May, 1858, *W. A. Shaffer* instituted the present suit in the District Court of Lafourche, claiming to be the owner of lots 5 and 6, in section No. 71, T. 17, R. 16, East, by purchase from *William J. Minor*, on the 23d of December, 1851, and praying "that he have judgment against said *Scuddy*, quieting him in his title, possession and enjoyment of the aforesaid lots five and six, in section 71, T. 17, R. 16, East; that said *Scuddy* be forever enjoined from setting up title to said tract of land and disturbing your petitioner in his possession and enjoyment of the same."

To this action *Scuddy* filed two peremptory exceptions and an answer.

The exceptions were sustained, and the action was dismissed.

Our view of this case renders it necessary to consider but one of the exceptions, which is the plea of *res judicata*, founded on the suit of *Shaffer v. Scuddy*, 10 An. 134.

It is admitted that the thing demanded in the present suit and in that in 10th Annual is the same.

It is contended, however, that the cause of action is not the same, because in the former action reported in 10 An. 134, *Shaffer* offered two titles in opposition to that of *Scuddy*, viz: one derived from *Madelaine Billio*, and the other obtained by *Shaffer* from the State of Louisiana; and that he bases this action upon a title derived from *W. J. Minor*.

In the former suit, *Scuddy* represented himself to be the owner of the land now in contestation, and prayed to be declared the owner and proprietor of the same.

The judgment of this court decreed *Scuddy* to be its owner, and also that he recover possession from *Shaffer*, of this tract of land, and that the case be remanded to be tried as to the claims of *Shaffer* against his warrantor. 10 An., p. 136.

In the former suit *Scuddy*, then, declared himself to be the owner of the land; but he could not be the real proprietor, if there existed an outstanding title superior to his. In proclaiming himself to be the owner, *Scuddy* in fact averred his title to be of higher rank than any other, and particularly, than any held by *Shaffer*, whom he directly sued as being in wrongful possession of the land.

The former suit was filed on the 8th of April, 1851; judgment therein was rendered by the District Court on the 24th of June, 1854, and by this court on the 9th of January, 1855. *Shaffer* avers to have derived his title from *W. J. Minor* on the 23d of December, 1851. Now, as the issue in the former suit was, whether *Scuddy* or *Shaffer* was the true owner of this land, it was the duty of *Shaffer* to have plead not only the titles derived from *Billio* and the State of Louisiana, but

SHAFFER  
v.  
SCUDDY.

also, that derived from *Minor*. As the last was not plead, it must be presumed that *Shaffer* had no confidence in the same.

When an issue is made between the parties to a suit, each is presumed to adduce all the evidence in his power to enable the issue to be determined correctly.

If one of the parties neglects or does not wish to introduce a part of his evidence when it is known to him, the issue cannot, after a final decision, be again opened to enable him to do so. If this were possible, litigation would be uselessly continued. If a party has four titles, he could institute in succession four different suits, instead of having the issue of ownership terminated in one suit. C. C. 2265 ; *Williams v. Close*, 12 An. 878. Even if the answer of *Shaffer* had been filed in the former suit, previously to the purchase of the title of *Minor*, this would not have hindered him from amending his answer and pleading the title of *Minor*, for the issue was, whether *Scuddy* or *Shaffer* was the owner of the land, and the amendment would have been pertinent to the issue.

It is also argued, that even admitting the demand to have been between the same parties, still, that *Shaffer* does not appear in the same capacity in both suits. That in the first suit he acted as the vendee of *McMasters* ; in this, he acts as the vendee of *Minor*, and that in the former suit he was a mere formal and technical defendant in the case ; *McMasters*, his warrantor, being the real defendant. Appellant relies upon *Millaudon v. McDonough*, 18 La. 103.

The record shows that *Shaffer* took an active part in the defence in the first suit ; but even conceding that he did nothing therein, except to cite his warrantor to defend it, still he was one of the defendants. He was directly sued as being in possession of land belonging to *Scuddy*. It was in the power of *Shaffer* to have plead the title of *Minor*, notwithstanding he had called *McMasters* in warranty. The latter was cited to defend the title he had sold to *Shaffer*, but not to maintain titles that *Shaffer* might have derived from other parties.

The call in warranty was merely one of the modes by which *Shaffer* could have defended the suit.

The issue of ownership contested not only the title derived from *McMasters*, but any other that *Shaffer* might have.

When a vendor of land is called in warranty by his vendee, in a suit in which plaintiff asserts himself to be the owner of the land, the vendee is as much a defendant as his warrantor. The latter is only called in to defend the title he has sold, whilst the vendee can defend his claim to the land not only by that derived from his warrantor, but by any titles he may have derived from other parties.

The warrantor is bound to defend the title he has sold, but the vendee can resist the ownership of plaintiff by any defence personal to himself and pertinent to the issue, and is thus a defendant as much as the warrantor. Besides, the vendee can defend the title derived from his warrantor, notwithstanding the latter has been called in to maintain it. In calling the warrantor, the vendee does not deprive himself of also upholding the title, that the former is called upon to protect.

Judgment affirmed, with costs of appeal.

## W. C. JACKSON v. J. W. HAYS.

Where a slave is sold with full guaranty, evidence is inadmissible which would contradict the written act of sale by showing that the slave was not warranted against a particular vice. But to rebut the allegation of fraud and concealment, parol evidence may be received to show that at the time the sale was about to be passed the vendor had stated to the vendee that the slave had once run away from him.

**A** PPEAL from the District Court of the Parish of Carroll, *Farrar, J.*  
*Sparrow & Montgomery*, for plaintiff and appellant. *Goodrich & Defrance*, for defendant.

COLE, J. Plaintiff purchased of defendant on 17th November, 1857, a slave, for which he gave his note for \$1500, and afterwards took it up and gave therefor in part cash and for the balance his draft, which was afterwards protested. He represents in this suit that the slave who was named *Dock*, was a rebellious and dangerous character, addicted to running away. That the defendant well knew of his vices of character at the time of sale; but intending to deceive petitioner, he omitted to declare his vices. That about the 29th of December, 1857, this slave committed the crime of rape upon a white woman in the Parish of Carroll, for which he was regularly tried, condemned and executed, according to the laws of the State. That previous to the perpetration of the crime, and whilst he was still in the ownership and possession of *Hays*, his vendor, this slave was frequently in the habit of visiting and prowling at night around the house and premises of said white woman with a design which ended in the commission of the rape. That the defendant well knew of said visits and intentions of the slave, and omitted to inform petitioner thereof, whereby he was entrapped into the purchase of this slave and defrauded.

That he received from the State of Louisiana as the value of the slave an amount in cash equal to that paid by him to defendant, and prays for judgment for the draft or its value in money.

Defendant pleads the general denial, except that he sold the slave, and plaintiff was as fully advised of his character as he was. He prayed that the demand against him be rejected, and that judgment be rendered in his favor for the amount of the draft, costs of protest, and of suit. The District Court rendered judgment for the defendant as prayed for, and plaintiff has appealed.

In this court appellant relies principally upon the allegation, defendant knew that this slave intended to commit the crime of rape.

It is impossible, the appellee could have certainly known that this intention would be executed. It seems difficult to see how he could have discovered with certainty, even that such design existed in the mind of the slave, for the latter would hardly have informed his master of his intention.

The evidence is somewhat conflicting, but we can see no reason to differ from the conclusion of the District Judge. The white woman upon whom the rape was committed testified that the slave was never at her house at any time. Her husband also corroborated the testimony of his wife.

Upon the trial plaintiff's counsel excepted to the ruling of the court, permitting the defendant's counsel to prove the general character of his client, and also his character as to truth and veracity.

JACKSON  
v.  
HAYS.

The court did not err.

The character of the defendant was directly attacked by the plaintiff in charging him with a knowledge and concealment of the criminal design of the negro to commit a rape, and he was entitled to rebut, as far as possible, an accusation so serious and disgraceful in its nature by his general reputation, and also to rebut the testimony tending to discredit his veracity by his general reputation as to truth and veracity.

There is also a bill of exceptions by defendant to the ruling of the court, refusing to permit him to prove by the notary who passed the act of sale, and by *Hilliard*, one of the witnesses to the act, that the defendant had stated to plaintiff that the boy *Dock* had once run away from him, and he would not warrant him in that particular.

The court properly refused the admission of testimony to show that the defendant did not warrant the slave against running away, for that would have contradicted the written notarial act of sale, which contained a full guaranty.

The court, however, erred in not allowing the defendant to prove he had stated to plaintiff at the time the sale was about to be passed, that this slave had once run away from him, in order to rebut the allegation in the petition of fraud and concealment by the defendant of the vice of running away.

This would not have contradicted the warranty in the act of sale, for a vendor may be willing to guaranty his slave against the habit of running away, if he has been but once guilty of this vice.

Judgment affirmed, with costs of appeal.

MERRICK, C. J., concurring. I concur in the decree without expressing an opinion upon all the points decided by the majority of the court.

### R. S. WAILES, Wife, v. SMITH C. DANIELL.

Decision in *Harper v. Stanbrough*, 2 An. 377, re-affirmed.

The will of A. C., made in the State of Mississippi, where he died, and where his estate was situated, contained the following clause: "*I give and bequeath to my grandson, White Turpin Pettit, and his heirs lawfully begotten, all the balance of my estate, real, personal and mixed, together with the rest and residue of which I may die possessed, to enure to and vest in the said White Turpin Pettit, on the day on which he shall have attained the age of twenty-one years and not before, and in the event of the said White Turpin Pettit dying before he shall have arrived at lawful age, as aforesaid, and leaving no heir of his own body, or in the event of his death at any time thereafter, without lawful issue, then, and in such contingency or contingencies, I give, devise and bequeath, all the real and personal and mixed estate aforesaid, to Rebecca S. M. Wailes, daughter, and only surviving child of my brother Leonard Corington, and wife of Benjamin L. C. Wailes, and to her heirs forever.*" Held: That such a clause in a will is a substitution prohibited by our laws, and that negroes forming a part of the bequest having been removed to this State and sold here before the happening of the contingency by which the title was to vest in the testator's niece, the title of the purchaser here could not be disturbed.

**A**PPPEAL from the Third District Court of New Orleans, *Duvignaud, J.*

*A. N. Ogden & Stansbury*, for plaintiff. *Benjamin, Bradford & Finney*, for defendant and appellant.

VOORHIES, J. The plaintiff and defendant are both residents of the State of Mississippi. The former sets up title to three slaves,—*Jacob, Sam and Julienne*,—in the latter's possession in the State of Louisiana.

WAILLES  
v.  
DANIELL.

*Alexander Covington*, the plaintiff's uncle, a resident of the State of Mississippi, left a will, in which is found the following clause :

"I give and bequeath to my grandson, *White Turpin Pettit*, and his heirs lawfully begotten, all the balance of my estate, real, personal and mixed, together with the rest and residue of which I may die possessed, to endure to and vest in the said *White Turpin Pettit*, on the day on which he shall have attained the age of twenty-one years and not before, and in the event of the said *White Turpin Pettit* dying before he shall have arrived at lawful age, as aforesaid, and leaving no heir of his own body, or in the event of his death at any time thereafter, without lawful issue, then, and in such contingency or contingencies, I give, devise and bequeath, all the real and personal and mixed estate aforesaid, to *Rebecca S. M. Wailes*, daughter, and only surviving child of my brother, *Leonard Covington*, and wife of *Benjamin L. C. Wailes*, and to her heirs forever."

The legatee, *White Turpin Pettit*, arrived at the age of majority, altered his name into that of *Turpin Covington*. On the 7th day of January, 1855, he sold the negroes in controversy to the defendant, by act *sous seing privé*, passed in the city of New Orleans, where the slaves had been removed.

*Turpin Covington* having subsequently died, without leaving any lawful issue of his body, the plaintiff contends that the slaves in question vested in her, notwithstanding the transfer made by the deceased to the defendant.

The clause by which the testator bequeathed the residue of his estate to *White Turpin Pettit*, with the stipulation that, in case the latter died leaving no heirs, the property should vest in the plaintiff, is a substitution under our laws. C. C. 1507; 5 An. 552, *J. E. Latiolais v. Solastie A. Roy*; 7 An. R. 395, *Succession of Franklin*; 9 An. R. p. 510, *C. B. Sherrod & Co. v. D. E. Callegan et als.*; 10 An. 572, *D. W. Murphy v. Executor of W. Cook*.

But the plaintiff contends that the above disposition, however reprobated by our laws, is valid by the laws of Mississippi, where the last will was opened and probated; and that, inasmuch as the parties litigant are citizens of the latter State, and the property in question was situated in it at the time the will took effect, there can be no impropriety in giving effect to this devise, although the property be now situated in this State.

This same question was thoroughly investigated in the case of *Harper v. Stansbrough*, 2 An. 377. C. J. Eustis, the organ of the court, said: "It is the attribute of every government to establish and regulate such modifications of the rights of property in things, within its jurisdiction, as the public interest requires. Testamentary substitutions are prohibited in this State. The prohibition is established in the interest of public order and State policy. They have always been held null by our courts. Nor does it appear material in relation to the nullity of the substitution as the basis of a title, whether the testamentary disposition acts upon the property within this State at the time of its taking effect, or subsequently on the translation of the property to this State. The effect which we give to our own laws on property within our jurisdiction is no more than that which is usual, particularly in relation to this description of property."

It must be remarked that, in the case under consideration, the slaves were removed to Louisiana before the defendant purchased them, and before the title could have vested in the plaintiff by virtue of the will of her uncle,—at a time, therefore, that his vendor had the full ownership for himself and his heirs, subject, it is true, to be subsequently defeated in the State of Mississippi, by the

WATLES  
v.  
DANIELL.

happening of a contingency,—the vendor's demise without leaving any heirs of his body.

The policy of our laws is to exclude substitutions and *fidei commissa*; and, consequently, however valid may be in Mississippi the devise to the plaintiff, our courts cannot give it effect on property removed, and purchased, and held here, before the happening of the contingency, which puts an end to the first legatee's rights in order to vest the title in the remainderman. The cases of *McCall v. White*, 10 An. 577; of *Holloman v. Holloman*, 12 An. 607, and of *Groves v. Nutt et als.*, 13 An. 117, are not in conflict with the case of *Harper v. Stansbrough*. In the latter case, the doctrine announced had no reference to cases where the title of the second devisee or remainderman had already vested before the removal of the property from another, to this State. The will having already had its effect in another State, it is evident that the subsequent translation of the property into Louisiana, could not defeat the acquired title.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed.

It is further ordered and decreed, that the plaintiff's demand be rejected with costs.

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MICHAEL DAILY v. O. G. NEWMAN et al.

In a case where the formalities required by law for the collection of taxes in the city of Jefferson, appear to have been substantially complied with, and a sale of a lot of ground was made by the Sheriff upon a judgment obtained by a proceeding *in rem* against the property upon which the tax was due—*Held*: That the purchaser could not be dispossessed by the owner of the property at the time the tax was levied, on the ground that the property was erroneously assessed in the name of one who was not the proprietor.

Where taxes are erroneously assessed, it is the duty of the tax payer to have the tableau of assessment corrected, if he so desires. The error in the assessment is a matter of defence of which the tax payer must avail himself, and the complaint comes too late, if made after judgment, and a sale of the taxed property.

Technical objections to the mode of proceeding in suits, ought to be urged before judgment.

**A**PPEAL from the District Court of the Parish of Jefferson, *Burthe, J.*  
*R. K. Cutler*, for plaintiff and appellant. *J. H. VanDalsen*, for defendant.

**COLE, J.** This suit is instituted by plaintiff, to recover possession of a certain square of ground in faubourg Bouligny, in the city and parish of Jefferson; said square being No. 102. It was purchased by plaintiff from *F. W. Schmidt*, on the 12th of December, 1851.

The defendant, *Newman*, bought the square of *L. Cuthbert*, who had purchased it from *W. C. Wilson*, and the latter bought the same at a public sale made by *Fanning*, then Sheriff of the parish of Jefferson, in a suit entitled, "The Mayor, Aldermen and Inhabitants of the city of Jefferson against Square No. 102, in faubourg Bouligny, city of Jefferson, parish of Jefferson, assessed in the name of *F. W. Schmidt*." This suit was for taxes for 1850 and 1852, both assessed in the name of *F. W. Schmidt*.

The corporation of the city of Jefferson proceeded against the lot by the proceeding *in rem*, as provided in the section 20 of the Act of 1850. Session Acts, 1850, p. 60.

DAILY  
V.  
NEWMAN.

A curator *ad hoc* was appointed to represent the non-resident owner, and the formalities of the Act of 1850 appear to have been substantially complied with.

A full and accurate description of the lot was given in the notices and advertisements of the sale thereof.

Plaintiff contends that the sale is without effect, because his name was not mentioned as the proprietor of the square, and because the taxes of 1852 were not assessed in his name, but in that of *Schmidt*.

The plaintiff, or his agent, knew that he owed taxes for 1852, and he could have applied to have the tableau of assessment amended.

Besides, the action was *in rem*, and the property was so accurately described in the advertisement, that no one could have been deceived as to the land that was seized. The owner was also represented by a curator *ad hoc*.

It was in the power of plaintiff to have objected on the ground, that the lot was not assessed in his name before the judgment and sale; but it is now too late, for he has neglected to avail himself of a defence which must have been known to him or his agent. *Dutillet et als. v. Blanchard*, ante p. 97.

It is also objected, that the law of 1850, regulating the mode of proceeding for the collection of taxes, was repealed by the Act of 1853. Session Acts of 1853, p. 222, §§ 7 and 8.

This proceeding was *in rem*, a curator *ad hoc* acted for plaintiff, and besides the description of the land was such as to give him full notice of the seizure. Under these circumstances, plaintiff cannot now avail himself of this objection.

Technical objections to the mode of proceeding in suits ought to be urged before judgment, otherwise there would be much danger in purchasing property at judicial sales.

This case differs from that of *Zimmerman v. Bartchy*, ante page 520. In that case, the illegality and nullity occurred after the judgment; the Sheriff having seized property which was not subject to seizure.

What occurs before judgment is generally unknown to the purchaser at judicial sales, whereas it can be seen from the *fi. fa.* by virtue of the authority of what court it has issued, and the purchaser is supposed to know the law, and whether the property seized can be legally sold to satisfy the judgment.

Judgment affirmed, with costs of appeal.

BUCHANAN, J., took no part in this case.

LAND, J., absent.

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EDWARD L. NIMMO v. ROBERT K. WALKER, Executor.

14 552
40 778

Where one renders services for continuous years to another on his promises to provide in his will for the party rendering such services, and he dies without making such provision, an action may be maintained for the value of the services.

The promises in such a case having reference to the period of the promisor's death, prescription is suspended until that time.

APPPEAL from the District Court of the Parish of St. Bernard, *Foulhouze, J. I. E. Morse*, for plaintiff and appellant. *Lea & Marr*, for defendant.

BUCHANAN, J. The evidence in this case shows very clearly that the plaintiff

NIMMO
v.
WALKER.

was employed by the deceased, *Baker Woodruff*, to attend to his business, from 1846 to 1855; and that *Woodruff* never made him any compensation therefor; but when spoken to on that subject, held out hopes of making him amends in his will. At some times promising, according to the witnesses, to leave plaintiff the greater part of his property; at others, to leave it to the plaintiff's wife, who was *Woodruff's* niece. These promises proved fallacious, inasmuch as it is admitted in argument that neither plaintiff nor his wife were mentioned in *Woodruff's* will. In addition to the services rendered by plaintiff in attending to the business of *Woodruff*, it is proved that the latter, who was a butcher, lived during a great part of the time in plaintiff's house, and (being in very infirm health) was nursed by plaintiff's wife. The circumstances of this case differ from those of *Rice* and of *Fink*, relied upon by defendant, in the essential particular, that the deceased recognized the right of plaintiff to compensation, and promised to make it at a future time.

These promises had reference to the period of *Woodruff's* death; and it is but just and proper, to view prescription as suspended until that time.

The acknowledgment of indebtedness for borrowed money, contained in the notarial act of the 7th of March, 1857, is not inconsistent with the claim now urged by plaintiff. That notarial act is a sale of various tracts of land south of Red River, by *Nimmo* to *Woodruff*, amounting in the aggregate to seven hundred and eighteen acres, for the price of two thousand six hundred dollars, amount of borrowed money due by the vendor to the vendee, and to secure the greater part of which, viz, \$192 68, the vendor had a mortgage upon these same lands. This contract is represented in argument as a general settlement of accounts between the parties. But it has not that character. It is a settlement of particular items of account between the parties; and a very advantageous settlement it was for the deceased, unless we are to presume that sugar lands in the Attakapas are worth no more than three dollars and a half per acre.

We have presented to us, in this case, a man who, with his wife, have consumed their youth in the service of a miserly valetudinarian, upon his deceitful promises to provide for them in his will; he having no forced heirs, and they being among his next of kind. The valuation of these services, by the witnesses, ranges from one thousand to two thousand dollars per annum. We will allow at the rate of twelve hundred dollars per annum for the length of time claimed.

This case presents various features of resemblance with that of *Alexander v. Alexander*, 12 An. 590.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed; and that the plaintiff recover of defendant, in his capacity of testamentary executor of *Baker Woodruff*, deceased, the sum of ten thousand eight hundred dollars, to be paid in course of administration, with costs of both courts.

Re-hearing refused.

WRIGHT, WILLIAMS & Co. v. J. J. B. WHITE.

14	588
48	704
14	583
118	780

Where property has been attached and released on bond, a party claiming the property attached and bonded cannot do so by intervening in the suit between plaintiff and defendant; he must enforce his claim to the property against the person who has possession of it.

Where a suit on an account was commenced by attachment in this State, and for the same cause of action was at the same time carried on and prosecuted to final judgment in the courts of Mississippi—*Held*: That the judgment thus obtained in Mississippi could be substituted by way of amendment, as the cause of action in the Louisiana court, in place of the account, so as to maintain the attachment.

APPEAL from the Fourth District Court of New Orleans, *Price, J.*
Clarke & Bayne, for plaintiffs and appellants. *T. N. Pierce*, for defendant.
Mott & Fraser, for intervenors.

LAND, J. This is an attachment suit for the recovery of nine thousand five hundred and nine dollars and thirty-two cents, with eight per cent. per annum interest from the 9th day of June, 1855, for money advanced in payment of defendant's draft, given on a final settlement of his account with *Hill, McLean & Co.*, his former factors.

One hundred and fifty-four bales of cotton were attached as the property of the defendant, on board the steamboat *Sallie Robinson*, at the port of New Orleans, consigned in the name of *P. O'Donnell* to *Oakey, Hawkins & Co.*

The consignees, *Oakey, Hawkins & Co.*, intervened in the suit, and claimed the cotton as the property of *O'Donnell*.

On the 25th of November, 1856, *Oakey, Hawkins & Co.* obtained an order of court, permitting them to bond the cotton, and accordingly, on the 27th day of the same month gave bond and security as required by order of court.

On the same day, to-wit, the 27th of November, 1856, *Rebecca J. White*, the wife of the defendant, and *Mrs. S. C. W. Faust* filed their petition of intervention in this suit, and claimed the cotton attached as their joint, undivided, separate property.

To this petition of intervention the plaintiff pleaded, in his answer thereto, the following peremptory exception, "that the cotton claimed had been delivered on bond, anterior to the filing of the intervention, to *Oakey, Hawkins & Co.*, and is not now in court," and prayed that the intervention be dismissed.

On the 29th of May, 1857, the plaintiff filed a supplementary petition, in which he alleged, that since the institution of this suit he had obtained a judgment in the Circuit Court of Yazoo County, in the State of Mississippi, against the defendant, for the same subject-matters stated in the original petition filed in this cause, and prayed for judgment as in said original petition, and that defendant be cited to answer thereto.

After the filing of the supplemental petition, the attorney appointed to represent the defendant filed the following exception, "that the original cause of action, if any existed, has been merged in the judgment rendered in the State of Mississippi and the proceedings therein had, as shown by the supplemental petition and documents annexed; that this court, by the said proceedings of plaintiffs, has been divested of jurisdiction in the matters in controversy, and this suit should be dismissed at plaintiff's costs. Defendant further pleads *res judicata*."

WRIGHT
v.
WHITE.

The intervenors also filed an exception to the supplemental petition, as follows: "*that the same is a change of the original cause of action, and is contrary to law, and further pleaded the exception of res judicata.*"

First. The intervention of *Oakey, Hawkins & Co.* is unsustained by the evidence. It does not appear that *O'Donnell* was the owner of the cotton attached, or that it was even shipped with his knowledge or consent. Nor does it appear that he or the consignees were in possession of the bill of lading prior to the attachment of the cotton by the plaintiff. This intervention, therefore, must be dismissed.

Second. The peremptory exception filed by the plaintiff should have been sustained. The bond given by *Oakey, Hawkins & Co.* was only a substitute for the property attached, with regard to the plaintiffs, and not as to the intervenors, or third parties claiming title thereto.

The intervenors cannot avail themselves of the bond, and their remedy was against the property itself in the hands of the party having possession of it. *Dow v. Kershaw*, 18 La. 57; *Beal v. Alexander*, 1 Rob. 277, 7 Rob. 349.

Third. The exception filed by the attorney appointed to represent the defendant should have been overruled. The plaintiff had the right, under the law of Louisiana, to sue the defendant in the courts of this State, and also in the courts of Mississippi at the same time, and for the same cause of action. This right necessarily carries with it the accessory right to prosecute the suits in the courts of the two different States to final judgments on the merits. This right is remedial, and is intended to secure to the creditor all possible means for the collection of his debt, in different jurisdictions. If the exceptions filed on behalf of defendant were sufficient in law to dismiss the plaintiffs' action, the right to institute separate actions in different States, for the same debt, would be nugatory; for so soon as a judgment should be obtained in one State, it could be made the means of dismissing the suit in the other, and thereby deprive the creditor of the fruits of his diligence in the undecided suit.

Conceding that the account sued on was merged in the Mississippi judgment, the debt was not thereby extinguished, but established to be due and owing from the defendant to the plaintiff. This judgment in Louisiana is only evidence of the existence of the debt for the recovery of which this suit was instituted, the affidavit was made, the attachment bond was given, and the writ of attachment issued; and there is no legal reason why this judgment should not be substituted, by way of amendment, as the cause of action, in place of the account, for the purpose of maintaining the attachment. The fact that the judgment is for a greater amount than claimed and sworn to by the plaintiff, is immaterial—for the reason that the attachment is only valid, as against the property, for the amount sworn to, whatever may be the amount claimed in the petition.

The supplemental petition did not change the substance of the demand. The prayer of the original petition is, that the attachment be maintained, and that defendant be condemned to pay the sum of \$9,509 32, and interest, with privilege upon the property attached, and the prayer of the supplemental petition is the same.

It is, therefore, ordered, adjudged and decreed, that the interventions of *Oakey, Hawkins & Co.*, and of *Mrs. White* and *Mrs. Faust* be dismissed at their costs. And it is further ordered, adjudged and decreed, that the judgment be avoided and reversed; and proceeding to render such judgment as should have been rendered by the lower court, it is ordered, adjudged and decreed, that the plaintiff do

WRIGHT
v.
WHITE.

have and recover of the defendant the sum of nine thousand five hundred and nine dollars and thirty-two cents, with five per cent. per annum interest thereon, from the 9th day of June, 1855, and costs of the lower court; and that plaintiffs' privilege upon the property attached be recognized and enforced. It is further ordered and decreed, that the defendant pay one-third of the costs of this appeal, that *Oakey, Hawkins & Co.* pay one-third, and *Mrs. White* and *Mrs. Faust* the remaining third.

MERRICK, C. J., dissenting. I am unable to concur in the opinion of the court in this case.

The first section of the fourth Article of the Constitution of the United States requires, that full faith and credit shall be given in each State to the judicial proceedings of every other State, and confers upon Congress power to prescribe the mode of proof and declare the effect of such proceedings.

In pursuance of such authority, Congress has declared that judicial proceedings properly authenticated shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are taken. 1 Stat. at large, 122.

To ascertain, therefore, the effect of the judgment of the Mississippi court, we must look to the laws of that State, and in the absence of proof on that subject, we must presume that judgments rendered in the courts of Mississippi produce the same effect as our own. If we refer to the common law authorities, we find that the account sued on had become merged in the judgment. It had no longer any existence as an account, and had become a debt of record, which did not admit the same pleas. See *Mills v. Dujee*, 7 Cranch, 483; *Hampton v. McConnell*, 3 Wheaton, 234; 2 N. S., 601.

The doctrine of merger of the common law, both in reference to judgments and obligations, is almost precisely the same as the novation of the civil law. 12 An. 565.

If we look to our own law to ascertain the effect of the Mississippi judgment in that State, we find it novated the account. No suit could be maintained upon it, for it had become extinguished by novation. *Oakey v. Murphy*, 1 An. 372; *Dennistoun v. Payne*, 7 An. 334.

But it is supposed, that because the pendency of a suit for the same cause of action, between the same parties, in another State, cannot be pleaded as a dilatory exception, that, therefore, the judgment first rendered cannot be pleaded as *res judicata* to the other. But we have quite recently, in the case of *Scott & Co. v. Bogart & Co.*, determined that such plea could and ought to be made, and that the judgment last rendered, where the plea was not interposed, would be conclusive. If the first judgment could not be pleaded as *res judicata*, it might happen that the two judgments should be the opposite of each other.

The mere pendency of two suits in two different jurisdictions, for the same cause of action, does not necessarily imply that judgment may be rendered in both, but on the contrary, it only gives the plaintiff the right to execute the first judgment which he shall obtain, and the other suit must be dismissed, for the original cause of action has been novated; for the suit then comes within Art. 94 of the Code of Practice, which provides that "if the defendant, instead of claiming to be dismissed, answer to the two actions in two separate courts, the *first judgment rendered* by either of them *shall be valid* and executory against the party cast in the action. All proceedings shall be stayed in the other court, and the plaintiff dismissed after paying the costs."

WRIGHT
v
WALKER.

So too where the suits are pending in different States. The plaintiff may press either to judgment, but then the Constitution and laws of the United States step in, and if the original cause of action be merged or novated in or by the judgment of the State where rendered, it produces the same effect in every other State of this Union, and as a consequence, may be pleaded in bar to any suit commenced or thereafter to be commenced on the original cause of action thus extinguished.

But it is supposed, that because plaintiff had a cause of action here when he commenced his attachment, the Mississippi judgment only confirmed that cause of action. But this is inconsistent with the doctrine of merger and novation. Judgments do not confirm the original causes of action, but extinguish them and substitute in the place of them the highest evidence of the right of the party, viz, a judgment importing absolute verity. It is precisely as though the parties had expressly novated the original cause of action by a new contract of a higher character. See *Makes v. Cairnes*, 2 N. S. 600, 604. The cases in 5 L. R. 424, and 1 An. 382, are cited to show that this court has taken care to guard the defendant against the effect of a judgment which might be rendered in a sister State in a suit there pending. These decisions do not disprove the doctrine of *res judicata* resulting from the Constitution and Act of Congress, but prove that, in addition, it was necessary that the party should be protected against the rendition of two judgments so nearly at the same time, that one could not be pleaded in bar of the other.

The next question is, could the plaintiff amend, by substituting his new cause of action in the place of the old one? The proceeding by attachment is *stricti juris*, and amendments cannot be allowed in an attachment suit, which could not be allowed in an ordinary suit. If the judgment of the Mississippi court was a plea in bar to plaintiffs' original action, as we think has been demonstrated, the following reasoning of Judge Porter in the case cited is conclusive. He says, in a case very similar to this, of a replication setting up the judgment pleaded by the defendant, and demanding judgment on it, viz :

"How this can be granted to them we cannot perceive. If the plea be good as a bar to their action, then there is nothing more before the court on which to act; it would certainly be a magical kind of proceeding in the administration of justice, to change in an instant, and in the same suit, that which in the hands of the defendant was to him a shield, into a weapon of destruction in those of his adversary." 2 N. S. 603.

In the case of *Oakey v. Murphy*, 1 An. 372, the court refused to allow the plaintiff to amend by setting up the judgment.

The same point was ruled in the case of *Dennistoun v. Payne*, 7 An. 334. See 5 N. S. 70; 8 N. S. 438; C. P. 419. I do not see how plaintiffs can be permitted to amend in the present case, without overthrowing the well established principles of law.

If they suffer inconvenience from the application of the rules of law to their case, it would teach creditors that it is not always safe to pursue the debtor with a multiplicity of suits; and if it be done, that it will be well to consider in which one judgment ought first to be taken.

Whether the case would be different where all the suits were attachment suits, and operated only *in rem*, and not *in personam*, it is not necessary to consider.

I think the judgment ought to be affirmed.

VOORHIES, J., absent.

ELAM BOWMAN v. MCKLERoy & BRADFORD et al.

A holder of a note given in payment of the price of property sold for the purpose of defrauding creditors, and secured by mortgage upon the property sold, cannot enforce his mortgage to the prejudice of creditors whose right of mortgage originated before the fraudulent sale and execution of the note.

The recording of a judgment against a debtor, in a parish where he has negroes attached to a plantation, of which he is part owner, creates a judicial mortgage upon the slaves, when the owner is not domiciliated in the State.

Slaves under seizure cannot be hired out by the Sheriff, unless by the consent of parties, and the mortgagee is not entitled to receive hire for the slaves, during the time that they may be under seizure.

A deed of trust executed in Mississippi and recorded in this State, which expresses that it was given to secure a certain amount, and also to secure future advances that might be made, cannot be enforced here, against the property mortgaged, to the prejudice of other mortgage creditors, except for the amount specified.

APPEAL from the District Court of the Parish of Tensas, *Farrar, J.*
H. B. Shaw and A. N. Ogden, for plaintiff. *Snyder & Reeves, and Clark & Bayne*, for defendants and appellants. *T. P. Farrar, for Leggett. F. H. Farrar, for Cartwright & Doniphan. J. Aroni and J. W. Montgomery, for D. S. Bisland and D. P. January*, intervenors. *U. B. & E. Phillips*, for *J. M. Motlow and J. R. Bisland. George S. Sawyer* in *p. p.*

COLLÉ, J. In December, 1855, *James R. Bisland*, one of the defendants, resided on the Mississippi river, a few miles above Natchez, in the State of Mississippi.

He was then the owner of fifty-eight slaves, who figure in this suit, and which appear to have then constituted the whole of his property.

These slaves were heavily mortgaged in the State of Mississippi to various creditors.

On the night of the 17th of December, 1855, *Bisland*, without the knowledge or consent of his creditors, placed all these slaves on a passing steamer, landed them the next day more than a hundred miles below, on the Louisiana side, in the parish of Point Coupée, at the plantation of his brother-in-law, *R. W. McRae*, and immediately made a pretended sale of them to *James M. Motlow*, the overseer of his brother-in-law, *McRae*.

The notes given by *Motlow* to *J. R. Bisland*, for the pretended price, were transferred by said *Bisland* to *McRae*, and by him to *McKleroy & Bradford*.

These slaves were sold in 1856, by *Motlow* to *Elam Bowman*.

The first of the series of notes of *Motlow* to *J. R. Bisland*, having matured, *McKleroy & Bradford* obtained from the District Judge in Point Coupée, an order of seizure and sale against these negroes, who were then in the parish of Tensas, in the possession of *Bowman*.

The sale was enjoined by *Bowman* in the District Court of Tensas.

The various creditors of *J. R. Bisland* intervened in that court, claiming to enforce their liens, and making *J. R. Bisland* and *Motlow* parties.

The District Court decided the sale from *Bisland* to *Motlow* to be fraudulent, null and void, as to the creditors, and gave judgment to each for the amount of his claim against *J. R. Bisland*; ordered a sale of the slaves, and proceeded to fix the rank in which the creditors should be paid, giving to *McKleroy & Bradford* only such surplus as might remain after paying the creditors of *J. R. Bisland*.

14	587
45	78
14	587
45	294
14	587
50	906

BOWMAN
v.
McKLERROY

land, and placing *George S. Sawyer* last in the rank of the mortgage creditors aforesaid.

McKleroy & Bradford and *Sawyer*, have appealed.

We consider the plea to the jurisdiction to have been waived, and proceed to determine the rights of the different parties.

We are of opinion that the sale of *J. R. Bisland* to *Motlow*, of the slaves in litigation, was fraudulent and simulated; that no consideration passed for the same from *Motlow*; and that it was not really intended to be a sale so as to vest in *Motlow* a *bona fide* title to the negroes.

An important question now arises as to the respective rank of the mortgage creditors of *J. R. Bisland* and of *McKleroy & Bradford*.

The notes received by *J. R. Bisland* from *Motlow*, were transferred by *Bisland* to *McRae*, about the 2d of January, 1857, and by the latter to *McKleroy & Bradford*, about the 5th of January, 1857.

The creditors of *J. R. Bisland*, who are parties to this suit, hold mortgage claims against him upon these slaves, which originated prior to his sale to *Motlow*.

It is contended that *McKleroy & Bradford*, being the holders of the notes of *Motlow*, before maturity, are entitled to be paid the amount of the mortgage upon these negroes, securing them, in preference to the creditors of *Bisland*, who held mortgages originating before the execution of the notes by *Motlow*.

It appears that *McKleroy & Bradford* must have had notice before taking the notes of claims against these negroes. About April, 1856, *Motlow* published a notice in the *New Orleans Picayune*, where *McKleroy & Bradford* carried on their business, and in the *Point Coupée Echo*, stating that the consideration of the notes had failed, and warning all persons not to trade for them.

Suits were also pending, previous to their getting the notes, in the parish of *Point Coupée*, and there were in the mortgage office of *Point Coupée* mortgages recorded against these negroes, and it was in this parish where the sale of the slaves to *Motlow* was passed. If they intended to depend upon the mortgage, and not upon the makers and endorsers, to guaranty the payment of the notes, ordinary prudence would have made them examine the mortgage office of *Point Coupée* to see whether *Bisland*, before selling to *Motlow*, had not covered the slaves with liens. C. C. 2428.

But even if *McKleroy & Bradford* are holders of the notes for a valuable consideration before maturity, and without notice, they cannot avail themselves of the mortgage which is accessory to the notes, independently of the rights of creditors holding mortgages anterior to the execution of the mortgage securing their notes.

Their action upon the mortgage is one *in rem*, and is distinct in its nature from their personal action against the maker and endorsers.

The negotiability of notes has been created to facilitate commerce; the protection of the holder before maturity and without notice against the equities existing between the maker and payee, or other parties, is an exception to the general rule, that a person cannot transfer a greater right than he possesses, and the negotiability of notes, and the rules appertaining thereto, must not be extended so as to effect more injury than good.

Mortgages are real rights, and are governed by certain rules as to rank from the time of their recording, and also from other causes.

The mere securing of a negotiable note by mortgage, cannot give to the mortgage a rank superior to one recorded before it.

If one mortgages property, not his own, and without any authority, to guaranty a negotiable note, the mortgage is without effect.

A party taking a negotiable note secured by mortgage, must incur the risk that there may be other parties who may successfully oppose his mortgage.

The mortgage is a privilege upon real property. Before the property can be held liable to secure a note, it must appear that the mortgagor was the owner of the property, or had the legal right to give the mortgage; and if he had the right, still the mortgage may be defeated as to its effect, by the existence of tacit or conventional mortgages, superior to it in rank.

If the mortgagor were the pretended owner of the property by a simulated sale, the negotiability of the note cannot give force to the act of mortgage, and thus transform a simulated sale into a real one.

The negotiability of notes cannot destroy the rights of third persons to real property, who are not parties to the note, and perhaps know nothing of its existence.

It is true that the transfer of a note, carries with it its accessories, and the mortgage is an accessory, but the mortgage is conveyed only so far as the person giving it was entitled to create it.

If the latter held the property subject to tacit or conventional mortgages, then in granting to a third person a mortgage to secure a note, and in transferring the mortgage note to him, he transfers a right of mortgage inferior to mortgages held by other persons, and the holder of the mortgage note takes it thus, inferior to the rights of those persons.

If a different doctrine should obtain, the proprietors of real estate, and those holding *bona fide* mortgages would be entirely in the power of the unscrupulous. The negotiability of notes introduced to facilitate commerce, would be the destruction of property holders, and their rights would be sacrificed without ever being parties to the mortgage and note that doomed them to ruin.

It matters not in the present case, if the mortgages of the creditors of *J. R. Bisland*, originated in the State of Mississippi.

The rights of citizens of a sister State ought to be protected, as far as their protection does not conflict with our laws.

If we expect the claims of our citizens to be equitably determined in foreign tribunals, the right of foreign citizens must also be respected.

The eye of justice must look impartially upon the demands of parties; its vision is not bounded by the limits of a State, but by those of the eternal principles of right and wrong.

It is antagonistical to those principles to permit a citizen of another State to run from that State his slaves, heavily mortgaged, into this State, in order to elude his mortgage creditors, and then to pass a simulated sale of the slaves to the overseer of his brother-in-law, and then to allow the brother-in-law to transfer the mortgage notes executed as the price, so as to make the mortgage securing the notes, to be superior to those of the creditors of the absconding citizen, which existed before his simulated sale to the overseer.

If this were sanctioned, instead of facilitating commerce, it would be highly detrimental to it.

For it would afford the shield of courts to the machinations of the unjust, and destroy all confidence in the security arising from mortgages on slaves, and this

BOWMAN
v.
McKIBBY.

portion of the property of the State which constitutes so much of its wealth, would be almost useless as a security for debts.

A principle so unjust and destructive to the business of the south, ought not to be upheld by the judiciary.

We are, therefore, of opinion, that the creditors of *J. R. Bisland*, who held mortgages originating before the execution of the notes to *Motlow*, are entitled to be paid in preference to *McKleroy & Bradford*, the present holders of those notes.

We shall now proceed to fix the rank of the different parties to this suit, and the time from which their mortgages are to date, whether from being recorded in Mississippi or this State.

1. *D. S. Bisland* and *D. P. January*, paid a debt of *J. R. Bisland*, with whom they were bound on his appeal bond for the payment thereof. They had, therefore, an interest in discharging it, and their legal obligation was to pay it.

A legal subrogation consequently took place of right, according to Article 2157, number three of the Civil Code, and *D. S. Bisland* and *January* became subrogated to whatever right the judgment creditor had on the property of *James R. Bisland*. This right was a judicial mortgage which was recorded on the 22d of December, 1853, in the parish of Catahoula, where a part of the slaves then were attached to and working upon a cotton plantation, the undivided half of which then belonged to *J. R. Bisland*, who was domiciliated in the State of Mississippi.

We are of opinion that the recording of a judicial mortgage against a debtor in the parish where he has negroes attached to a plantation of which he is part owner, creates a judicial mortgage upon the slaves, when the owner is not domiciliated in the State of Louisiana; for in such case, it is impossible to record it in the parish where the judgment debtor resides. *Mallard & Armistead v. Carpenter*, 6 An. 397; *Spencer v. Amis*, 12 An. 127.

The judicial mortgage of *D. S. Bisland* and *D. P. January*, must then take effect upon the slaves in controversy, which were in the parish of Catahoula at the time of the recording of the judgment. They will be designated in the decree.

The amount of their mortgage is \$3,294 64, with eight per centum interest thereon, from the 4th January, 1852.

2. *Elam Bowman* bought the slaves in dispute of *Motlow*, but he also subsequently bought an outstanding mortgage upon these slaves.

This sale is null, because *Bowman* bought the slaves, subject to the decision of this suit as to the title of *Motlow*, and as *Motlow* is decreed to have no title, the sale to *Bowman* is without effect, and the right of mortgage of *Bowman*, which may be said to have been extinguished by confusion, revives.

This mortgage has effect from the 24th of February, 1854, for \$11,584 40, with eight per cent. interest per annum from the 27th of December, 1855, until paid.

The negroes are in the possession of *Bowman*; the mortgage creditors cannot, however, claim from him the hire.

This claim must be reserved to be urged by the owner or owners of the slaves.

When slaves are seized, the Sheriff cannot hire them out, unless by consent of parties. C. P. Arts. 659, 662.

It is only when lands or houses are seized, that the Sheriff seizes "the rents, issues and revenues." C. P. 656.

The mortgagee is not entitled to receive hire for slaves during the time they may be under seizure. C. O. Arts. 453, 457, 3371.

BOWMAN
v.
McKENROY.

3. *Hackaliah Leggett's* mortgage is recognised for \$13,500, with six per cent. interest on \$4,500 thereof, from 7th February, 1855, on \$5,000 thereof, from the 7th of March, 1855, and five per cent. interest on \$4,000 thereof, from the 23d December, 1854.

The mortgage of *Leggett* is to date from the 17th of March, 1854.

His claim is based upon three drafts secured by mortgage from *J. R. Bisland*, passed in the State of Mississippi, on the 7th of March, 1854.

This mortgage is upon the slaves in controversy, and was recorded in Mississippi and Louisiana.

4. The mortgage of *Cartwright & Doniphan* is based upon a deed of trust executed by *J. R. Bisland* in their favor, on the 30th of May, 1854, on the slaves in controversy, and other property, which latter was afterwards exhausted by a sale under a prior mortgage in favor of *Miltenberger*.

The deed of trust expresses that it was made to secure five thousand dollars then due, to cover future advances to be made to *Bisland*, and to secure them for their liability on certain drafts of *Bisland*, on which they were accommodation endorsers.

The advances were made to about \$14,000. The accounts of them, showing the exact amount due, were shown to *Bisland*, who admitted them, in writing, to be correct, and they were duly recorded in the mortgage records of Point Coupée, as containing the amounts intended to be secured in the deed of trust to which they refer.

We are of opinion, that the mortgage is void as to the creditors of *J. R. Bisland*, No.'s 1, 2, 3, 5 and 6, except for the \$5000, which were specified. C. C. Art. 3277. *Frost v. Beekman*, 18th John. Ch. R. p. 550; An. Ch. Dig. by Wheeler, vol. 2, p. 191; 4 Kent, p. 175; 2 An. 974, 917; 9 R. 482.

This mortgage is to have effect from the 30th May, 1854, with interest at the rate of 6 per cent. from that date. The right of *Cartwright & Doniphan* is reserved to their personal action against *J. R. Bisland* for the excess of their claim over five thousand dollars.

5. *George S. Sawyer* is entitled to a mortgage upon certain of the slaves by virtue of a decree of the Vice Chancery Court, Southern District of Mississippi, at Natchez. His mortgage is \$8445, with ten per cent. interest thereon from 1st July, 1854, and bears date from 1st July, 1854.

J. R. Bisland sold to *Sawyer* fifteen of the negroes seized in this suit in payment of this decree; but the slaves were to remain in the possession of *Bisland*, being hired by him. *Bisland* afterwards carried them off in order to deprive *Sawyer* of his rights.

This illegal action of *Bisland* ought not to injure *Sawyer*.

The latter sold these fifteen negroes to *Bowman*. But as *Bowman* in his injunction in this case did not claim them, and as *Sawyer* did, without any objection on the part of *Bowman*, this may be considered as a tacit dissolution of the sale from *Sawyer* to *Bowman* at the time the intervention was filed.

After the intervention of *Sawyer* was filed, *Bowman* and *Sawyer*, by an act, mutually rescinded the sale.

Besides, even if the negroes belonged to *Bowman* at the time of the intervention of *Sawyer*, the latter had the right to intervene to defend the title he had conveyed to *Bowman*, for he had sold with special warranty.

BOWMAN
v.
McKLEROY.

So far as *Bisland* is concerned, *Sawyer* is entitled to consider the sale to himself of the fifteen negroes null, because *Bisland* ran away with them and caused the consideration to fail, and he has the right as to *Bisland* to have his mortgage enforced. If the sale were considered in force, then *Sawyer* would be entitled to a judgment for the fifteen negroes, but he has asked for judgment in the alternative either to have his title decreed to be valid for the negroes, or to have the mortgage enforced.

As the fifteen negroes are reasonably worth more than his debt, the other parties cannot complain at our recognition of his mortgage, instead of recognising him as owner of the fifteen negroes.

The rescission of the sale by *Bowman* in favor of *Sawyer* was not the purchase by *Sawyer* of a litigious right in the sense of Art. 2422 of the Civil Code, which forbids attorneys from purchasing litigious rights, falling under the jurisdiction of the tribunal in which they exercise their functions, because that Article does not refer to arrangements that lawyers may make as to their own claims, but to the purchase of rights in which they have no property.

6. The sale from *J. R. Bisland* to *Motlow* being rescinded so far as it affects the mortgage creditors of the former, who are parties to this suit, *McKleroy & Bradford* are entitled to be paid their claims as owners of the mortgage notes out of the balance of the proceeds of the sale of all the slaves in contestation, which shall be left after the satisfaction of the previous mentioned creditors in the manner specified as aforesaid.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; that the injunction sued out against the order of seizure and sale be perpetuated; that the sale of the slaves in contestation in this suit from *J. R. Bisland* to *J. M. Motlow*, is null, void and without effect as to the mortgage creditors of *J. R. Bisland*, whose claims are recognised in this judgment; that the sale of the said slaves from *Motlow* to *Elam Bowman* be rescinded; that the slaves aforesaid be seized and sold by the Sheriff of the Parish of Tensas, according to law, and that the various claimants be paid in the following rank out of the proceeds of all or a part of the slaves in contestation, as shall now be detailed.

I. *D. S. Bisland* and *D. P. January* shall be paid \$3294 64, with 8 per cent. interest from the 4th January, 1852; their mortgage is recognised as taking effect from the 22d December, 1853. The said amount is to be paid out of the proceeds of the sale of all the slaves mentioned in their intervention and their issue, except the following, *Eliza Pierce*, *Yarrow*, *Sally*, *Victoria*, *Perry*, *Alsey Levi*, *Sucky* and *Peggy*.

II. *Elam Bowman* shall be paid \$11,584 40, with 8 per cent. interest per annum from the 27th of December, 1855, until paid. His mortgage is to have effect from the 24th of February, 1854, and he is to be paid said amount out of the proceeds of the sale of all of the slaves.

The claim against him for the hire, use and enjoyment of the slaves in contestation is reserved, if any such right exists, to be urged in another suit in an action by the owner or owners of the slaves.

Hackaliah Leggett shall be paid \$13,500, with 6 per cent. interest on \$4500 thereof from the 7th February, 1855, and on \$5000 thereof, from the 7th March, 1855, and 5 per cent. interest on \$4000 thereof from the 23d of December, 1854. His mortgage is to take effect from the 17th March, 1854, and he is to be paid his claim out of the proceeds of the sale of all the slaves.

IV. *Cartwright & Doniphan* shall be paid out of the proceeds of the sale of all the negroes in contestation, five thousand dollars, with 6 per cent. interest thereon from the 30th of May, 1854, from which date also their mortgage is to have effect for said amount. The balance of their claim shall be paid out of the residue, if any there be, of the proceeds of the sale of all the negroes in dispute, after paying all the preceding claims, and those that follow their claim in this judgment; or as much of their demand as can be so satisfied, reserving their rights against *J. R. Bisland* for any balance of their claim remaining unpaid.

V. *George S. Sawyer* shall be paid \$8445, with ten per cent. interest thereon from the 1st July, 1854. His mortgage is to have effect from the 1st July, 1854, and he is to be paid said amount out of the proceeds of the sale of the negroes (and their issue) in contestation, which are mentioned in the decree of the Vice Chancery Court, Southern District of Mississippi, at Natchez, rendered and signed the 1st July, 1854, in the case of *George S. Sawyer v. James R. Bisland*.

VI. *McKleroy & Bradford* shall be paid the amount of their notes sued upon and their demand out of the proceeds of the sale of all the slaves in contestation, after the preceding five mortgage claims are paid the amounts of their mortgages recognised by this judgment. Their right of action against the makers and endorsers of the notes aforesaid, held by them, if any such they have, is reserved.

It is further ordered and decreed, that all costs of the lower court shall be paid out of the proceeds of the sale of the negroes, in preference to any of the preceding claims, and the costs of appeal shall be paid by *Cartwright & Doniphan*.

SAME CASE—ON A RE-HEARING.

BUCHANAN, J. The re-hearing in this case was granted as to *Cartwright & Doniphan* and *McKleroy & Bradford*.

Cartwright and Doniphan were allowed by the judgment of the District Court, the sum of fourteen thousand three hundred and forty-three dollars and thirty-nine cents and interest, with right of mortgage for the whole of that sum. Our judgment reduced the mortgage of these intervenors to five thousand dollars, and reserved their personal action against *James R. Bisland* for the excess of their claim. In their petition for a re-hearing, *Cartwright & Doniphan* have not complained of this reduction of their mortgage, as compared with the other parties, to whom a right of mortgage has been allowed by the judgment, but contend that they ought to have a distributive share of the proceeds of the negroes seized, for the remainder of their claim, as ordinary creditors of *James R. Bisland*, there being more than enough to satisfy all the mortgage claims allowed by the judgment of the court.

Upon further consideration, we are satisfied that *Cartwright & Doniphan* are entitled to an amendment, in their favor, of our previous judgment. For the reasons stated by us heretofore, their right of mortgage cannot be allowed for more than five thousand dollars, but they are creditors of *James R. Bisland*, directly, by account acknowledged by him, for advances and supplies in the years 1854 and 1855, for the surplus of their claim, to the amount allowed by the District Court.

McKleroy & Bradford are holders of five promissory notes for \$6960 each.

BOWMAN
v.
McKLERoy.

dated the 18th December, 1855, and payable respectively the 1st January, 1857, 1858, 1859, 1860 and 1861, made by *J. M. Molloy* to the order of, and endorsed by *James R. Bisland*.

The first of these notes alone was due and protested at the time *McKleroy & Bradford* instituted their hypothecary action, by executory process, on the 9th January, 1857. The whole of the five notes were filed in court, with their petition in that action, and at this time there are three out of the five notes due, amounting, in the aggregate, to twenty thousand eight hundred and eighty dollars. For this amount, with interest as expressed on the face of the notes, *James R. Bisland* is now the debtor of *McKleroy & Bradford*. But for the security of this debt, *McKleroy & Bradford* cannot pretend, upon the principles of our decision and of that of the District Court, to have any mortgage, as against the other creditors of their debtor, for both courts decree the act of mortgage of *Molloy* to *Bisland*, "his heirs and assigns," for the security of these notes, to be null and void, and of no effect, as to *Bisland's* creditors. *McKleroy & Bradford* are, therefore, viewed by us as ordinary creditors, at this time, of *James R. Bisland*, for his endorsements now due as above.

Now, this case being in its origin, a seizure under execution, the sale stayed by injunction, and third oppositions interposed by parties claiming liens and preferences; regularly, the court would have nothing to do but to settle the conflicting claims, and the rank of the liens upon the property seized; and would not feel authorised to distribute the proceeds of that property, in satisfaction of any mere ordinary debts of the owner of the property. But a contrary course has been adopted in the court below, and also in this court, with the consent and concurrence of all parties interested, debtor as well as creditors. All of those creditors had instituted suits to establish their claims, which suits are in evidence, and have been substantially, if not formally, consolidated with the present proceedings. In this manner, a sort of *concurso* has been formed, and the judgment appealed from as well as that of this court, resembles a tableau of distribution, in which ordinary creditors have a place, as well as privileged creditors. It is thus that *McKleroy & Bradford*, for instance, have been allowed any thing in our previous judgment.

In view of this position of the case, we have come to the conclusion to pass upon the ordinary claim of *Cartwright & Doniphan* at this time, without referring them, as before decreed, to their separate personal action against *James R. Bisland*.

The order and amount of the mortgages, as fixed by our previous judgment, will not be changed, but the residue of the proceeds of the slaves seized, after satisfying those mortgages, will be allotted *pro rata* to *Cartwright & Doniphan*, and *McKleroy & Bradford*.

It is, therefore, adjudged and decreed, that our judgment herein rendered on the 2d May, 1859, be amended; that *Cartwright & Doniphan*, as ordinary creditors, be paid out of the proceeds of the slaves seized, a sum of nine thousand three hundred and forty-three dollars and thirty-nine cents, with interest, at the rate of five per cent. per annum from the 1st January, 1856, until paid, in addition to the sum already allowed said *Cartwright & Doniphan*, as mortgagees in said judgment, under the number 4; the said sum of \$9343 39, to take rank after the judgment in favor of *George S. Sawyer*, as mortgagee, under the number 5 in our previous decree, and to be paid concurrently and *pro rata*, (should there not be enough to satisfy both claims.) with the allowance herein after made to

BOWMAN
v.
McKLERoy

McKleroy & Bradford; that *McKleroy & Bradford*, as ordinary creditors, be paid out of the proceeds of the slaves, after satisfying costs and mortgages, and concurrently with the ordinary claim of *Cartwright & Doniphan*, herein before allowed, a sum of twenty thousand eight hundred and eighty dollars, with interest at eight per cent. per annum, from the 18th December, 1855; that the costs of this appeal be borne, one-half by *Cartwright & Doniphan*, and one-half by *McKleroy & Bradford*; that the rights of *McKleroy & Bradford*, if any they may have, for the remainder of their claim by notes, not satisfied out of the proceeds of the slaves seized herein, be reserved to them, as against the maker and endorser of said notes; and that in all other respects, our judgment of the 2d May, 1859, remain undisturbed.

LAND, J., absent.

THE MASTER AND WARDENS OF THE PORT OF NEW ORLEANS v. SHIP
CHARLES MORGAN et als.

The provision of the Act of 1855, organizing a board of Port Wardens for the port of New Orleans, which allows such Port Wardens to demand from each vessel arriving from sea the sum of five dollars, *whether they be called upon to perform any services or not*, is not a charge imposed as a duty, without regard to a corresponding and equivalent benefit, and is not, therefore, unconstitutional.

APPEAL from the Third Justice's Court of New Orleans.

M. Hahn, for plaintiffs. *H. J. Leovy*, for defendants and appellants.

MERRICK, C. J. Another case entitled *The Board of Harbor Masters v. The Ship Charles Morgan et al.*, No. 5967, was submitted with these eighteen suits in which the Master and Wardens of the Port of New Orleans are plaintiffs, and upon the same argument and briefs.

As the case of the Harbor Masters presents a question differing somewhat from the eighteen above mentioned cases, we shall consider it by itself on another occasion, and proceed now to decide the said cases, numbered on this docket from 5800 to 5817 inclusive.

The cases now under consideration present substantially the same questions which were recently decided by us in the case of the same plaintiffs against the ship *Martha J. Ward*. Defendants' counsel, however, supposes, contrary to the fact, that he presents to us a question not decided in that case when he calls our attention to the fifth ground of nullity set forth in the answer, as follows, viz :

"The said Act of 1855, No. 343, is null and of no effect, because the 6th section provides that the Master and Wardens shall be entitled to demand from each vessel arriving in the port of New Orleans from sea, the sum of five dollars, *whether they be called upon to perform any services or not*," and these defendants allege that their vessels arrive at this port several times a week, and that in no manner whatever do the Master and Wardens, or either of them, render any services for these defendants, or for their steamers' officers or crews.

On this point, defendants contend that, "whenever a charge is imposed upon a vessel by the sovereign authority, without any regard to a corresponding and equivalent benefit and advantage, the charge is a duty and is imposed unconstitutionally."

PORT WARDENS
SHIP C. MORGAN. ^{v.} Without undertaking to controvert this proposition of defendants' counsel, which he has sustained by a very elaborate argument and numerous quotations of authorities, we think we may affirm of the statute relative to the Master and Wardens of the port of New Orleans, that as a whole, it is not obnoxious to the charge made against it. It is true that the sixth section of the Act grants to the Port Wardens a right to demand the sum of five dollars from each vessel arriving in the port of New Orleans from sea, "whether they be called upon to perform any services or not." But the meaning of the phrase is, whether they be called upon by the officers or persons in charge of the ship to perform any special service, or not. For it is evident, that it is the interest of the shipping that there should be disinterested persons in the port easily found and clothed with authority to perform such duties as are imposed upon the Port Wardens: for, as every ship entering from the gulf has been subject to the damages and casualties of the sea, so it is the interest of such ship that there should be some person clothed with official authority to inspect the hatches, hold surveys of ship or damaged goods, to pronounce upon the sea-worthiness of the vessel, to order and make sales of damaged goods, and to make an official record of all such proceedings for the protection of the owners and all concerned in ship and cargo. The Act in question provides for these necessities of commerce, and it compels the Port Wardens to keep an office where they may be found, and to keep a record of their proceedings. The Legislature has deemed it the best and most equitable mode to keep up this office, and maintain these officers during all seasons of the year and the prevalence of the frequent epidemic diseases to which the city is subject, to levy a contribution upon all ships arriving from sea, and for the benefit and the necessities of which the expense is required to be incurred.

The maintenance of these officers (who also regulate the conduct of the pilots) is a benefit to the entire shipping interest, and each ship receives an equivalent in the convenience of obtaining the services and immediate presence of these officers, although they may not have been called upon to perform any special duty for the particular ship in question.

The Acts of the Legislature relative to the Port Wardens do not, therefore, on a review of the question, appear to us to be unconstitutional on this ground.

The other questions in this case have been decided in the case of these plaintiffs against the ship Martha J. Ward, and we are satisfied with that decision.

Judgment affirmed.

COLE, J., absent, concurred in this opinion.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

ALEXANDRIA.

AUGUST, 1859.

PRESENT:

HON. E. T. MERRICK, *Chief Justice.*

HON. A. M. BUCHANAN,	}	<i>Associate Justices.</i>
HON. C. VOORHIES,		
HON. T. T. LAND,		

A. V. ROBERT et al. v. W. W. BROWN et al.

14	597
48	482
14	597
120	43

A commission to sell property of minors issued by the clerk will not supply the place of the necessary order of sale; nor will it be inferred from such commission that a decree of sale existed, although it recites that it was issued "*in pursuance of the order of the District Court.*"

The facts that a family meeting was convoked, and advised the sale, and that a petition had been presented to the court to homologate the proceedings, will not cure the nullities arising from the sale of property made under such a commission.

The prescription of five years, established by the Act of 1855 to cure the informalities growing out of public sales, cannot apply to a case where there is a total want of authority to sell; it cures only those informalities which may occur in the execution of a decree, or other authority to sell.

A PPEAL from the District Court of the Parish of Natchitoches, *Chaplin, J. Elam & Campbell*, for plaintiffs and appellants. *Smith, Levy & Moïse*, for defendants.

MERRICK, C. J. "This is an action brought by the administrator on account of the creditors, and the heirs in their own right, to restore the property in controversy, together with the fruits and revenues, to the successions of *Samuel & Susan M. Quarles*.

"Plaintiffs allege, that the land was owned by their ancestors, *Samuel & Susan M. Quarles*, at the time of their death, in 1848, and that their title has never been legally divested; that the sale by *John H. Quarles*, on the 1st of April, 1850, under which the defendants claimed, is null and void, because he had no authority to make it, that is to say, there was no order of the court, or judgment authorizing the sale; that it was void for informalities, and defendants were possessors in bad faith.

ROBERT
v.
BROWN.

"Defendants aver that they hold under good and valid titles, and if not, they are entitled to the fruits and revenues, and to recover the value of their improvements. Afterwards they excepted to the action, on the ground that plaintiffs have made no return, or offered to return the price paid by the defendants; that such return or offer was necessary, because the sum so paid enured to the benefit of the plaintiffs in the payment of a debt due by their ancestors, from whom they claim to have inherited the land." And they plead the prescription of five years to the action.

A trial of the case before a jury resulted in favor of the defendants, and the plaintiffs appeal.

Under the issue made in this case, our first inquiries have been directed to ascertain the fact, whether an order for the sale of the property ever existed. No vestige of such an order has been found among the mortuary proceedings, after the most careful examination. The clerk's fee docket has no charge for such an order, although it was the habit, as well as the interest of the clerk, to make such entry.

A commission to sell issued by the deputy clerk will not supply the place of an order of sale. Neither can it be inferred from such commission, that a decree of sale existed, although it contains the recital that it is "in pursuance of the order of the District Court."

One of the witnesses swears that he found the records in the *Quinles* succession "in a very tattered and torn condition." But then the first suit was commenced in five years after the sale, and it is shown that the probate proceedings were recorded, and moreover, that one of the witnesses, who would have become a bidder and given a higher price, absented himself from the sale because he had been informed there was no order of sale, or some other irregularity in the proceedings.

The petition to homologate the proceedings of a family meeting advising the sale does not strengthen plaintiffs' position, nor does the first petition of the administrator, praying for the sale of the merchandize, and the decree thereon (which is only responsive to the petition) add any strength to the defendants' case.

Considering the recent period of the sale, the testimony is inadequate to establish the presumption of the existence of an order of sale which has been lost. *Beard, tutor, v. Morancy*, 3 Rob. 121.

The prescription of five years has been pleaded under the Act of 1834, re-enacted in 1855, curing the informalities growing out of public sales. *Phillips' Dig.*, p. 22, sec. 4. We are of the opinion, that this statute does not cure the total want of authority to sell, but merely irregularities and informalities in the execution of the decree, or other sufficient authority to sell.

If the defendant bought at the administrator's sale under a commission reciting the decree for the sale of the property, and the adjudication was in the usual form, we are not prepared to say that he is in bad faith for the want of a decree upon which the commission issued. But in this case, there is other testimony which was offered for the purpose of showing that the defendant was in bad faith. Under the circumstances, we think it best to remand the case, in order to enable the jury to pass upon the question of good or bad faith in the defendants, and to settle the claims of the parties respectively for improvements and revenues.

If the defendants were in bad faith, and were responsible for rents and revenues beyond improvements, to an amount equal to the price paid for the property

ROBERT
v.
BROWN.

and interest, it is evident that equity required no tender on the part of the plaintiffs prior to the institution of this suit. Under the circumstances, we think the defendants' right to reimbursement, if such they have, may be secured by refusing the plaintiffs execution until the requisite sum be tendered the defendants or deposited with the clerk. This may be regulated by the decree of the District Court hereafter to be rendered.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that the said tract of land be declared to belong to the successions of said *Samuel & Susan M. Quarles*, represented by said administrator, and that this cause be remanded for further proceedings according to law and the views herein expressed, the defendants paying the costs of the appeal and the costs of the lower court up to the present date.

H. W. REYNOLDS, Ex'tor., v. W. B. STILLE.

14 599
115 99

The copy of an act under private signature does not prove the genuineness of the original, although admitted to record on the affidavit of a subscribing witness.

A PPEAL from the District Court of the Parish of Sabine, *Chaplin. J. Tucker & Levy*, for plaintiff and appellant. *J. B. Elam*, for defendant.

LAND, J. This suit was instituted to recover certain tracts of land in the possession of defendant, and claimed by him as owner.

It was necessary, under the pleadings, for plaintiff to prove title in himself, and in order to do so, he had to prove the authority of an attorney in fact, who had made a conveyance of the lands, for two former proprietors, from whom he derived his alleged title. And for the purpose of proving such authority in the agent, he offered in evidence, *two certified copies of acts of procuracy* which had been recorded in this State, on the oath of one of the subscribing witnesses.

The powers of attorney were acts under *private signature*, and the defendant objected to the introduction of the copies, on the ground that they were not the best evidence, and did not make proof of the originals. The objection was sustained, and the plaintiff took his bill of exceptions to the ruling of the court. The cause was tried, and a final judgment rendered in favor of defendant.

The District Judge did not err in rejecting the copies offered in evidence. In the case of *Norwood v. Green*, 5 N. S. 176, it was held that the copy of an act under private signature did not prove the genuineness of the original, although admitted to record on the affidavit of a subscribing witness, for the reason, the proof of execution was *ex parte*.

In the case of *Parham v. Murphree*, it was directly held that a certified copy of a power of attorney did not make proof of the original. 4 N. S. 355. The Judge, however, erred in rendering a *final* judgment against the plaintiff, the judgment should have been one of nonsuit.

It is, therefore, ordered, adjudged and decreed, that the judgment be reversed; and it is now ordered, adjudged and decreed, that there be judgment against the plaintiff as in case of nonsuit, and that he pay the costs of the lower court, and the defendant pay the costs of this appeal.

N. B. WHITFIELD v. HARDY BRYAN et als.

When, after issue joined, one of the defendants dies, and the plaintiff delays or neglects to revive the suit against his representatives, the other defendant cannot have the suit dismissed, but if entitled to a separate trial, may compel the plaintiff to try the case as far as he was concerned.

APPEAL from the District Court of the Parish of Natchitoches, *Chaplin, J. J. M. B. Tucker*, for plaintiff and appellant. *Smith & Campbell*, for defendants.

VOORHIES, J. On the trial of this case in the court below, the plaintiff obtained from the jury a verdict for the sum of \$38,250; but, on motion of the defendants, the verdict was set aside and a new trial ordered. Subsequently, one of the defendants died; and several sessions of the District Court having been held without the suit being revived by making the legal representatives of the deceased defendant parties, the other defendant caused the suit to be dismissed at the plaintiff's costs. The plaintiff took a bill of exception to the ruling of the District Judge, who refused his application to reinstate the case on the docket; and, from the judgment of dismissal, this appeal is taken.

The reasons assigned by the District Judge are as follows: "that at the December term of this court, 1857, the death of *Leon Bryan*, one of the defendants, was suggested, and leave granted to plaintiff to revive the suit against his representatives; that afterwards, at the May term of said court, the case was continued on plaintiff's application, no administrator having been appointed to *Leon Bryan's* succession, or any steps taken so to do; that at the present term of the court, the counsel for plaintiff having moved to dismiss, because no administrator was appointed, and plaintiff's counsel having stated that one had been appointed who would qualify at the present term, and the said counsel having subsequently declared that the administrator would not qualify; and it appearing to the court that the plaintiff had had ample time to make proper parties, and had neglected so to do, and was now asking for further delay; and the court being of opinion that a co-defendant could not be thus harrassed or delayed in the trial of his case by the evident neglect or laches of the plaintiff,....."

If there were proper parties before the court, and the plaintiff was not entitled to a continuance, he should have been ruled to a trial, and not dismissed from court. The plaintiff was present through his counsel, and the utmost that the defendant could require of him was an immediate trial. C. P. 536.

"If, after issue joined, either the plaintiff or the defendant die, it is not necessary to recommence the action, it continues between the surviving party and the heirs of the one deceased."..... C. P. 361. The plaintiff had the right to have the suit revived against the legal representatives of the deceased defendant; on the other hand, the co-defendant, if entitled to a separate trial, might with propriety have compelled the plaintiff to try the case, so far as they were concerned. The dismissal was unauthorized.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and that this case be remanded for further proceedings, the appellee paying the costs of appeal.

HARRIET H. PARNELL et al. v. C. A. PETROVIC—WILLIAM LAYSTER v.
C. A. PETROVIC.

The husband is prohibited by law from purchasing the property of his wife in a direct sale, and he therefore cannot be permitted to acquire a title to her property indirectly for a price fixed beforehand by the machinery of legal proceedings against the wife, resulting in the sale of her property.

The relationship of the husband to the wife forbids an arrangement by the husband with the creditors of the wife, under which the title of the wife is to be divested by judicial proceedings against her, and the property transferred to the agents of the husband.

The purchaser of the property of the wife, under an agreement between the husband and the purchaser, that when the debts of the wife assumed by the purchaser should be paid off from the revenues of the property, the property should be conveyed to the husband or his heirs, will not divest the wife of her title, or enable the husband or his heirs to hold the property adversely to the wife and her heirs.

A PPEAL from the District Court of the Parish of Natchitoches, *Chaplin, J. Moïse & Randolph, P. A. Morse, and A. N. Ogden & Stansbury*, for plaintiffs and appellants. *B. L. Hodge and W. M. Levy*, for defendant.

MERRICK, C. J. The plaintiffs in this action, and the plaintiff in the case of *Layster*, tutor, against the same defendant, claimed title to the real estate, slaves and movables in controversy, as heirs of *Mrs. Harriet H. Petrovic*, by her former marriages. The defendant claims as sole heir of *Peter Petrovic*.

"*Peter Petrovic* and *Harriet H. Winter*, were married in the parish of Natchitoches in the year 1833. By a marriage contract, dated February 4th, 1833, the property of the future wife was transferred to the future husband, and for its estimated value, twenty-five hundred dollars, and the balance in cash, he acknowledged himself her debtor to the amount of eight thousand one hundred dollars.

"On the 4th of December, 1841, *Mrs. Petrovic* obtained judgment against her husband for the sum of thirteen thousand dollars, for separation of property, dissolution of the community, &c. At a sale of the husband's property, made on the 24th March, 1842, under a writ issued upon this judgment, *Mrs. Petrovic* purchased 143 33-100 acres of land, two preëmption claims, a stock of cattle, and thirteen slaves, for the sum of \$6,645. And in satisfaction of the balance of her judgment, her husband, on the 20th of July, 1842, conveyed to her nine slaves.

"*Petrovic* obtained a discharge from all his debts under the bankrupt law.

"The property thus acquired was mortgaged by *Mrs. Petrovic* on the 20th of July, 1842, to the Union Bank of Louisiana, for a loan of \$12,268.

"In 1836, *Peter Petrovic* had mortgaged certain other lands and slaves which he then owned, to *Lambeth & Thompson*, which mortgage they obtained an order of sale upon, and on the 12th of Sept., 1840, the property so mortgaged was sold, and purchased by *T. E. Touzin*, at the price of \$34,000. Of this sum *Touzin* retained \$24,000, to be applied to mortgages having preference over that of *Lambeth & Thompson*. *Petrovic* had borrowed \$25,000 from the City Bank of New Orleans, on the 1st of April, 1837, and *Lambeth & Thompson* had agreed that the mortgage given by him to the bank, should have priority over theirs; so that the property thus purchased was still subject to the City Bank mortgage, as well as some others.

"On the 25th of August, 1842, *Touzin* conveyed the property, acquired as

PARNELL
v.
PETROVIC.

just stated, to *Mrs. Petrovic*, she assuming the payment of certain debts, and more particularly the mortgage debt due the City Bank, just referred to, which amounted at that time to \$20,000, and a debt due *A. Ledoux & Co.*, secured by mortgage on the said property, amounting to \$19,495 23."

The City Bank of New Orleans having obtained a judgment against *Petrovic* and wife, upon the mortgage in favor of that institution, issued an execution (January 2d, 1847) against *Mrs. Petrovic*, and caused the property affected by said mortgage to be sold. The bank became the purchaser for the sum of \$20,000, which left over \$5,000 due the bank still unpaid.

On the 18th day of February, of the same year, 1847, the following agreement (which we copy at length) was entered into between *Peter Petrovic* and *Messrs. A. Ledoux & Co.*, of New Orleans :

" *Memorandum of an agreement between Messrs. A. Ledoux & Co., of New Orleans, and Peter Petrovic, of Natchitoches.*

" 1st. It is known and understood, that *Mrs. Harriet H. Petrovic*, wife of *P. Petrovic*, is largely indebted unto the City Bank of New Orleans, the Union Bank of Louisiana, and to *Messrs. A. Ledoux & Co.*—the true amounts will be hereafter ascertained by the parties.

" 2. It is known and understood that the several banks and *Messrs. A. Ledoux & Co.* have a mortgage upon all the lands and slaves belonging to *Mrs. Petrovic*.

" 3d. It is known and understood that the said banks have instituted legal proceedings against *Mrs. Petrovic* and her husband, and that the City Bank has sold, and the Union Bank is now proceeding to sell the lands and slaves respectively mortgaged to them, and that each bank will buy in the lands and slaves under her respective proceedings.

" 4th. It is known and understood, that when the banks shall complete the sales, that the said banks will sell the whole of the lands and slaves purchased by them at the sale of *Mrs. P.'s* property to *Messrs. A. Ledoux & Co.*—that the banks are to reduce their debts down to a certain sum, and that the City Bank will grant a credit of one, two and three years, without interest, to *Messrs. A. Ledoux & Co. for the payment of Mrs. Petrovic's debts*, and that the Union Bank will grant a credit of one, two, three, four and five years, without interest, to *Messrs. A. Ledoux & Co. for the payment of the debt due her by Mrs. Petrovic* ; and it is understood and agreed that *Messrs. Ledoux & Co.* are to assume to the said banks the debts due the said banks (after the deduction now in contemplation to be made on said debts by said banks shall be made) by *Mrs. Petrovic*, on the terms above specified.

" 5th. It is understood and agreed that the banks are to convey to *Messrs. A. Ledoux & Co.*, the whole of the lands and slaves, sold and purchased by them, at the sale of *Mrs. Petrovic's* property.

" 6th. It is understood and agreed, that when the banks shall have made their sales to *Messrs. A. Ledoux & Co.*, *Mrs. Petrovic* shall also convey to *Messrs. A. Ledoux & Co.*, the whole of the lands and slaves, and the appurtenances belonging to the plantation of *Mr. Petrovic*, left unsold by the banks, so that the whole of the slaves, plantation and appurtenances shall be in the name of *Messrs. A. Ledoux & Co.*

" 7th. It is understood and agreed that *P. Petrovic* is to work the plantation and slaves, in the name of *A. Ledoux & Co.*, for the term of five years, that is the years 1847, 1848, 1849, 1850 and 1851, and if at the end of the said five years, he shall, from the proceeds of the plantation, have repaid the *Messrs. A. Ledoux*

PARNELL
v.
PETROVIC.

& Co. the amount which they shall have paid the said City and Union Banks, the debt and interest due to *Messrs. Ledoux & Co.*, by *Mrs. Petrovic*, and the sum of four thousand five hundred dollars for their name, trouble, risk and care on account of their assumption and attention aforesaid, then *Messrs. Ledoux & Co.* shall and will reconvey to *Mr. Peter Petrovic*, or his heirs, the whole of the said slaves, land and appurtenances, free from all incumbrances.

"8th. It is understood and agreed that if *Mr. Petrovic* fails to meet the installments as they shall severally become due to the banks, the payment made to the banks by *Messrs. Ledoux & Co.*, shall be considered in the nature of advances made for *Mr. Petrovic*, and he shall allow to them the usual commissions of two and a half per cent., and interest at eight per cent. on such advances, and to form a portion of the aggregate debt to be repaid in the five years, as above mentioned.

"9th. It is understood and agreed, that every bale of cotton made on said plantation is to be shipped to the house of *A. Ledoux & Co.* by *Mr. Petrovic*, any time they may order it, to be sold by them; that they are to be allowed the usual commission of two and a half per cent. for selling and charges for their troubles, and that the net proceeds, after deducting expenses of plantation, shipments, sales, &c., &c., are to be by them applied in liquidation of the above debts, and that the same are first to be applied in payment of the debts arising from the bank debts then due, and when they shall be discharged, in payment of the debt now due *Messrs. A. Ledoux & Co.*, and the interest thereon, and in all cases to the interest before the capital.

"10th. *Messrs. A. Ledoux & Co.* are to furnish the plantation with the necessary supplies for carrying it on.

"11th. *Mr. Petrovic* is to be allowed to draw from *Messrs. A. Ledoux & Co.*, annually, a sum of money not to exceed five hundred dollars, which is to be repaid by *Mr. Petrovic*, and commissions of advances and interests of eight per cent. charges thereon, as above mentioned.

"12. *Mr. Petrovic* is to be allowed to employ one overseer on said plantation, at a salary not exceeding four hundred dollars.

"13th. On that portion of the debt to be repaid to *Messrs. Ledoux & Co.*, known as the two bank debts, no interest is to be paid by *Mr. Petrovic*, except when advances are made, as is mentioned in article eight of this agreement.

"14th. This agreement is dependent upon the banks carrying out their agreement with *Messrs. Ledoux & Co.*, that is, if the banks fail to convey the property to *Messrs. Ledoux & Co.*, then this agreement is not binding upon either of these parties.

"15th. When the whole conveyances shall be completed. then these parties are to enter into a notarial act, of which these articles are to be the basis.

"16th. It is understood and agreed, that in the event of overflow or the ravages of the cotton worm, *Mr. Petrovic* shall fail to make a crop of cotton, and it be thought advisable by *Messrs. Ledoux & Co.* to remove the hands, slaves and other appurtenances on the cotton plantation to the sugar region, for the culture of sugar, then *Mr. Petrovic* is to comply with their request.

"Signed in duplicate at New Orleans, this 18th day of February, 1847.

(Signed)

" A. LEDOUX & Co.

" P. PETROVIC.

" Attest : GEORGE POLLOCK, D. F. ROYSDON."

Accordingly the Union Bank of Louisiana acquired the title as contemplated, and afterwards, on the 1st of April following, both banks made transfers of the

PARNELL
v.
PETROVIC.

property acquired by them to *Messrs. A. Ledoux & Co.* The City Bank for \$21,000, on the terms agreed, viz, one, two and three years, and the Union Bank for \$14,000, payable in 1, 2, 3, 4 and 5 years. On the 6th day of April, *Mrs. Petrovic* sold seventeen slaves, (mostly children,) sixteen head of mules and horses, nine yoke of oxen, three hundred head of hogs, and twenty-five horned cattle, to *A. Ledoux & Co.*, for a price purporting to be \$14,253 16, paid in ready money out of the presence of the notary.

Petrovic took charge of the whole property transferred to *A. Ledoux & Co.*, and managed the same to the time of his death in 1851, *Mrs. Petrovic* having died some months previously.

It seems that the defendant, *Charles A. Petrovic*, after the death of his father and mother, went into the possession of the property, and managed the same until the 9th of April, 1853, when *A. Ledoux & Co.*, reciting the previous proceedings, but assuming that the contract was made for the benefit of *Peter Petrovic* and not his wife, transferred and conveyed to *Charles A. Petrovic*, as sole heir of *Peter Petrovic*, the property in controversy.

It is, therefore, evident that the controversy turns upon the construction placed upon and the effect to be given to the contract between *A. Ledoux & Co.* and *Peter Petrovic*, and the proceedings in execution of the same.

Did that contract and those proceedings under it, have the effect of divesting *Mrs. Petrovic* of the ownership of the property, and convey the same through the agency of the banks and *A. Ledoux & Co.*, to *Peter Petrovic* and his heir?

The sales to *A. Ledoux & Co.* were not intended to vest in them the absolute ownership of the property. They, *Ledoux & Co.*, took the title to the property, if at all, as agents, as is quite evident from the perusal of the whole instrument. Are they to be considered as the agents of *Peter Petrovic* or his wife?

A consideration of the first six clauses of the contract shows (as has been observed by plaintiff's counsel) that the parties had already contracted with the City Bank and the Union Bank, that they would aid these parties in their views, by buying the property and conveying the same on credit as mentioned in the agreement. It is further apparent, from the sixth clause of the agreement, that it was agreed and understood that *Mrs. Petrovic* should convey to *Messrs. A. Ledoux & Co.*, the whole of the lands and slaves, and the appurtenances belonging to the plantation of *Mrs. Petrovic*, left unsold by the banks. It would, therefore, seem, that there had been a previous understanding with *Mrs. Petrovic*, as well as the banks, that the sales should take place, and the banks become the purchasers of the property mortgaged, and that she would perfect such sales as they should make to *A. Ledoux & Co.*, by transferring the residue of the property to them.

When, therefore, she completed the conveyance, "so that the whole of the slaves, plantation and appurtenances were in the names of *A. Ledoux & Co.*," did she not conclusively show, that she had ratified a contract to which she had previously given her consent and became a party?

But if she had signed the contract of the 18th of February, 1847, at the time of its execution, it would have vitiated the same, if considered as a sale to her husband, because as the husband is prohibited from purchasing the property of his wife in a direct sale, he cannot be permitted (for a price fixed beforehand) to acquire indirectly and by the machinery of legal proceedings, what he could not do directly. C. C. 1784.

But suppose it be considered that the contract of the 18th of February, 1847,

was entered into without the knowledge of *Mrs. Petrovic*, and with the intention on the part of *Petrovic* of acquiring the property for himself. It would then appear that he had entered into a contract by which judicial sales of his wife's property were to be made, at which it was the interest of the contracting parties that a fair competition among the bidders should be prevented. Not only this, but the wife herself was to be required to make a sale of the residue of her property to the agents of her husband, and thus to the husband himself. The relationship of the husband to the wife, forbids proceedings on his part so prejudicial to her rights. C. C. 1886, 1889.

But it is said, that in the act of sale from *Mrs. Petrovic* to *A. Ledoux & Co.*, she was allowed a credit for the whole amount of her indebtedness to them, arising from the *Touzin* debt.

Whatever consideration may have been named in the act of sale, it is clear that the same was by the agreement of the 18th of February, 1847, to be paid back to *Messrs. A. Ledoux & Co.*, out of the revenues of the wife's property, her lands, the labor of her negroes and mules, and the care of the overseer.

How can it be said that they, or *Petrovic*, paid a price for this property, when *Ledoux & Co.* were to be refunded the whole amount, debt, interest, commissions, and \$4,500 besides, out of the revenues of the property?

Indeed, the whole contract, were it to be considered as made on behalf of *Peter Petrovic* and valid, would have the effect of transferring to him the entire property of *Mrs. Petrovic*, without any equivalent, and without any trouble on his part, save that of passing the revenues through the hands of his agents, *Messrs. Ledoux & Co.*

It does not appear to us that the proceeding can be sanctioned. *Messrs. A. Ledoux & Co.* must be considered as holding whatever of title they acquired, as the agents of *Mrs. Petrovic*, the only person for whom they could acquire the title under their contract. *Peter Petrovic* would not have been permitted to derive any advantage from a transfer made by *Ledoux & Co.* to him of the property in controversy. His heir cannot be in a better situation than himself.

But it might perhaps be supposed, that whatever the conclusions of the court should be in regard to the property sold by the Union Bank, after the contract of 18th of February, 1847, and the sale of *Mrs. Petrovic* to *Ledoux & Co.*, that the title of *Mrs. Petrovic* having been completely divested to a portion of the property before the date of the contract, *Ledoux & Co.* acquired a perfect title from the City Bank to such portion of the property, and consequently conveyed the same to the defendant.

There are two answers to this position :

1st. A fair construction of the first clause of the contract shows that the whole City Bank debt was considered (notwithstanding the sale) as due that institution, and by the fourth clause, it was to be reduced and then paid by installments. The actual property in the land was, therefore, in the debtor of the bank, *Mrs. Petrovic*, and the title was only held by the bank as security.

2. The illegal stipulation in the contract (if it be viewed as a sale to the husband of the other portions of the property,) vitiated the whole contract as such. C. C. 1886.

The sale, therefore, from *A. Ledoux & Co.* must be held to enure to the benefit of the heirs of *Mrs. Harriet H. Winter*, of whom the defendant is admitted to be one.

It is agreed by counsel, that this court shall only pass upon the title of the

PARNELL
v.
PETROVIC.

parties, leaving all other questions for future adjustment. The decree accordingly will be so pronounced.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed. And we do now order, adjudge and decree, that the property in controversy be declared to belong to the succession of *Mrs. Harriet H. Winter*, deceased, late wife of *Peter Petrovic*, deceased, and her heirs; and that the plaintiffs be recognized as two of said heirs, and each, as well as the defendant. *Charles A. Petrovic*, entitled to one undivided fourth part of her said property. And it is further ordered, that this suit be remanded, in order that proper parties be made, that an inventory be taken, and that a partition be ordered, and all other needful proceedings be had according to law; the defendant and appellee paying the costs of the appeal.

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E. H. SATTERFIELD et al. v. H. KELLER et al.

Where a promise to sell to two persons jointly, contains the stipulation that such purchasers are to furnish a reliable city acceptance by a certain time, or the contract shall be null and void, the tender of the accepted draft of one of the purchasers is not a performance of the stipulation.

A party seeking to compel the specific performance of a contract of promise to sell, must himself show a specific compliance with his own obligations.

A PPEAL from the District Court of the Parish of Avoyelles, *Cullom, J.*
H. & S. L. Taylor and *W. B. Lewis*, for plaintiffs and appellants. *Canaon & Irion, O. N. Ogden* and *A. N. Ogden*, for defendants.

VOURHIES, J. A proper construction of the act containing the promise of sale from the defendants to the plaintiffs, will determine the respective rights of the parties. This instrument reads as follows:

"State of Louisiana. Parish of Avoyelles.

"Before me, *Aristide Barbin*, Notary Public in and for the parish of Avoyelles and State of Louisiana, and in presence of the undersigned competent witnesses, personally came and appeared *Messrs. Henry Keller* and *David C. Keller*, both of the parish of St. Landry, and *James Keller*, of the parish of Avoyelles, of the one part; and *Edward H. Satterfield* and *Edward Smith*, of the parish of Avoyelles and State of Louisiana, of the second part; who declared that they have entered into the following agreement, to-wit:

"I. The said appearers of the first part hereby obligate themselves to sell, transfer and deliver unto the appearers of the second part, *Edward H. Satterfield* and *Edward Smith*, the following property, to-wit: 1st, a certain plantation situated, lying and being on the left descending bank of Bayou Boeuf, in this parish, and containing fifteen hundred and thirty-five acres, together with all the buildings and improvements thereunto belonging, or in anywise appertaining thereto; 2d, eighty-three head of slaves (names omitted); 3d, all the stock and working mules and horses, to-wit, 32 head of mules, 2 mares, 35 head of neat cattle, 2 pair oxen; 4th, all the farming utensils, without any reserve; 5th, all the corn, except three thousand bushels, in sacks; 6th, sixty acres of seed cane, to be mat-lashed by vendors:—for the price and sum of one hundred and thirty thousand dollars, payable as follows:

"Twenty-five thousand dollars, a draft on *Messrs. West, Renshaw & Cammack*,

or some other responsible house of the city of New Orleans, payable on the 15th of April, eighteen hundred and fifty-nine; and the balance payable in five annual installments, to-wit:

"On the 15th of April, 1860; on the 15th of April, 1861; on the 15th of April, 1862; on the 15th of April, 1863; on the 15th of April, 1864, with eight per cent. per annum interest from maturity till paid, except the last installment, which bears same rate of interest from the 15th of April, 1863, till paid.

"The vendors are to retain mortgage.

"It is understood and agreed between the contracting parties, that this act of promise of sale is to be null and void unless the said *Satterfield* and *Smith* will furnish to the other party the said city acceptance for the first aforesaid installment, within this date and the first day of January next, eighteen hundred and fifty-nine.

"The said vendors hereby obligate themselves to keep the said sugar-house insured until the sale hereby promised is passed, or the said plantation delivered, with said sugar-house, at the rate of fifteen thousand dollars. And if the same should be destroyed before said period, the said purchasers are to accept the insurance in lieu of said sugar-house.

"The vendors hereby obligate themselves to release all liens, privileges and mortgages that may affect said property or any part thereof, on or before the day of sale aforesaid.

"The said property is to be delivered as soon as the said vendors are able to take off the crops now growing on said plantation.

"The words '*Edward Smith*,' on the first page, '*twins*' on the second, and the '*15th of April, 1853, till paid*,' interlined on the 4th page, and the word '*22*' and date, erased before signing.

"Thus done and passed, at Marksville, Avoyelles, this fifteenth day of October, eighteen hundred and fifty-eight, in presence of *Messrs. F. P. Hitchborn* and *Ludger Barbin*, of lawful age and domiciliated in this parish, who have signed, with the contracting parties, and I, Notary Public, after the reading thereof.

F. P. HITCHBORN, }
L. BARBIN, } Witnesses.

HENRY KELLER,
D. C. KELLER,
JAMES KELLER,
E. H. SATTERFIELD,
EDWARD SMITH.
ADE. BARBIN, Not. Pub."

There is a clause, in this instrument, which declares the nullity of the promise of sale, "unless the said *Satterfield* and *Smith* will furnish to the other party the said city acceptance for the first aforesaid installment, within this date and the 1st day of January, 1859." Before the expiration of this delay, the plaintiffs could not be called upon to deliver the accepted draft in question: that is certain. And it is no less certain that, under the very terms of the deed, the promise to sell was null and void, unless the plaintiffs furnished this draft within that time. But granting that *Satterfield* and *Smith* were effectually bound to furnish the accepted draft, how do they stand now? They sue for the specific performance of a contract of which they have failed to perform the very stipulation which was a prerequisite to perfecting the deed of sale. They did not even attempt, in proper time, to furnish such a draft as the one the parties contemplated. The draft of *Satterfield*, although accepted by a responsible firm of the city, was not a compliance with the contract: it should have been the draft of *Satterfield* and *Smith*.

SATTERFIELD
v.
KELLER.

BATTERFIELD
v.
KELLER.

The purchasers, as well as the vendors, did not imagine that any body's draft would answer the purpose, however irresponsible the drawer might be. Such seems to have been the understanding of the plaintiffs' own counsel; for they allege as a grievance, that the District Judge would not, during the trial, allow *Smith* to sign the draft as drawer or endorser. A party seeking to compel the specific performance of a contract of promise of sale, must himself show a specific compliance with his own obligations, or at least an attempt to that effect. This point we expressly ruled in an analogous case lately decided in New Orleans, (*Graugnard v. Lombard*, ante, p. 234.)

But the plaintiffs' demand is the more unreasonable, as they apply to the courts for the execution of a contract different in many respects from the one which they entered into. Under pretence that there are over seventy thousand dollars mortgages on the property in question, they claim the right to hold in hand the amount of the three first installments, including the sum of \$25,000, to be paid by an accepted draft, and that, in the teeth of their own stipulations that the deed of sale should be passed after the delivery of this draft within the specified time, and that the sale should otherwise be null and void.

It was proper for the District Judge to decree the nullity of the contract entered into between the parties litigant; but we are of opinion, that the damages awarded by the amicable compounders ought to have been disallowed under the circumstances. The plaintiffs having failed to make good their demand for the enforcement of the promise of sale, were not entitled to damages of any kind.

It is, therefore, ordered and decreed, that the judgment of the District Court be amended, by disallowing the damages allowed therein to the plaintiffs, and that, in other respects, it be affirmed; the costs of both courts to be borne by the said plaintiffs.

W. H. REMBERT v. WHITWORTH & POAG.

Where a commission to take testimony is specially directed by name to a person in another parish, his authority to administer oaths will be presumed.

APPEAL from the District Court of the Parish of DeSoto, *Creswell, J.*
Elam & Wemple, for plaintiff. *Mundy and Smith & Nutt*, for defendants and appellants.

BUCHANAN, J. This is an action upon a contract of affreightment for damages done to cotton shipped by plaintiff on board of flatboats of defendants, to be carried from Grand Bayou to New Orleans; said damage alleged to have been caused by the carelessness, recklessness, and want of skill of defendants and their servants.

The defence is, that the damage was occasioned by the unavoidable accidents of navigation, for which defendants are not responsible.

The jury found a verdict for plaintiff, and defendants appeal.

On the trial, defendants excepted to the introduction of the depositions of *Phelps*, a witness for plaintiff, examined under a commission directed to *William Payne*, as special commissioner in another parish, and of *Walmesly*, examined under commission directed to *Frederick Williams*, as special commissioner in

RECKERT
v.
WRIGHTWORTH.

another parish, on the ground that the signatures of said *Payne* and *William*, unaided, did not suffice to prove their authority to administer oaths.

The Act of 25th of March, 1828, § 8, amending Article 425 of the Code of Practice, provides, that commissions to take testimony in another parish, may be directed to any Judge or Justice of the Peace, or to any other person authorized by law to administer oaths. Under this law, if a commission be specially directed by name to a person in another parish, the authority of such special commissioner to administer oaths, will be presumed. *Baine v. Wilson*, 18 La. 64.

The defendants also excepted to the introduction of the testimony of *J. J. Taylor*, a witness introduced by plaintiff to prove declarations of one *Bonneau*, a witness of defendant, conflicting with the statements made by said *Bonneau*, when examined under a commission in this cause. But it is unnecessary to pass upon this bill of exceptions, inasmuch as there is evidence enough to sustain the verdict of the jury without the testimony of *Taylor*.

The questions of fact presented by the issue, appear to have been correctly solved by the verdict.

Judgment affirmed, with costs.

ESTATE OF T. J. HICKMAN v. PETER BOGGUS.

Where by an evident clerical error, a different name from that of the defendant in the suit has been inserted in the prayer of the petition, the suit should not be dismissed, but leave granted to correct the error by an amendment *instanter*.

APPEAL from the District Court of the Parish of Rapides, *Cullom, J.*
Ogden & Ryan, for plaintiff and appellant. *W. B. & J. C. Lewis*, for defendant.

LAND, J. This suit was commenced for the recovery of a slave, and was dismissed on an exception to the petition, the nature of which will best appear from the petition itself, and the exception thereto, which are as follows :

"The petition of *Valery Gannie*, a resident of the parish of Natchitoches, and administrator, duly qualified, of the estate of *Thomas J. Hickman*, deceased, shows that the said *Thomas J. Hickman*, in his lifetime, possessed as owner a certain negro man slave for life, named *Adam*, of black complexion, and aged about fifty-five years, which slave was acquired by him by purchase from *Jonathan West*, on the 28th day of February, 1852, by an authentic act passed before *A. L. Bringham*, Notary Public, and duly of record in the office of the Recorder of the parish of Rapides. He shows that the estate of the said *Thomas J. Hickman* has continued in the ownership of the said slave up to the present time, and has had possession of the same up to a recent period, but that the said estate and your petitioner, as administrator thereof, have been disturbed in their said possession, within the last twelve months, by one *Peter Boggus*, a resident of your parish of Rapides, who has tortiously taken possession of said slave and refused to give him up, although thereto amicably requested. He shows that said slave ran away from petitioner, and that the defendant has taken possession of him, and absolutely refuses to surrender him, notwithstanding that due demand has been made of him by the overseer who had the slave in charge for said estate, and for your petitioner, as administrator. He shows that said estate has sustained

HICKMAN
v.
BOGGUS.

damage by the illegal detention of said slave, to the amount of three hundred dollars. He prays that the said *Jonathan West* be duly cited to answer hereto, and that he be ordered and condemned to deliver up said slave to your petitioner, and that he have judgment against him for the sum of three hundred dollars as damages as aforesaid. Your petitioner also alleges, that he fears that the defendant will send the said slave out of the jurisdiction of the court during the proceedings of this suit. Wherefore, he prays for a writ of sequestration, on his complying with the requisites of the law, and that the Sheriff of your said parish be commanded to sequester and take into his possession the said slave, in order that he may be restored to the possession of your petitioner, under the judgment to be herein rendered by the court. He prays also for a judgment against the said *Peter Boggus*, for the costs of this suit and for general relief."

EXCEPTION.

"*Estate of T. J. Hickman v. Peter Boggus*—District Court, Parish of Rapides, No. 6174.

"*Peter Boggus*, who has had a copy of the petition and a citation in the case above named, served upon him, in obedience to the order contained in said citation, comes into court and says, he does not know how he can be made responsible for the costs of a suit in which he is not a defendant. By reference to the prayer of the petition, it will be seen that the plaintiff asks for a citation against *Jonathan West*, for the possession of a slave alleged to be in the possession of *Peter Boggus*, and for damages, and concludes by asking a judgment against *Peter Boggus* for costs. Plaintiff does not ask for citation against *Boggus*, but only against *West*, nor does he ask for judgment for possession of a slave and damages against *Peter Boggus*, but only asks that *Peter Boggus* pay the costs of a suit against *Jonathan West*. Now, your respondent says, that he ought not to have had any document or citation served on him, and avers that the whole proceeding is erroneous, and so far as he is concerned, asks the court to dismiss the same with costs. He says, no judgment being asked for, none can be rendered against him. He prays for general relief," &c.

The name of *West* used in the prayer of the petitioner, is evidently a clerical error, and the judgment of the lower court should have granted to plaintiff leave to correct it, by an amendment *instante*.

It is, therefore, ordered, adjudged and decreed, that the judgment be reversed, and the cause remanded for further proceedings according to law, with leave to plaintiff to correct the clerical error in his petition, and that defendant pay the costs of this appeal.

ESTATE OF J. WEST v. ESTATE OF J. HICKMAN.

In a suit by the administrator of an estate to recover property sold by the intestate, parol proof is inadmissible to show that the sale by authentic act was simulated, unless the sale is alleged to have been made in fraud of creditors.

When the defendant sets up in his answer title by authentic act, to the property sued for, the plaintiff is entitled to amend his petition, by putting at issue the validity of such title

APPEAL from the District Court of the Parish of Rapides, *Cullom, J.*
W. B. & J. C. Lewis, for plaintiff. *T. C. Manning*, for defendant and appellant.

MERRICK, C. J. "Plaintiff, as administrator, claims, on behalf of the estate of *J. West*, certain slaves, with their increase and hire, since November 7th, 1851, from the estate of *Thomas J. Hickman*. He alleges that these slaves were delivered into *Hickman's* possession by virtue of an act *sous seing privé*, of date of 7th November, 1851, which was a mere simulation, and never intended to be a transfer of ownership. He prays that they be adjudged to be delivered to him as administrator; further prays for hire since November, 1851, and for costs and general relief."

"Defendant's answer denies any knowledge of the act mentioned in plaintiff's petition, and sets up title to the slaves, together with three others, by virtue of an authentic act, dated 28th of February, 1852, purporting to be a sale from *West* to *Hickman*. He alleges some of these slaves to be in plaintiff's possession, and sets up claim in reconvention for hire.

"After answer filed, and before trial, plaintiff moved to amend his petition, alleging the simulation also of the authentic act, set up in defence, and further claiming other property, delivered by *West* into *Hickman's* possession in the month of November, 1851, on the same ground as that upon which the slaves are claimed.

"This amendment was objected to, and the court sustained the objection."

The plaintiff excepted.

On the trial of the case, the plaintiff offered parol proof of the declarations and admissions of the parties to the act, to show simulation, to which the defendant excepted.

From a judgment in favor of the plaintiff, defendant appeals.

The evidence, as it stands, shows, that the sale was undoubtedly a simulation. But from a consideration of the pleadings, it is evident, that so much of the proof as relates to the declarations and admissions of the parties, was inadmissible, and ought to have been excluded. There is no allegation in the petition, that the simulation was in fraud of or to the injury of creditors. Without such allegation, the administrator cannot be permitted to give parol proof to defeat defendant's authentic title. *Gravier's Curator v. Carraby's Executor*, 17 La. 118; *Judson v. Connolly*, 4 An. 169; *Berens v. Dupré et al.* 6 An. 494.

The court also erred in refusing the plaintiff leave to amend and attack the authentic title set up against him by the defendant. The proposed amendment did not change the nature of plaintiffs demand, but tended to remove another obstacle in the way of his recovery.

The case must be remanded, in order to allow the plaintiff to amend his pleadings, and put directly at issue the validity of the notarial act set up by defendant. Should the plaintiff decline to amend, (as he may do,) by alleging injury to the creditors of the succession, he may still submit the question, whether the counter-letter was not intended by the parties to apply to the notarial act also.

And this counter-letter may be read by the "light of surrounding circumstances," and the plaintiff may, for this purpose, show the acts of the parties independent of their declarations, and even that no consideration was given at the notarial sale.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed; and that the lower court be instructed to allow the plaintiff to file his said amended petition, and for further proceedings according to law and the views herein expressed; the defendant paying the costs of the appeal.

EXECUTORS OF MORGAN v. C. D. MÉTAYER.

The death or insolvency of one debtor *in solido* does not release or extinguish the right of *solidarity* which the creditor has against the others ; and the acknowledgment of a debt, by placing it on a tableau of distribution made by the syndic of a debtor *in solido*, who is insolvent, interrupts prescription as to the other debtors bound *in solido* with him.

APPEAL from the District Court of the Parish of Natchitoches, *Chaplin, J. A. H. Pierson*, for plaintiff. *Kearney & Hamilton*, for defendant and appellant.

LAND, J. The only question in this case is, whether the acknowledgment of a debt, and placing the same on a tableau of distribution, by the syndic of an insolvent debtor *in solido*, interrupts prescription as to the other debtors *in solido*.

It is a general rule that the service of citation upon one debtor *in solido*, or his acknowledgment of the debt, interrupts the prescription with regard to all the others, and even their heirs and sureties.

Pothier says, " There is a great difference between an acknowledgment made after the time of the prescription is accomplished, so as to destroy it, and one made before, which has the effect only of interrupting it ; the latter may be made not only by the debtor himself, but also by a *tutor, curator, or person having a general procuration* ; it may be made by the debtor himself, though a minor, without his being entitled to restitution against it." He further says, " Any act by which the debtor acknowledges the debt interrupts the time of prescription, whether it be passed with the creditor, or without him. For instance, if in the inventory of the effects of the debtor, the debt is included amongst the charges (*parmi le passif*), such inventory though not made with the concurrence of the creditor, is an act which recognizes the debt, and interrupts the prescription. Pothier on Obligations, Nos. 658, 665.

In this case, the syndic acknowledged the debt before the time of prescription had been accomplished, and in a mode that would have been obligatory on the debtor himself.

It is not disputed that a *tutor, curator, or other administrator*, under our jurisprudence, may acknowledge a debt so as to interrupt prescription ; and consequently, when the debt is *in solido*, the legal effect of the acknowledgment, under the rule above mentioned, is to interrupt the prescription as to the other debtors *in solido*, their heirs and sureties. And we perceive no sufficient legal reason to induce us to hold that the syndic of an insolvent debtor *in solido* has not the same power as his legal representative in all rights of action, and of property, to interrupt prescription by an acknowledgment of the debt. So long as the liability is *in solido*, the acknowledgment of one debtor, or his legal representative, must have its legal effects, as to the others. The death or insolvency of one debtor *in solido* does not release or extinguish the right of *solidarity* which the creditor has against the others. This right can only be released or renounced by the consent or agreement of the creditor. Pothier on Ob., No. 277.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

C. V. LEDOUX et al. v. HARRIET M. MURRAY et al.

Where in a suit to compel the defendant to render an account, an order to file the account has been made, and a judgment by default taken on the petition for want of an answer, the refusal of the defendant to comply with the order, although a good ground for his arrest and punishment, for contempt of the authority of the court, will not deprive the defendant of the right to file his account at any time before the judgment by default is made final.

A PPEAL from the District Court of the Parish of Rapides, *Cullom, J.*
W. B. Lewis and Hyman & Cazabat, for plaintiffs. *J. H. C. Barlow and M. Canfield*, for defendants and appellants.

VOORHIES, J. The defendants, *Harriet M. Murray*, as principal, and *S. W. Henarie*, as surety, executed a bond for the sum of \$7,567 50 in favor of *C. V. Ledoux* and the creditors of the firm of *J. F. Murray & Co.* "The condition of this obligation (the instrument reads) is such, that, whereas it is necessary for the purpose of collecting the debts due the commercial firm of *J. F. Murry & Co.*, that some one should be appointed to act therein; and now, whereas *Mrs. H. M. Murray* is willing, with the assent of the said *C. V. Ledoux*, to take upon herself the duties and responsibilities of such collection; now, if the said *Mrs. Murray* shall well and faithfully discharge the duties of said trust, then this obligation to be null and void, else to remain in full force and effect."

C. V. Ledoux, acting in his own name and on behalf of the creditors of the firm of *J. F. Murray & Co.*, sued the parties for a rendition of account, and, in default of their complying with this demand, he prayed for judgment for the amount of the penal obligation.

The defendants waived service of the foregoing petition; and on the 16th day of May, 1857, judgment by default was entered against them. Subsequently, the defendant, *Harriet M. Murray*, was ordered to file an account; but, this order not having been served upon her, she was again ordered to the same effect, and served with a copy of the order. The case was repeatedly fixed for trial, although no account nor answer had ever been filed; and on the 23d day of November, the case having been reached and called for trial, the defendants offered to file an account and an answer.

The District Judge refused to let in the account at that stage of the proceedings, because the defendant had had abundant time to comply with the order of court to that effect, but had refused or neglected to do so. This was a good reason why the court should have proceeded, in the meantime, to have the parties arrested for a contempt of its authority, and dealt with accordingly. But it is never too late, before a case is at issue and fixed for trial, for the defendant to file an account in compliance with a previous order of court. The Code of Practice, Art. 463 provides that, "as soon as the answer has been filed in a suit, the clerk shall set down the cause on the docket of the court, in order that it be called in its turn, and a day fixed for its trial." In this case, although no answer has ever been filed, the court proceeded to assign a day for trial: the defendant could not be prejudiced by this order. It is true that the plaintiff could, at any time after the lapse of the judicial days, make the judgment by default final on motion; but this is not the course pursued by him in this instance. He could not prevent the defendant, at any time before making the judgment by default final, from putting the case at issue by filing an answer.

LEDOUX
v.
MURRAY.

This case must be remanded for the purpose of allowing the defendants to file an account and joining issue. With regard to the exception which the District Court would not allow the defendants to file after judgment by default, we express no opinion as to the right of the defendant on its merits. The exception should have been filed, subject to be afterwards overruled by the court, if the case justified the ruling.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed, and that this case be remanded for further proceedings; the plaintiffs and appellees paying the costs of appeal.

14 514
100 1084

THOMAS C. ANDERSON v. C. E. JOHETT, Clerk, et al.

A citation issued and signed by the Parish Recorder in his official capacity, instead of the clerk, will be fatal to the validity of any judgment which may be rendered against the party on whom it was served.

When a clerk refuses or neglects to issue citation, on the demand of a plaintiff or his attorney, and is specially informed that the cause of action will be barred by prescription within a short period, unless interrupted by service of citation, he renders himself and his sureties liable for the debt, or demand, as soon as prescription is accomplished, in consequence of his neglect to perform his official duty.

In a suit brought against a clerk and his sureties, to render them liable for such neglect, they cannot plead, by way of defence, that the party who had acquired the right to prescription through their neglect will not plead it, the presumption is that he will, and the burden of proof is on them to rebut it.

A PPEAL from the District Court of the Parish of Rapides, *Cullom, J.*
W. B. Lewis, for plaintiff. *T. C. Manning* and *J. Osborne*, for defendants and appellants.

LAND, J. The plaintiff filed his petition in the District Court of the Parish of Rapides, on the 29th day of October, 1856, on four several promissory notes, each for the sum of one hundred dollars, and due respectively on the first day of January, 1852, bearing interest at the rate of 8 per cent. per annum from maturity, and signed *in solido* by *S. A. Anderson, Sr.*, *W. R. Anderson*, *J. L. Escoffie*, and *S. A. Anderson, Jr.* In the suit on the notes, citations were not placed by the clerk of the court in the hands of the Sheriff until the 10th day of June, 1857.

On the 18th day of April, 1857, the present action was commenced against the clerk and the sureties on his official bond, to recover the amount of the notes and the interest thereon, upon the ground that the claim of plaintiff against the makers of the notes had been lost by prescription in consequence of the neglect of the clerk to issue citations to the defendants before the time of prescription had been accomplished, that is to say, in time for service before the 1st day of January, 1857.

There was judgment for plaintiff, and defendants have appealed.

One of the sureties on the bond, *Vestal Gould*, assigns as error patent on the face of the record, that judgment has been rendered against him without any legal citation or notice. It appears that the citation served on him was issued and signed by the Parish Recorder, in his official capacity. A citation must be signed by the clerk who delivers it, and express his quality; it must be sealed with the seal of the court by whose order it is given. C. P., Art. 179, No. 7. This error

was not cured by the appearance and answer of this defendant, none having been filed, and is, therefore, fatal to the validity of the judgment against this party.

It is objected on the merits, by the clerk and *L. A. Stafford*, the other surety on the bond, who filed answers to the suit, that the judgment is erroneous, for the reason that the plea of prescription had not been made by any of the defendants at the time of the commencement of this suit, and that the same is still pending against two of them, who have not yet pleaded prescription to plaintiff's demands, and who may never do so; and that, as the court cannot notice or pass upon the plea of prescription, unless specially made, that it does not appear that the plaintiff has, or ever will sustain any loss in consequence of the neglect of the clerk in issuing citations to the defendants.

There would be, perhaps, much weight in this objection, under ordinary circumstances; but it is our opinion, that when the clerk of a court, as in this case, refuses to issue citation on the demand of a plaintiff or his attorney, and is specially informed that the cause of action will be barred by prescription within a short period, unless interrupted by service of citation, that he makes himself and his sureties liable for the debt, or demand, as soon as the prescription is accomplished, in consequence of his neglect of official duty. The plaintiff is injured by his nonfeasance, and the defendant is furnished with a plea in bar fatal to the action. It does not lie in the mouth of the clerk and his sureties to say, that the defendant will not plead it; the presumption in such a case is, that he will, and the burden of proof is on them to rebut it.

It is, therefore, ordered, adjudged and decreed, that the judgment, as to *Vestal Gould*, be reversed, and that the suit as to him be remanded for further proceedings according to law; and that the judgment as to *C. E. Joiett*, the clerk, and *L. A. Stafford*, his other surety, be affirmed, with the costs of the lower court, and one-half of the costs of this appeal, and that the other half of the costs of appeal be paid by the plaintiff. And it is further ordered and decreed, that upon the payment of this judgment by said clerk or his sureties, that he or they be subrogated to the rights of the plaintiff upon said promissory notes.

J. R. WILLIAMS et als. v. WILLIAM HAWTHORN et als.

Creditors having individually the right to institute the revocatory action, they may be joined as plaintiffs to the same suit, to have a fraudulent or simulated conveyance made by their common debtor annulled.

In a revocatory action, all persons charged with colluding for the purpose of defrauding the plaintiffs, may be joined as defendants.

APPEAL from the District Court of the Parish of Rapides, *Cullom, J. Hyman & Cazabat*, for plaintiffs and appellants - *W. B. & J. C. Lewis*, for defendants.

VOORHIES, J. The motion to dismiss, in this case, has been unadvisedly filed; it sets forth as a defect, that one of the appellants has not given his bond of appeal, whilst it appears that both of them executed separate bonds.

This action is brought by two creditors of *Albert Hawthorn*, for the purpose of annulling a sale made by their debtor to *William Hawthorn*, and a judgment

ANDERSON
v.
JOHNETT.

14	615
50	1235
14	615
el19	24

WILLIAMS
v.
HAWTHORN.

obtained by *Martha Hawthorn* against her husband, *Albert Hawthorn*. The alleged grounds of nullity are fraud and simulation.

Albert Hawthorn, his wife *Martha Hawthorn*, and his brother *William Hawthorn*, who are made defendants in this matter, excepted to the plaintiffs action, on the following grounds, to wit :

1st. A misjoinder of plaintiffs.

2dly. A misjoinder of defendants ; and,

3dly. An illegal cumulation of causes.

I. The claims of the plaintiffs against their common debtor, are distinct ; but the cause of action, when they seek to avoid the effects of a fraudulent or simulated conveyance made by the common debtor to their detriment, is the same. If each and every creditor, irrespective of the origin of his claim, has the right to institute individually the revocatory action, there can be no impropriety in their joining for that purpose in the same action, in order to avoid a multiplicity of actions tending absolutely to the same result.

II. The second ground of objection, that there is no privity between the defendants, is met with the express allegation in the petition, that all the defendants are colluding for the purpose of defrauding the just creditors of one of these parties.

III. The plaintiffs ask the nullity of the sale to *William Hawthorn*, and of the judgment in favor of *Martha Hawthorn*, and go on to allege, that the wife has caused the undisposed of property of her husband, to be seized and sold, and that they are entitled to be paid by preference out of the proceeds in the hands of the Sheriff, because they have a judicial mortgage on all the property in question, and the defendant, *Martha Hawthorn's* claims, being fictitious and fraudulent. But the Sheriff is not made a party to these proceedings. The wife has a legal mortgage on the property of her husband ; the property conveyed by *Albert Hawthorn* to *William Hawthorn*, is encumbered with a mortgage in favor of *Martha Hawthorn*, if her claim be not fictitious ; and the plaintiffs claim a judicial mortgage on all the property in controversy ; it is, therefore, their interest to have her judgment set aside, at the same time that the sale to *William Hawthorn* is cancelled, and, to that extent, the right of action against one of the defendants is closely related to the right of action against the other.

If the plaintiffs succeed in their cumulated demands, they can at once, without molestation, proceed to make their claim out of the whole property of the common debtor ; whilst their remedy would be more circuitous, if they had to proceed against each of the defendants separately. Besides, it is not conceived in what respect the latter may be injured by being called upon collectively to answer the plaintiffs' demand ; their respective rights are to be tested in the same manner, as if separate suits had been instituted.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed ; that the exception filed by the defendants to the plaintiffs' action be discharged ; and that this case be remanded for further proceedings ; the appellees paying the costs of appeal.

SUCCESSION OF ROBERT McALPIN.

14	617
46	430

The Articles 985 and 986 of the Code of Practice, prescribe the form in which a debt due by a succession, must be acknowledged by the administrator—*Quere*: Whether such acknowledgment can be made in any other form, to interrupt prescription.

APPEAL from the District Court of the parish of Natchitoches, *Chaplin, J. A. H. Pierson*, for plaintiff. *J. M. B. Tucker*, for opponents and appellants.

MERRICK, C. J. This case is presented by an opposition to an administrator's account, wherein he had placed the appellee as a creditor for \$848 for medical services.

The principal question presented by the case is the plea of prescription of three years.

The services were rendered from 8th of May, 1850, to 6th of June, 1853, the time of the death of the intestate.

The claim was not noticed at the time of filing the first account in July, 1855.

The second and final account was not filed, until 26th of March, 1859. The opponents maintain that prescription had intervened, and barred the claim between the death of the intestate and the filing of the last account, wherein the claim was acknowledged.

To show an interruption of prescription, the appellee calls our attention to the testimony of the administrator himself. He deposes, that :

"*Dr. Rainer* made his claim against the succession of *McAlpin*, known to witness, who is administrator of the estate, two or three months after *McAlpin's* death. The claim was not placed on the first tableau, because the account had been given to *Mr. Compere*, who did not give it to witness in time to put it on the first tableau, and *Rainer* thought it was already in the hands of the administrator."

On his cross-examination, he says :

"The claim of *Dr. Rainer* was put upon the tableau of witness, as administrator of the estate, because he, *Rainer*, was entitled to something, and that if too much was allowed, the heirs could oppose the claim. Witness states, that no other medical bill was presented to him but that of *Dr. Rainer*, and of the physician whom witness, as administrator, had himself employed. Witness, as administrator, has made no written acknowledgment since 1858 of the claim of *Dr. Rainer*, except by putting it on the rough sketch of a tableau which he kept for his own reference as he did with all others. Witness told *Dr. Rainer*, that he would place his claim on the tableau. Witness has received letters from lawyers and *Dr. Rainer*, requesting this account to be placed on the tableau. Witness answered none of the letters; but told *Dr. Rainer*, that he would say nothing of an account which was not in his hands."

The rough sketch of a tableau, unless communicated to *Dr. Rainer* or some other person, or filed, could not be considered as the acknowledgment of the debt, and this appears to have been made since 1858.

If it be conceded, (which is a point we do not undertake to decide,) that the administrator can acknowledge a debt in any other form than prescribed by Arts.

SUCCESSION OF
MCALPIN.

985 and 986 of the Code of Practice, still we do not think that there has been that acknowledgment of the debt required to interrupt prescription. Suppose the administrator promised to place the claim on the tableau of distribution when it was presented to him in 1853, by the creditor, and again when it was acknowledged in 1858, or placed on the tableau filed in 1859, the only times at which it appears there were any conversations concerning this claim, the prescription of three years had run between the supposed acknowledgment in 1853, and the written acknowledgment in 1858. It appears to us that the plea must be maintained.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, so far as it allowed the said *Rainer* any sum whatever, and that the opposition to the claim of said *Rainer* be sustained; and that said *Rainer* pay the costs of the appeal, and so much of the costs of the lower court as are occasioned by the opposition to his said claim against said succession.

14	618
44	1090
14	618
52	1766
14	618
108	94
14	618
110	68
14	618
128	204

CELESTE JOFFRION v. HYPOLITE BORDELON et al.

The voluntary separation of husband and wife does not prevent their acquisitions during the period of the separation, from falling into the community under Article 2371 of the Civil Code.

When the property of the wife described in the marriage contract, is not declared to be given in dower, it remains paraphernal.

Where property purchased during the marriage is paid for out of the separate funds of the husband, a charge exists in favor of the separate estate of the husband against the community for the amount of such purchase.

A PPEAL from the District Court of the Parish of Avoyelles, *Cullom, J. Edwards, Barlow & Waddel*, for plaintiff and appellant. *H. & S. L. Taylor*, for defendants.

MERRICK, C. J. The plaintiff, then a widow, being about to marry *Valery Bordelon*, on the 8th of October, 1840, signed, with him, a marriage contract, wherein it was agreed that there should be a community of acquets and gains between the future spouses. The marriage contract enumerated the paraphernal property of the wife, but did not constitute the same in dower. It also enumerated the separate property of the future husband.

The marriage was solemnized the same day. The parties lived together but a few months and then separated, the wife receiving her paraphernal effects and ever afterwards living upon the same, and managing her affairs without the assistance of the husband.

The husband lived upon property purchased by himself, and made some further acquisitions.

Valery Bordelon died in 1858. The present suit is brought against the administrator and the heirs of the deceased, by the plaintiff, to recover her supposed dotal rights, and also one-half of the community of acquets and gains, and the usufruct of the residue.

The judgment of the lower court having been rendered against the pretensions of the plaintiff, she has appealed.

It is contended, that as it is clear that the acquets were not the product of the reciprocal labor of both the husband and wife, (inasmuch as the wife had volun-

tarily abandoned her husband,) there is no reason to apply the provisions of Art. 2371 of the Civil Code to this case, where, for a period of nearly eighteen years, the wife contributed nothing to the common fund.

The testimony shows, that the separation of the parties was voluntary. It was in the power of the husband, after he had concluded to reside with his wife on her paraphernal property no longer, to summon her to reside at his house, or any other domicile he had seen fit to establish, and in the event of her refusal, he could have effected, by suit, a separation of property and, ultimately, a divorce. C. C. 151, 2389.

Of this right, he never thought it worth the while to avail himself. Not having done so, but resting entirely upon the voluntary separation, his acquisitions fell into the community under the effect of Articles 2371 and 2401 of the Civil Code. The latter Article declares, that every voluntary separation of property is null, both as respects third persons and the husband and wife between themselves. See also 6 An. 632.

If there are cases in which the wife, by her conduct, may forfeit her interest in the community, the passive conduct proved in the present instance, does not appear to us to come within such excepted cases. See 12 An. 145.

The property of the wife described in the marriage contract, not having been declared to be given in dower, remained paraphernal. The same having been restored to the wife, at the time of the voluntary separation, and having been administered by her, she has no claim upon the community for what she may have lost, worn out or consumed by use.

In the acts of sale by which the husband purchased the property now claimed as community, there are no clauses by which it can be inferred, that it was intended to be bought as separate property. The sales were in the usual form, and though it may have been the intention of *Valery Bordelon* to pay for the same out of his separate funds, yet it is not, as we perceive, so expressed in the acts. These purchases made during the existence of the marriage, fell into the community. 5 An. 611; 7 An. 104, *Bass v. Larche, tutor*.

The proof, although circumstantial, we think, is sufficient to show that the purchases were paid for with the separate funds of the husband. The community should, therefore, be changed in favor of the separate estate of the deceased with the amount of the purchases of the effects of the community.

It appears to be conceded, that the slave *Dadate* belonged to the separate estate of the deceased.

We shall not undertake to settle the rights of the parties further by this decree, but will remand the case for further proceedings.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed; and it is now ordered, adjudged and decreed, that a community of acquets and gains be declared to have existed between the plaintiff and the said *Valery Bordelon*, deceased; that the separate estate of the said *Valery Bordelon* be recognized as a creditor for the sums paid for the property and effects belonging to the community; that plaintiff's demand for and on account of dotal effects, be rejected; and that this cause be remanded to the lower court, with directions to cause an inventory to be made of the effects of said community, and to proceed to the settlement of the same according to law, and the principles herein announced; the defendants and appellees paying the costs of the appeal.

STATE OF LOUISIANA v JAMES ADAMS.

It is sufficient, in an indictment for an attempt to carry a slave by land out of the State, to describe the slave as being "a negro man, slave for life," and giving the name of his master, when the name of the slave is not known, to the District Attorney or to the Grand Jury.

The Act of 1816, making it a crime to carry, or attempt to carry a slave by land out of this State, is not repealed by the general repealing clause of the Act of 1855, relative to crimes and offences, nor by the same clause in the Act of 1857, relative to slaves.

The general repealing clauses of these Acts do not repeal the former statutes denouncing crimes and offences, upon which the Acts are silent.

In a cross-examination of a witness for the State, the question was asked the witness "*if he was not anxious that the defendant should be convicted.*"—*Held*: That the question was a proper one, and might be asked to show bias on the mind of the witness, and that it was competent for the jury to decide from his answer to what extent his credibility may have been affected by it.

A PPEAL from the District Court of the Parish of Rapides, *Cullom, J.*
C. N. Hines, District Attorney, for the State. *Hyman & Cazabat*, for defendant.

VOORHIES, J. This case comes up on two motions to quash, and several bills of exception. The defendant was found guilty of the offence of feloniously and willfully attempting to carry a slave out of the State by land.

The first motion to quash points out as a defect, that the name of the slave is not given. It was sufficient to describe him, in the words of the indictment: "a certain negro man, slave for life, whose name is to the jurors aforesaid unknown, but who then and there belonged to and was the property of *James H. Dawson.*" It is not made apparent by bill of exception, that the Grand Jury or the State Attorney were at the time aware of the name of the slave; the above must, therefore, be held to be a sufficient compliance with the law in describing the slave in question.

The second motion to quash sets up that the Act upon which this prosecution is based, has been repealed by the Acts of the 14th March, 1855, "relative to crimes and offences," and of the 19th of March, 1857, "relative to slaves." It is true that the repealing clauses of these Acts repeal all former Acts on the same subject-matter; but we have repeatedly held, in giving effect to this clause, that it does not repeal those statutes, denouncing certain crimes and offences, upon which these Acts are silent; or, in other words, that all foregoing statutes punishing crimes and offences are not done away with, unless reference be made to these offences in the above quoted Acts of 1855 and 1857. *State v. Slave Jack*, ante 385.

This case must, however, be remanded, on account of the ruling *ex officio* of the District Judge, rejecting the following question propounded on cross-examination by the defendant to a State witness, to-wit: "if he was not anxious that the defendant should be convicted?" The question was a proper one, as the object of it was to show bias on the part of the witness for the prosecution. In weighing that testimony, it was all-important that the jury should have been made aware of the state of the witness's mind on the subject; and if really he was anxious that the accused should be convicted, it would then have been the duty of the jury to ascertain to what extent, if at all, his credibility was affected.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed, and that this case be remanded for further proceedings.

ESTATE OF M. MAILLON, f. w. c., v. HENRY BOYCE.

When the defendant, in a petitory action, prays for oyer of the title papers under which plaintiff claims, the plaintiff is bound to file them on the day fixed by the order of the court, under the penalty of a dismissal of the suit.

An order of survey will not withdraw a case from the consideration of the court during the delay fixed for the return of the survey, as in case of an order of continuance.

APPEAL from the District Court of the Parish of Rapides, *Cullom, J.*
W. B. & J. C. Lewis, for plaintiff and appellant. *J. K. Elgee*, for defendant.

MERRICK, C. J. The plaintiff's counsel states his case as follows :

"The facts on which the decision of this appeal depends are these : In December, 1858, *Lytleton Bailey*, administrator of the estate of *Merrick Maillon*, brought suit against *Henry Boyce*, for certain tracts of land confirmed and patented, the one to the legal representatives of *Jean Baptiste Vallery*, and the other to the legal representatives of *Joseph Mariataurus*, and through them derived to plaintiff. On the 3d of May, 1859, defendant filed, in open court, a motion praying for oyer of the documents sued on. To this motion the court responded, by ordering the documents to be filed on or before May 9th. On the 12th of May, plaintiff not having filed the documents called for, the court, on motion of defendant's counsel, dismissed the suit.

"On the 14th of May, plaintiff filed a motion for new trial, on the following grounds :

"1st. That the only legal effect and consequence of his failure to file his title papers on the day fixed by the court, was to relieve the defendant from the necessity of answering, and was no sufficient reason for dismissing the petition, as in case of nonsuit.

"2. That subsequently to the order to file documents, to wit, on the 7th May, the court, on motion of plaintiff's counsel, granted an order of survey, returnable on the first Monday of its next term in November, 1859, and thereby continued the case ; thus placing it beyond its jurisdiction and control, unless by consent of parties.

"This motion being overruled, plaintiff has found it necessary to seek relief at the hands of this honorable court."

Article 174 of the Code of Practice requires, that when the action is founded on a notarial or public act, an authenticated copy of it must be annexed to the petition, in order that it may be communicated to the defendant, if he require it.

By Article 175, it was provided, that if the title, on which the demand is founded, be an act under private signature, it must be annexed, in order that the defendant may be enabled to confess or deny his signature. This latter Article was amended by the Act of 1826, so as to dispense the plaintiff from the necessity of filing the original act with his petition, "provided, that if the defendant pray a view or oyer of the document declared upon, the court shall order the same to be filed within a reasonable delay, and in default of plaintiffs complying with said order, his petition shall be dismissed. Phillips' Dig. p. 91, sec. 5.

The Article 175, as amended, is *in pari materia* with Article 174, and by the well known rules of construction, they must be considered together. The conse-

MAILLON
v.
BOYCE.

quence of the refusal to comply with the Judge's order to produce the copies of the authentic titles which the plaintiff ought to have annexed to his petition, must be the same as in the case of a private act under the amended Article 174. The penalty for a disobedience of the Judge's order, should be the same in the one case as the other.

The order of survey did not rescind the previous order, and was only obtained on the supposition that the order to produce title papers would be complied with. It did not have the effect of withdrawing the cause from the consideration of the court during the delay fixed for the return of the survey as a formal order of continuance might have done.

The case of *Smith's Heirs v. Blunt*, 2 La. 133, relied upon by plaintiff, is not entirely analogous. In that case, there was no order of court requiring the plaintiff to produce the copies of the public acts. Defendant claimed a dismissal of the action, on his exception, because the plaintiff had neglected to file such copies with his petition. The court very properly held, that it was no ground for dismissing, and intimated that it would be a sufficient protection to the defendant to allow him the right of refusing to answer until the documents on which the action is based, should be filed.

In the present case, the District Judge, exercising the discretion vested in him, fixed a delay within which the plaintiff was to file the papers forming his title. The reasonable penalty for a disobedience of the order was a dismissal of the suit, as prescribed by the statute.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be affirmed, with costs.

SUCCESSION OF JOHN GURNEY.

Irregularities and informalities, which precede the decree of a Probate Court ordering the sale of the property, to pay the debts of the succession, cannot render the decree of the court and the sale under it null and void.

When a court has jurisdiction, its decree protects the purchaser at a probate sale, from all informalities which may have preceded it, in the absence of any charge, or proof of fraud, even though the purchaser be the administrator, or one of the heirs-at-law.

APPEAL from the District Court of the Parish of Natchitoches, *Chaplin, J. J. B. Smith*, for plaintiff. *A. H. Pierson*, for opponents and appellants.

LAND, J. The administrator of this estate, was the brother and one of the heirs at law of the deceased. He filed his final account for homologation, which was opposed by his co-heirs, among other matters, on the ground that the lands belonging to the succession had been illegally sold, and that the sale thereof was null and void.

They also commenced a direct action (which was cumulated with the opposition,) to annul the sale, and to subject the lands to further administration.

The grounds of nullity alleged are as follows :

First. The inventory for the same, was made without any notice to them whatever, and without their being present or represented thereat, and the inventory was far below the real value of the same.

Second. The order for sale was granted without any previous notice or citation

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to them to show cause against the same, and without any showing whatever made for the necessity of the sale.

Third. The sale was consented to by the attorney of other heirs that were absent, at a time when he could not be acquainted with the wishes of those he represented, and before the delay allowed by law had expired.

Fourth. The sale was made without sufficient advertisement.

Fifth. It was made at a great sacrifice and loss to your petitioners, and without any opportunity on their part to prevent it, or of furnishing means to satisfy the just debts of the succession.

The three first mentioned causes of nullity *preceded the decree of the court ordering the lands to be sold*, for the payment of the debts due by the succession, and are insufficient under our jurisprudence as settled in the cases of *Mitchell's heirs v. Mitchell's curator*, 11 L. 156, and of *Lalane's heirs v. Moreau*, 13 L. 431, to annul the sale made by order of the court. They are irregularities which do not render the decree of the court and the sale under it null and void. The court had jurisdiction and its decree protects the purchaser, although he was the administrator and one of the heirs at law, in the absence of any charge or proof of fraud against him.

The two other mentioned causes of nullity *followed the order of sale*, but they are not as questions of facts sustained by the evidence. The advertisement was sufficient, and it does not appear that the co-heirs sustained any loss in the sale of the lands. The active competition between bidders at the sale, caused the property to sell for more than its appraisement, and to bring its full market value.

The judgment of the lower court annulled the probate sale of the lands, and rejected a claim placed on the tableau, for the sum of \$54 90, the cost of advertising and the fees of the Sheriff for making sale of the lands, and is in these particulars erroneous. It is, in all other respects, correct.

It is, therefore, ordered, adjudged and decreed, that the judgment be reversed so far as it decrees the judicial sale of the lands of the succession null and void, and rejects the claim of fifty-four dollars and ninety cents, for advertising and selling the same, and that the demands of the co-heirs in these respects be rejected, with costs. And, it is further ordered and decreed, that the judgment be in all other particulars affirmed, with the costs of the opposition in the lower court, and that the appellees pay the costs of this appeal.

CLAIRE CAILLETEAU, Tutrix, v. LOUIS INGOUF, Administrator.

The validity of a judgment confirming the mother as natural tutrix of her minor children, cannot be called in question collaterally.

A PPEAL from the District Court of the Parish of Avoyelles. *Cullom, J.*
Hitchborn & Barbin, for plaintiff and appellant. *H. & S. L. Taylor*, for defendant.

VOORHIES, J. The plaintiff, claiming to be the natural tutrix of her child, *Irène Ingouf*, the sole heir of *Dominique Ingouf*, deceased, took a rule upon the administrator of his succession to compel him to file an account of his administration.

CHAILLETEAU
v.
INGOUF.

The administrator excepted to the plaintiff's demand, on the ground that she was not the tutrix of her child, as she alleged; but that she had forfeited that right by contracting a second marriage, without the assent of a family meeting.

It appears that she obtained a divorce from her first husband, *Dominique Ingouf*, on the 19th day of October, A. D. 1854, the judgment giving her the exclusive care, control and superintendence of her infant daughter, *Irène*, the issue of their marriage. On the 23d day of December of the same year, she was married to *Alfred Broutin*. Several months having elapsed, *Dominique Ingouf*, her first husband, died; and she then was confirmed, and qualified as the natural tutrix of her child, *Irène*.

The question to be decided is, whether these proceedings are absolutely null and void; and whether they can be enquired into collaterally by the administrator in this instance.

The Civil Code says that, "After the dissolution of marriage by the death of either husband or wife, the tutorship of the minor children belongs of right to the surviving mother or father: that is what is called tutorship by nature." C. C. 268. By the preceding Article the father is, during the marriage, the administrator of the minor's property. But it is only in case the marriage is dissolved by the death of one of the spouses, that natural tutorship takes place. When the dissolution is the result of a judgment of divorce, neither the father nor mother can claim the natural tutorship, because the Code has provided specially for that contingency. Article 153 reads: "In all cases of separation, the children shall be placed under the care of the party who shall have obtained the separation, unless the Judge shall, for the greater advantage of the children, and with the advice of the meeting of the family, order that some or all of them should be intrusted to the care of the other party."

In the case of *Acosta v. Robin*, this court said: "But, in our judgment, there can be no tutor to a child, while the father and mother are alive. The first law of the 16th title of the 6th Partida declares *tutela*, in Latin, to be that guardianship which is given over minor *orphan* children, not minors alone, as stated in Moreau & Carleton's translation of the law. . . . Our Code declares tutorship by nature to be, the right of the surviving father, or mother, on the dissolution of the marriage by the death of one of them, to be tutor of the children. It contemplates the father to act in another character during the marriage, and calls him the administrator of the estate of his minor children." 7 N. S., 387, *Acosta v. Robin*; Paillete on Code Napoleon, Art. 389; Toullier, vol. 2, liv. 1, tit 10, No. 1090; 12 R. R., 172.

There is no special provision in the Civil Code, as to the tutorship of minors from the time of the dissolution of marriage by divorce; indeed, the Code provides simply for the action of separation, and not of divorce as now known, although Article 133 says that "the bond of matrimony is dissolved by a divorce legally obtained." But then it goes on to state that, "separation from bed and board does not dissolve the bond of matrimony, since the separated husband and wife are not at liberty to marry again; but it puts an end to their conjugal cohabitation and to the common concerns which existed between them." That is what the Civil Code meant by the term *divorce*. By a subsequent Act of the Legislature, this matter was more minutely provided for, and the distinction between the effects of separation and divorce laid down, so that now the judgment of divorce dissolves the bonds of matrimony, leaving the spouses at liberty to marry again. Acts 1827. p. 130.

CAILLÉTEAU
v.
INGOUR.

The case before us could not have arisen under the provisions of the Civil Code, because the plaintiff would not have been at liberty to marry again before the death of her first husband. The forfeiture of the right of tutorship declared in Article 272 C. C., had no possible reference to a case where the second marriage was contracted at a time when both father and mother were alive, and neither could be appointed natural tutor or tutrix. The plaintiff, under the Act of the Legislature, had the undoubted right to marry again, after being divorced from her first husband; yet her right to the natural tutorship could not accrue before his demise: hence, she could not be required to pursue the idle ceremony of procuring the advice of a family meeting "for the purpose of deciding whether she should remain tutrix"—hence, her failure to do so did not deprive her *ipso facto* of the tutorship.

It is not necessary to decide whether, after the death of her first husband, the plaintiff, in order to be confirmed as natural tutrix, should have first convoked a family meeting. She now holds the appointment of tutrix by a judgment rendered since the death of her first husband, and as such she has qualified. It is clear that the defendant cannot question collaterally the validity of this judgment. The fact that he is the minor's grand-father may enable him to enquire into the merits of these proceedings, with the view of provoking the appointment of another tutor, or his own appointment, to represent this minor; but, conceding his right to assail these proceedings for that purpose, and to avail himself of the alleged forfeiture of the right of tutorship by the plaintiff, it does not follow that he has the right to disregard the action of the court in this respect, and to resist collaterally its effects, for the purpose of withholding the rendition of an account of his administration.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed, and that this case be remanded for further proceedings; the appellee paying the costs of appeal.

JOSEPHINE M. LEWIS AND HUSBAND v. HEIRS OF MRS. E. R. WILLIAMS.

A legacy of \$15,000 was made by the testatrix E. R. W. to the minor children of her son J. W. The legacy vested by the testatrix's death while the father and mother of the minors were both living, and a contract was entered into between the father of the minors and one of the forced heirs, who had bought out the whole estate, by which a term of ten years was accorded to the heir to pay the legacy due to the minors, on his obligation to pay the amount with 8 per cent. interest, payable semi-annually, secured by a mortgage. *Held*: That the children of J. W. on becoming of age or being emancipated were not divested of their rights by a settlement so made, and could exercise their claims against the succession of E. R. W. unless they chose to avail themselves of the stipulations contained in the settlement with their father.

A legatee who is not a forced heir cannot demand collation, nor even if made derive any benefit from it in settling his rights as legatee under the will.

A PPEAL from the District Court of the Parish of Rapides, *Cullom, J.*
J. C. & E. T. Lewis, for plaintiff and appellant. *J. K. Elgee*, for defendant.
VOORHIES, J. The parties litigant are the children and grandchildren, heirs and legatees of the deceased, *E. R. Williams*. The present controversy grows out of her will, which reads as follows :

LEWIS
v.
WILLIAMS.

"I make this my following olographic will :

I wish, of course, all my just debts to be paid, and I wish the whole of my estate I own, or may own at the day of my death, I do dispose of the same in the following manner.

1st. I give to *Mrs. Maria Johnson*, fifteen thousand dollars.

2d. I give to my grand-children, *Josephine, Archibald P., Charles B., Annette, Elizabeth, Pintard Davidson*, children of *Josiah P. Williams*, fifteen thousand dollars, to be divided among them or their survivors.

3d. I give my son *John R. Williams*, thirty thousand dollars.

4th. I give to my daughter *Mrs. Frances Chambers*, fifteen thousand dollars.

5th. I give to my daughter *Laura Williams Maddox*, forty thousand dollars.

6th. I wish it understood distinctly that all the property that I do not specially donate hereinafter, that I may own at the day of my death, shall go to my four heirs at law.

7th. *Maria Johnson, John R. Williams, Frances Chambers and Laura Maddox*, each one-fifth, and in the event of their or either of them, not being alive at the time of my death, to the children of such as may at that time be living, such grandchildren or child, taking together the portion his or their parent would have taken.

8th. And the other residuary one-fifth of my estate, I give to *Josephine Maria Williams, Archibald P. Williams, Charles Bushnell Williams, Annette Williams, Elizabeth Williams, Pintard Davidson Williams*, they being the children of my son *Josiah P. Williams*.

9th. This residue fifth is to be divided among those of the above six children who may be alive at the time of my death.

10th. And I further desire that if there are any other children born to my son *Josiah*, and who may be alive at the time of my death, that they shall also equally participate in the said residue of one-fifth of my estate with those who may be alive, share and share alike between them all.

11th. I give to my three daughters, *Mrs. Johnson, Mrs. Chambers and Mrs. Maddox*, all my household furniture and effects and kitchen furniture, and all my silver and plate, and wardrobe, except my watch, which I give to my daughter, *Mrs. Chambers*.

12th. I give to my son *John R. Williams*, any four of the horses or mares I may own at the day of my death that he may choose to select.

These two last donations, No.'s 11 and 12, are intended to be particular donations, and not to be valued or included in estimating the residuary portion of my estate, which is to be divided under articles 6, 7, 8, 9 and 10, above.

Signed,

ELIZABETH R. WILLIAMS."

The plaintiff, *Josephine Lewis*, a legatee under the 2d and 8th clauses of this will, sues to recover her share in the legacy of \$15,000, and in the residuary one-fifth of the estate. For this purpose she has made all the heirs and legatees parties to this suit, in which she demands a partition of the estate of the testatrix.

It appears that after the demise of the testatrix, the estate being largely involved, and all the forced heirs being of age, extra judicial settlements were made between them, so that ultimately the whole estate vested in *J. R. Williams*, one of the heirs.

The plaintiff, with her brothers and sisters, although not forced heirs of their grandmother, were nevertheless legatees, not only of the stated sum of \$15,000, but also of the residuary interest or portion of the estate, after the payment

LEWIS
v.
WILLIAMS.

made of all debts and previous legacies. Being minors, they could not be divested of their rights in the succession by the extra judicial acts of the forced heirs. Their rights are residuary, it is true; but that residuum must be ascertained by process of law in order to bind these minors. This has not been done. The agreements and settlements made between *J. R. Williams*, however binding they may be as between the parties, cannot prejudice the rights of the plaintiff, and of her brothers and sisters.

It is necessary, for the purpose of enabling the court to decide the issues raised by the pleadings, that this case be remanded to the District Court, for the purpose of proceeding to a partition of the estate of *Mrs. Elizabeth R. Williams*, deceased, in the mode pointed out by law.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed, and that this case be remanded for further proceedings in accordance with the views above expressed, the appellees paying the costs of appeal.

J. K. Elgee, for re-hearing :

Three distinct and separate issues are presented to the court by the pleadings, none of which the court say can they decide upon till all the preliminaries for making a partition have been pursued.

First. The plaintiff, as a particular legatee, under the will of *Mrs. E. R. Williams*, claims from the defendants, her heirs, the sum of twenty-five hundred dollars; the amount and validity of the legacy is not traversed, but the defendants say, that whilst the plaintiff was as yet unmarried and a minor, this sum of twenty-five hundred dollars was paid to the father and mother, that the payment was a good and valid one, because the father was the administrator of the plaintiff's property at the time. C. C. Art. 265. And because the father and the mother had, by law, the usufruct thereof. See C. C. Art. 239. They therefore deny the plaintiff's action as against them, saying that she should apply to her father first, and call upon him to render an account. If the payment to the father was in violation of law, then the defendants may have to pay the money over again, but that point can now be decided, and does in no manner depend on a partition of the estate; it may be replied, that no proof of payment was offered, which perhaps, is itself true as regards the whole legacy of fifteen thousand dollars, but it is shown that the father and mother have been paid by defendants an amount much larger than the claim of the plaintiff, and that as regards the brothers and sisters they are not before the court either as plaintiffs or defendants on this point; further, if the legacy was loaned out by the father, he acted conformably to law, for he was entitled to the usufruct of the legacy. C. C. 239. And that usufruct was interest. C. C. 536, 537. He was bound by law to lend it (the legacy) when received, on interest, and to take security. See C. C. Art. 556. He has done so, and therefore the issue was fully and fairly presented to the court: 1st, whether the plaintiff, an emancipated minor, was not bound to call upon her father for payment before calling upon defendants; and 2d, whether the settlement of the legacy made by the father with the defendants could be on any ground *attacked collaterally*. It is reasonable to ask that these questions be disposed of before we arrive at the point of partition, for until it is decided, it will be a contest for the money, one party asking and claiming it, the other averring it has been paid, or otherwise settled, with a party legally authorized at the time to make the settlement. If the estate were sold and the money in court, we should be compelled, before division, to ask this tribunal to decide this issue.

Second. The plaintiff alleges that certain legacies made by the testatrix to her children are *null and void*, "because not specially stated to be, over and above their *legitime*, nor as an advantage over the other heirs." She further alleges "that the will contains *no other legal dispositions* than those made in her favor, and in that of her brothers and sisters;" these allegations are again traversed by the defendants, and the question is fully and fairly presented to the court, whether the legacies are good and valid or null and void. On this point it is not necessary

LEWIS
v.
WILLIAMS.

to wait for a decision until the estate is ready for partition, if there be not enough to pay them, who is to complain, not the plaintiff, nor her brothers and sisters, for her legacy and theirs has been paid to her and their father and mother, but what I presume the plaintiff no less than the defendant desire to have the decision of the court on is, are the legacies given to *Maria, Frances, Laura and John*, amounting to \$100,000, good and valid in law. If the estate is insufficient to pay the whole, then a ratable deduction must be made; but the court will see, as in the first issue, that if the estate were already sold, and the money before the court, no partition of much or little could be made until the court decided whether *Mrs. Williams* had legally and validly given to her children the particular legacies. We should be *then*, exactly where we are *now*.

Third. Residuum or not, I admit that before it can be decided positively and beyond the shade of a doubt, whether there be a residuum it may become necessary to sell the whole estate, but that necessity may be removed by this court deciding now whether the legacies made by *Mrs. Williams to her children*, are good and valid, not in amount, but, had she a right to make these legacies, supposing her estate to be amply sufficient to meet them; for it may be, that when the plaintiff is informed that these legacies must first be paid *in full*, before we can say there is a residuum, that she, her brothers and sisters, will desist from pursuing a shadow which can be of no profit to them, and must cause immense loss and inconvenience to the defendants.

Has the plaintiff instituted her action for her proportion of the \$15,000 legacy, correctly against the defendants, when it is shown that she is still a minor; and whilst yet a minor and unmarried, her father being her administrator, did settle and adjust the said legacy, its payment, &c, with defendants? Has she brought her action correctly, when the evidence discloses that the father has received from defendants in money, an amount far exceeding plaintiff's claim?

Had she a right to attack collaterally her father's acts, if injurious to her, ought she not to have first called upon him to render an account, and then failing in her pursuit there, might she not have adopted the direct action?

Has the father, during the marriage, the right to receive and enjoy the use of money belonging to his minor children, whilst they are minors or not emancipated?

If the father has so received the money of his children, is he not bound by law to lend it on interest and with security?

Has not the father of plaintiff during her minority, and before her marriage in effect, loaned the plaintiff's money out on good interest?

If the lending was illegal, then has not the father received money on account of the legacy due his daughter, and must he not account for the same to her? In fine, has the plaintiff shown, as she was bound to do, that she had asked her father and administrator for her money, and that he could not, or would not pay it?

The appellees further pray for a decision on the issue as to the legality and validity of the particular legacies made by *Mrs. E. R. Williams*, to her children.

VOORHIES, J. We have ordered this case to be remanded for the purpose of enabling the plaintiff to recover her portion in the succession of *Mrs. E. R. Williams*, deceased; and, in so doing, did not conceive that there could be any doubt or difficulty in the way of ascertaining the amount coming to her. As she is merely a legatee under the will, and by no means one of the legal heirs of the deceased, her rights are to be ascertained under the will itself. So that, after deducting from the property left by the testatrix at the date of her death, the following items, to-wit: the sum of \$15,000 in the first clause of the will; the sum \$15,000 in the second clause; the sum of \$30,000 in the third clause; the sum of \$15,000 in the fourth clause, and the sum of \$40,000 in the fifth clause; there is a residuum left to four of the forced heirs of the deceased, and to the plaintiff and her brothers and sisters as legatees. This residuum is ascertained after deducting the amounts carried in the five first clauses of the will; and, these specified sums being thus deducted, the plaintiff is then entitled to one-ninth part of one-fifth of the balance thus ascertained. She being merely a legatee under the

LEWIS
v.
WILLIAMS.

will, cannot claim collation, or avail herself of collation actually made, for the purpose of settling her rights under the will. Her rights are confined to the disposable portion; and should even some of the legacies be radically null, the legal heirs, and not the legatees, are to benefit thereby. *Turner v. Smith*, 12 An. 419.

As to the legacy of \$15,000 to the plaintiff and her brothers and sisters, she has a right to claim her share in the partition to be made of the estate. Her claim is against the succession of *Mrs. Williams*, and not against this defendant, unless she chooses to avail herself of the stipulations contained in the settlement made between her father and *J. R. Williams*.

We cannot take for granted, that even under the foregoing view of the matter, the court would do a vain thing to order a partition, on the supposition that no residue would be left, out of which the plaintiff could exercise her rights under the will. This objection is met by the reasons given by us in our first opinion.

MARY HICKS et al. v. ANN E. WEEMS et al.

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The incapacity of an administrator to purchase property on behalf of a succession, is not so absolute as to make his purchases utterly void.

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Where an administrator, in seeking to collect a debt due the succession, which had its origin in the price of real estate which belonged previously to the succession, and which was subject to the vendor's privilege in favor of the succession, has the property sold and buys it in for the estate for a small part of the debt, leaving a large balance of the debt to be ranked among the active means of the estate—*Held*: That although such proceedings may have been irregular, they were not absolutely void, and when ratified by the heirs, their title to the property cannot be questioned by any one.

APPEAL from the District Court of the Parish of Rapides *Cullom, J.*
Mercer Canfield, W. B. Lewis and T. C. Manning, for plaintiffs. *M. Ryan and Hyman & Cazabat*, for defendants and appellants.

MERRICK, C. J. "This is a petitory action, instituted by *Mrs. Hicks* and *Mrs. Speight*, sisters, and grand-daughters of *Mary Clark*, for the recovery of an undivided half of a tract of land, each of the plaintiffs being entitled to a fourth of the same.

"The tract of land in question belonged to *Mary Clark*, and was sold as a part of her succession. There is no dispute as to her title. She had but two children and heirs, both of whom were daughters. One of these daughters was the mother of plaintiffs. The other was the mother of *Terence* and *Kerly Scott*, who are the warrantors. These four grand-children (their mothers being dead) are the sole and equal heirs of the common ancestress, *Mary Clark*, and are each entitled to one-fourth part of her succession.

"One *Leeton* became the administrator of this succession, and subsequently tutor to the minors *Scott*. Proper proceedings were had in both capacities to legalize and effectuate a judicial sale of the property, and on the 29th day of June, 1835, the tract of land in question was publicly adjudicated by the Parish Judge to *Brewster* and *Weems*, for five thousand one hundred dollars, payable in one, two and three years.

HICKS
v.
WEEMS.

On the 13th February, 1840, *Daniel James* was appointed administrator of *Mary Clark's* succession. *Leeton* was dead, and there were debts still due and uncollected, chief among which were the notes given by *Brewster* and *Weems* for the purchase of this land. *Weems* had now become the owner of the land, by purchase from *Brewster* of his moiety, at a considerable advance over the price paid at the succession sale, a portion of which was to be discharged by the assumption of, and payment by *Weems* of *Brewster's* indebtedness for the original purchase.

"Soon after the appointment of *James*, suit was instituted to recover the amount of the three notes of *Brewster* and *Weems*, neither of which had been paid, and to enforce the mortgage upon the land. These proceedings resulted in the sale of the land, at which sale *Daniel James*, as administrator of *Mary Clark*, became the purchaser for the sum of sixteen hundred dollars.

"Subsequently, *Mrs. Ann E. Weems*, who had been separated in property judicially from her husband, purchased the land, as she alleges, from *Terence and Kerly W. Scott*. She shows no title sustaining the allegation made in her answer, but claims the ownership of the land, and asks that the *Scotts* be called in warranty; who in their turn, admit that they sold the land, without mentioning their vendee, and deny that the plaintiffs have any right to judgment."

The principal grounds of defence to the action are, that *Daniel James*, the administrator, bought the land for his own use as an individual; and, if the court should be of the contrary opinion, that then the sale was null, because minors were interested in the succession, and no family meeting advised, or decree of the court sanctioned the purchase; because the administrator, acting in a fiduciary capacity, was prohibited from purchasing property under the pain of nullity, and because property cannot be acquired for a succession.

We think with the District Judge, that the intention of *James* was to purchase as administrator. It would not otherwise have been so expressed in the Sheriff's return, and in the deed to the purchaser. Moreover, the defendants appear to have recognized this sale as such, by taking title from two of the heirs of the succession.

The incapacity of the administrator to purchase property on behalf of a succession is not so absolute as to make his purchases utterly void. Indeed, there are certain cases in which his purchases would doubtless be considered valid. Take the case of the purchase of provisions and necessary supplies for a plantation, or for taking off a crop. Here his contracts for the sale would be so much in the nature of acts of administration, that no one would think of questioning them.

In the case at bar, the administrator was attempting to collect a debt which had its origin in the price of real estate which belonged previously to the succession, and which was subject to the vendor's privilege in favor of the succession.

Now, it cannot, we think, be doubted, that the administrator, as an act of administration, might have sued to enforce the resolutive condition for the non-payment of the price, and thus have brought back the property into the succession. The action of the administrator was much more advantageous than this to the succession, for, by his purchase of the property at Sheriff's sale, for a small part of the debt, it was returned, and the debt, for a large part, could still be ranked among the active means of the estate. Although the proceeding may have been irregular, it was not absolutely void, and the heirs having ratified the same, no one can now question their title; much less can the debtor who has had a credit

Hume
v.
Walker.

upon the judgment for the price for which the property was adjudicated to the administrator. C. C. 1785; *Succession of Devereux*, 13 An. 34.

As the administrator did not attempt to purchase the property in his own name, it is idle to consider whether he might have done so.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be affirmed, with costs.

UNDER-TUTOR OF WALKER, Minor, for discharge.

The under-tutor of a minor may resign his office, without being compelled to allege and prove his excuses.

APPEAL from the District Court of the Parish of Rapides, *Cullom, J.*
Hyman & Cazabat, for plaintiff and appellant. *M. Ryan*, for defendant.

MERRICK, C. J. The under-tutor, *William W. Whittington*, has appealed from a refusal of the District Judge, to accept his resignation and discharge him from his office of under-tutor to said minor.

The question of the right to such discharge was considered by our predecessors in 1842, in the case of the *State v. The Judge of the Court of Probates of New Orleans*. The court said of the question then before them: "It seems to us rather as resolving itself into the question, whether one can be compelled to serve as under-tutor; for he who cannot be compelled to serve, may, at any moment, resign, and we have no doubt that the resignation must be notified to the Judge of the domicile of the minor. That part of the Code which treats directly of the appointment of the under-tutor, does not provide that any class of persons shall be compelled to act as such." * * * * *

"The office of under-tutor is essentially and always dative, and we know of no provision of law which compels any citizen to accept such an appointment, more especially where his domicile is different from that of the minor. We cannot but view the office in this case, as vacant by the resignation of the under-tutor, signified in a formal manner by petition, and that it is the duty of the Court of Probates to make the appointment." 2 Rob. 423.

We see no sufficient reason to depart from the conclusions of this court on that occasion. The under-tutor is not bound to allege and prove his excuses, but may resign.

It is, therefore, ordered, adjudged and decreed, by the court, that the judgment of the lower court be avoided and reversed, and that the resignation of said under-tutor be accepted, and that the said tutor pay the costs of the appeal and of this proceeding in the lower court.

LEWIS GIANNONI V. GEORGE GUNNY.

Where *A*, assuming to be the agent of *B*, buys a tract of land in the name of *B*, for whose benefit he pays the price, thereby intending to make a donation to *B*, he cannot afterwards defeat the title of *B*, by executing an act revoking the donation for want of acceptance of the donation by *B*.

APPEAL from the District Court of the Parish of Natchitoches, *Chaplin, J. A. H. Pierson*, for plaintiff. *J. B. Smith*, for defendant and appellant.

MERRICK, C. J. In January, 1852, *Solon Bartlett* and *Freeborn G. Bartlett* executed an act purporting to sell to the plaintiff, represented by the defendant as agent, a certain tract of land for the price of \$800.

Gunny, the defendant, paid the price of the land acquired, and remained in possession of the same. The plaintiff was not aware of the purchase until some time afterwards. The defendant subsequently executed a notarial act, revoking the former act in favor of the plaintiff, assuming that the same was a donation which had not yet been accepted.

The plaintiff has instituted the present action to recover the tract of land and rents and revenues. The defendant admits the execution of the act, but avers that it was intended as a donation, which has been subsequently revoked. The verdict of the jury, and the judgment of the court, gave the land to the plaintiff, and awarded the \$800, the price, and interest, to the defendant. The latter appeals.

The appellant calls our attention to a bill of exception to the opinion of the court refusing to admit in evidence the act of revocation of the donation, on the ground that the act could not be received as evidence to contradict the notarial act of sale of the 5th January, 1852, or the enunciation therein contained, because it was the act and declaration of the party alone who offered it, and was in the nature of parol evidence, made by the party offering it.

Without deciding the question whether the testimony ought to have been received, we shall give the defendant the benefit of the same, and will consider it in evidence.

The act of sale, as already said, purported to be between *Solon* and *Freeborn G. Bartlett*, as vendors, and *Louis Giannoni*, the vendee, "represented therein by his agent, *George Gunny*, who declared himself duly authorized to accept for the said *Giannoni*." The vendors, therefore, did not undertake to convey any part of the title to *Gunny*, but to *Giannoni*. Now, although the agent may (as he says) have intended a donation of the price to *Giannoni*, he could not, without at least the consent of the vendors, by any revocation of his supposed donation, revoke the sale until the vendee had declared whether he accepted the same. It is possible, that in the event he had repudiated the sale, it might have been declared to enure to the benefit of the agent who had paid the price out of his own funds. But until such declaration, it is clear he could not claim as owner the title to property sold to another by a formal act. See *Kemper v. Smith*, 3 M. 622, and 4 M. 409.

There is no occasion to hold the defendant responsible as an adverse possessor in bad faith. The only ground on which the plaintiff is permitted to recover is,

by treating the defendant as his agent. The account which he should render of the rents is more than compensated by the improvements.

If there be any hardship in this case, it does not prejudice the plaintiff.

Judgment affirmed.

GLANZBOM
v.
GURNEY.

LITTLETON G. ATKINSON v. JOHN L. ROGERS.

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When a person dies leaving property in two or more States or countries, his property in each State is considered as a separate succession for the purposes of administration, the payment of debts and the decisions of the claims of parties asserting title thereto. And when the property consists of immovables or slaves, it may be considered as a separate estate for the purpose of inheritance. An heir-at-law may sue in our courts for the recovery of immovable property, and its revenues, even when his ancestor, who was domiciliated in another State, had made a will which had been probated, and ordered to be executed in a foreign jurisdiction, and which here may not be valid and sufficient to defeat his inheritance.

If immovable property in this State is in the possession of a foreign executor, and a testamentary disposition has been made of it, not in accordance with our laws, the legal heir may sue such executor directly for its recovery in the courts of this State, and is not obliged to resort to the tribunals of the testator's domicile, to ascertain the validity of the disposition intended to deprive him of his right to immovable property within our jurisdiction.

When a suit is brought by the heir of one of the members of a partnership against the heirs of the other member, claiming a certain sum, and giving, in his petition, a detailed statement of the property belonging to the partnership, and of its annual revenues—*Held*: That if plaintiff has any right to the property described in his petition, and is, therefore, entitled to an account from the heirs of the surviving partner, his right, and the rendition of an account of the partnership affairs, can be determined in such a form of action as well as any other. *Held*: That such a suit is in the nature of an action for the settlement of partnership affairs, and a partition and division of the partnership effects.

A PPEAL from the District Court of the Parish of Avoyelles, *Cullom, J.*
F. P. Hitchborn, for plaintiff and appellant. *H. & S. L. Taylor*, and *F. Cannon*, for defendant.

LAND, J. There are two questions of law for decision in this cause, to wit: Has the District Court of the Parish of Avoyelles jurisdiction of the plaintiff's demand? And, secondly, if so, can the plaintiff maintain the action for the recovery of the property described in his petition, before a final settlement of the partnership affairs therein specified?

In connection with these legal questions, one of fact is presented for our determination, and that is, whether the domicile of *Dr. T. W. Griffin*, at the time of his death, was in the parish of Avoyelles, in this State, or in the county of Amite, in the State of Mississippi? Upon the question of fact, we concur with the Judge below, that his domicile was in the State of Mississippi at the time of his demise.

The allegations of the petition are, that *Thomas W. Griffin* and *Timothy M. Rogers*, purchased certain tracts of land in the parish of Avoyelles, for the purpose of establishing a planting partnership, and jointly furnished the necessary horses, mules and utensils, for carrying on the plantation. That they were joint and equal owners of the plantation and appurtenances mentioned, but that each furnished his own separate slaves for the cultivation of the land. That the partnership commenced in the year 1840, and continued until the death of *Griffin*, in March, 1843. That *Griffin* owned and placed on the partnership plantation certain named slaves, and that they and their natural increase are still on said plan-

ATKINSON
v.
ROGERS.

tation, and are the property of the heirs of *Thomas W. Griffin*, of whom the plaintiff alleges himself to be one.

That the horses, mules and plantation utensils, at the time of *Griffin's* death, were worth the sum of \$4,000, and that the crop of 1843, cultivated and gathered by the slaves mentioned, was worth the sum of \$8,000 ; and that the revenues arising from the sale of the crops grown on said plantation since the 1st of January, 1844, have amounted to \$12,000 per annum, and have been received and kept by *Timothy M. Rogers* and his heirs.

That *T. M. Rogers* and *Mary Griffin*, his wife, drew, after the death of *Thomas W. Griffin*, a written instrument, purporting to be his last will and testament, which they caused to be probated in the county of Amite, in the State of Mississippi ; and that although *T. M. Rogers* was appointed dative testamentary executor, he took no legal steps to administer the property of the testator, situate in the parish of Avoyelles, and that when the will was attacked by one of the heirs of the testator, in the county of Amite, it was abandoned by the legatees and executor, as though no will had been made.

That *John L. Rodgers*, as executor of *T. M. Rogers*, and as tutor of his minor heirs, is in possession of all the perperity and revenues aforesaid, and refuses to deliver the same to petitioner, or any such part thereof as rightfully belongs to him.

And, finally, that the drawing or writing of the pretended will of *T. W. Griffin*, and the probate thereof in Amite county, were simulated and intended to defraud him, and that he is entitled to demand and receive from the defendant *Rogers*, the sum of \$37,791 66, on account of the property and revenues described, but which are wrongfully withheld from him under pretence of the will of *T. W. Griffin*, which is a nullity.

The defendant, *John L. Rogers*, for himself and as tutor of certain minor heirs of *T. M. Rogers*, filed a plea to the jurisdiction of the court, on the ground that the succession of *T. W. Griffin* had been opened, his will probated and ordered to be executed in Amite county, in the State of Mississippi, and that if plaintiff has any rights to property or otherwise in said estate, he was bound to demand them in the Probate Court of Amite county, where the will had been probated and the succession opened ; and he further excepted to plaintiffs demand on the ground, that he could not sue for the recovery of any specified amount alleged to be due and growing out of the partnership, until a liquidation of the partnership affairs, set forth in his petition.

The same defendant, as executor and heir of *Timothy M. Rogers*, filed a plea to the jurisdiction of the court, so far as the estate of *T. M. Rogers* was to be affected by the action, on the ground that the succession of the said *T. M. Rogers* had been opened, and his last will probated, and respondent appointed executor thereof, in the Probate Court of the county of Amite, in the State of Mississippi ; and that if plaintiff has any cause of action, the same must be litigated before the courts of the State of Mississippi, where said succession was opened, and the heirs reside.

The pleas to the jurisdiction of the court were sustained, and the suit dismissed.

First. The plea to the jurisdiction of the courts of this State, on the ground, that the succession of *T. W. Griffin* had been opened in Amite county, in the State of Mississippi, is not good in law. When a person dies leaving property in two or more States or countries, his property in each State is considered as a

separate succession for the purposes of administration, the payment of debts, and the decision of the claims of parties asserting title thereto ; and when it consists of immovables or real estate, it may be considered as a separate estate for the purpose of inheritance ; for the will of a testator may deprive his heirs-at-law of his property, subject to the operations of the laws of his domicile, but fail to do so when his property consists of immovables, and is subject to the laws of another or foreign country. For instance, the nuncupative will of *Thomas W. Griffin*, reduced to writing after his death, in the State of Mississippi, may be valid in that State, and deprive his heirs-at-law of his property situate in that State, but the *same will* may fail to deprive them of his lands and slaves in Louisiana, for the reason that a valid testamentary disposition of immovables situate here, is to be determined by our laws and not the laws of Mississippi, or any other State. To hold, therefore, that an heir-at-law cannot sue in our courts for the recovery of immovable property and its revenues, because his ancestor or other person from whom he inherits has made a will, which has been probated and ordered to be executed in a different or foreign jurisdiction, and which may not here be valid and sufficient to defeat the inheritance of the heir, as to property within the operation of our laws, would be a denial of justice to him, and a substitution of the foreign law in lieu of our own, as to the disposition of immovable property by testament. For if he be remitted to the courts of the domicile of the testator, to ascertain his rights under the will, they might be determined by the law of the forum and not by the local law or *lex rei sita*.

Secondly. For like reason, if immovable property in this State is in the possession of a foreign executor, and a testamentary disposition has been made of it, not in accordance with our laws, the legal heir may sue him directly for its recovery, in the courts of our State, and is not obliged to resort to the tribunals of the testator's domicile, to ascertain the validity of the disposition intended to deprive him of the immovable estate within our jurisdiction.

Thirdly. The petition contains a detailed statement of the property alleged to have been in partnership, and of its annual revenues, and alleges that a certain sum is due him (plaintiff) as one of the heirs of a deceased partner. If the plaintiff has any right to the property described in his petition, and is, therefore, entitled to an account from the heirs of the surviving partner, his right and the rendition of account of the partnership affairs, can be determined in the present form of action as well as any other.

The suit itself is in the nature of an action for the settlement of partnership affairs, and a partition or division of the partnership effects.

It is, therefore, ordered, adjudged and decreed, that the judgment be reversed, and the cause remanded for further proceedings according to law, and the defendants and appellees pay the costs of this appeal.

STATE v. C. S. LECKIE et als.

Where, by an Act of the Legislature, the State remits a portion of the indebtedness of a Tax Collector, authorizing his bond to be cancelled on the payment of a fixed amount, it is a renunciation of the right to claim the interest at two per cent. per month allowed by statute in the nature of a penalty against defaulting Tax Collectors.

The State cannot be sued indirectly by way of a reconventional demand set up in the defendant's answer.

APPEAL from the District Court of the Parish of Rapides, *Cullom, J.*
T. C. Manning, for plaintiff and appellant. *O. N. Ogden* and *M. Ryan*, for defendants.

LAND, J. This suit was instituted against the defendant. *C. S. Leckie*, and his securities on his official bond for the collection of State taxes, in the parish of Rapides, for the year 1850, for the recovery of the sum of nine thousand eight hundred and sixty-three dollars and ninety-nine cents, with interest thereon at the rate of two per cent. per month, from the first of January, 1852.

Whilst this suit was pending, a legislative Act was passed for the relief of *Charles S. Leckie*, the defendant, as follows :

"Section 1. That the real and true amount due to the State of Louisiana by *Charles S. Leckie*, Collector of the State Taxes for the parish of Rapides, for the year 1850, is the sum of six thousand nine hundred and eighty-eight dollars and ninety-four cents.

"Sec. 2. That on the payment of said amount of six thousand nine hundred and eighty-eight dollars and ninety-four cents, in the Treasury of the State, by *Charles S. Leckie*, or any of his securities, or any person interested, the Auditor of Public Accounts is hereby authorized to cancel the bond given by *Charles S. Leckie*, as Collector aforesaid.

"Sec. 3. That the legal mortgage on the property of *Charles S. Leckie*, in favor of the State, as Collector of the State Taxes for the parish of Rapides, for the year 1850, shall attach to said property until the sum mentioned in this Act shall be paid ; provided that, if any person has purchased at public sale since the defalcation of said *Leckie*, any property on which said mortgage rested, on the payment of the price for which the property was sold into the Treasury of the State by the purchaser, the legal mortgage of the State shall be released on said property by the Auditor of Public Accounts.

"Sec. 4. That the Auditor of Public Accounts shall, and he is hereby authorized to carry into effect the settlement mentioned in this Act, in the manner he may deem most judicious for the interest of the State.

"Sec. 5. That nothing herein shall affect the rights of the State against said *Leckie* and his securities, until the amount mentioned in the first section of this Act shall be paid into the State Treasury, nor shall be so construed as to affect the suit now pending for the collection of the defalcation by said *Leckie*, until the amount shall be paid ; and provided further, that the fee due to the District Attorney, of two and one-half per cent. on the amount paid into the State Treasury, shall be paid to him by the said *Leckie*, or his securities, in compensation for his services, and all other costs of court which have or may accrue in said suit ; and provided further, that nothing herein shall be so construed as to affect the legal rights of subrogation as between the securities." See Session Acts of 1854, page 175.

Before the passage of this Act, the real estate and slaves of *Leckie*, upon which the State had a mortgage for the security of the payment of the taxes collected by him, had been seized and sold at the suit of his individual creditors.

There was judgment for the State for the sum of \$6,988 94, the amount stated in the above mentioned Act, with interest thereon at the rate of five per cent. per annum, from the 16th day of March, 1854, the date of the passage of said Act.

The State appealed, and specially asks that the judgment be amended, and the defendant and his securities be condemned to pay interest at the rate of two per cent. per month on the amount of the judgment, from the 16th of March, 1854, instead of five per cent. allowed by the decree. This suit was pending before and at the date of the passage of the Act of the Legislature of March 16th, 1854, and is mentioned in the fifth section thereof.

It is not disputed, that the Legislature was apprised of the demands contained in the petition, or motion to show cause, filed against the defendant, *Leckie*, and his sureties, and consequently, of the claim of two per cent. per month on the amount of defalcation. It is, indeed, conceded, that the principal of the debt was remitted from the sum of \$9,863 90 down to the sum of \$6,988 94, together with all interest to the date of the Act; for the interest is only claimed, in argument, from this date.

Remission is a mode of extinguishing obligations, and is conventional when
 • expressly granted to the debtor by the creditor; or is tacit, when the creditor surrenders voluntarily to his debtor the original title under private signature, constituting the obligation. C. C., Arts. 2195, 2196.

If the State had voluntarily surrendered to the defendant his official bond, without the payment of even a part, his obligation and that of his securities under it would have been extinguished for the whole, without *any express agreement to that effect*; and, *a fortiori*, would their obligation have been extinguished, by a voluntary surrender, after a partial payment, for the balance.

In the case at bar, it is declared on the part of the State, not that the bond shall be surrendered to defendant on part payment of the amount due, but that, the bond shall be *cancelled*, on the payment of an amount *less than the sum due*; for it is shown, that defendant and his sureties were indebted to the State for a *much larger sum than* the \$6,983 94 specified in the Act of March 16th, 1854. The evidence presents, therefore, the case, not of a *tacit remission of a portion of a debt*, but an *express conventional discharge of such portion*; for the Act declares that the sum of \$6,983 94 is the sum due, (although it was less than the sum due,) and that on the payment of the amount thus reduced, the *bond of defendant and his sureties should be cancelled*.

This Act of the Legislature can only be considered as one of remission, or liberality, on the part of the State, to the defendant and his securities, and a renunciation of all right to interest at the rate of two per cent. per month, given by the statute. This view is confirmed by the consideration that the interest, at the rate of two per cent. per month, is *in the nature of a penalty*, and is severe and ruinous in its continued monthly impositions, and that its allowance would be totally inconsistent with the liberal intention of the State, plainly manifested by the Act of the Legislature. The judgment is, therefore, correct in rejecting the penal interest of the statute, on the sum of \$6,983 94, declared by the Act to be due.

The sureties, as appellants, have filed an answer to the appeal, and prayed that the judgment be entirely reversed, and for one in their favor.

STATE
v.
LECKIE.

The ground on which they rely for a reversal of the judgment is, that the State has, by the provision contained in the third section of the Act of the 16th of March, 1854, impaired or destroyed their right of recourse upon the property of the principal debtor, for the reason they are required to be satisfied with the price at which the debtor's property, on which the State had a mortgage, had been sold, and that the evidence shows a sale of the property under a judgment bearing a judicial mortgage, *subsequent to the mortgage of the State*. If the property of the principal debtor had been sold under the judgment bearing the junior mortgage, *for less than the amount for which the sureties were bound, and they had been thereby injured*, by a release of the State's mortgage, the objection would perhaps be well taken; but the evidence shows, and it is not disputed, that on the day the Act of the Legislature was passed, the purchasers of the property owed, on account of its purchase, the sum of \$7,155 96, exceeding by \$167 02 the amount declared in the first section of the Act to be due on the bond. It is, therefore, evident, that there was nothing in the provision in the third section of the Act, or of its execution, *prejudicial to the rights of the sureties*, and that the objection which they make does not come within the reason of the rule which releases a surety when the creditor has done an act which deprives him of the power of subrogating the surety to all his rights of action, mortgage and privilege against the principal debtor. It is, besides, most apparent from the tenor of the Act itself, that it was not the intention of the Legislature that the State's right of recourse against the sureties, or the recourse of the sureties against the principal debtor, or his property, should be in any wise impaired or destroyed. This ground of objection is, therefore, not tenable.

M. Ryan, one of the sureties, pleaded in compensation of the demand against him, a claim for three thousand dollars, alleged to be due him by virtue of a retainer and professional services rendered, in the matter of claims to a large amount, due the State. The attorney representing the plaintiff objected, on the trial, to the introduction of testimony in support of the claim, on the ground, among others, *that it was unliquidated*, and could not be opposed in compensation to the plaintiff's *liquidated demand*. The objection was overruled, the testimony received, and the sum of five hundred dollars allowed the surety on his claim in compensation.

The District Judge erred. The objection to the testimony was well taken under the pleadings. The plaintiff's demand was a *liquidated debt*, and the *unliquidated claim* of the surety could not be opposed in compensation of it. The plaintiff was, besides, the State, and could not be sued by the surety on his claim, either directly or indirectly.

It is, therefore, ordered, adjudged and decreed, that the judgment be avoided and reversed, as far as it decrees to *M. Ryan* the sum of five hundred dollars on his claim in compensation, and the judgment so amended be in other respects affirmed, with costs in both courts.

J. F. CRAWFORD v. L. C. & C. J. PUCKETT.

An instrument of writing conveying a title to slaves in which the grantor uses the expressions, "*give and bequeath*," when followed by a delivery of the property, will be considered a donation *inter vivos*.

Where a father, in the State of Arkansas, made a donation of slaves to "*the heirs of his son*," the son then living and receiving the delivery of the property—*Held*: That it was a valid donation to the minor child of the son, then in existence, who, as presumptive heir, received the benefit of the donation, and that his father, acting merely in a fiduciary capacity, could not alienate the property to the prejudice of the rights of his minor child.

In a common law State where slaves are personal property, a gift by parol, followed by delivery, confers a valid title.

A PPEAL from the District Court of the Parish of Natchitoches, *Chaplin, J. J. D. Watkins*, for plaintiff and appellant. *J. G. Campbell*, for defendant.

VOORHIES, J. The plaintiff, as guardian of the minor children of *William George*, and of his deceased wife, *Frances Yeager*, sets up title to several slaves, in the possession of the defendants and purchased by them from *William George* himself.

The slaves in controversy were formerly the property of *Bazil George*, the father of *William George*; and the former delivered possession of these slaves to the latter, upon execution of the following instrument of writing, to wit:

"December 20th, 1843—Arkansas State, Ouachita county.

"Know all men by these presents, that I, *Bazil George*, of the county and State aforesaid, do this day give and bequeath unto the heirs of *William George*, in the county and State aforesaid, the following negroes, to have and to hold forever, as their property: *Hampton*, 26 years old, and *Esther*, his wife, 20 years old, and *Levy*, their child, six months old—in the presence of the undersigned witnesses. Whereunto I set my hand.

(Signed)

"BASIL GEORGE.

"Witnesses: *ABNER YEAGER, M. YEAGER, JOHN STANFORD.*"

The defendants' counsel contends that this is not a donation *inter vivos*, but a last will and testament, because of the terms used, *give and bequeath*. It is evident, however, that the donor took at the time quite a different view of this matter, for not only was the deed followed by a delivery of the property donated, but the deed itself was thereupon recorded in accordance with the laws of Arkansas, with regard to acts *inter vivos*.

It is further contended, that this deed of gift is null and void, on account of uncertainty as to those who are the grantees; and also because the pretended donees were not *in esse* at the time of its execution.

The last objection is met with the fact, which appears upon record, that one of the minors, represented in this case, was living at the time of the execution of the deed. So that, however, invalid as to the others the gift may have been for want of parties, it had the desired effect, by vesting the whole title in the donee then in existence. It did not behoove the defendants' vendor, *William George*, to avail himself of this defect, as he was acting merely in a fiduciary capacity, and the defendants themselves cannot now claim any better right than their vendor.

As *William George* had at the time a child, who was his presumptive heir,

CRAWFORD
v.
PUCKETT.

and as the slave was delivered to the former for the purpose of possessing it for the benefit of his heirs, it is not conceived in what respect there is any uncertainty as to the parties intended to be the recipients of the donor's liberality. The only possible uncertainty was, whether the gift was made simply to the living child of *William George*, or to all his children, born and unborn; but as the law discountenances dispositions of the latter character, we must conclude that the donor meant the living heir or child. It is true, that *nemo est hæres viventis*; but "he who is the nearest relation to the deceased, capable of inheriting, is presumed to be the heir, and is called presumptive heir. This quality is given to him before the decease of the person from whom he is to inherit, as well as after the opening of the succession, until he has accepted or renounced it." C. C. 876.

By using the expression *the heirs of William George*, the donor pointed to the children who were his presumptive heirs. No greater certainty can be required in pointing out the parties for whom a liberality is intended. 11 La. 431, *Theall v. Theall*; 2 Rob. 438, *Succession of Mary*; 3 An. 494, *Fisk v. Fisk*; 17 La. *Milne v. Milne*.

Besides, slaves being considered in the common law States as personal property, may be given by parol. We must, therefore, suppose that the title of the minor was perfected by the delivery. *William George*, having accepted the delivery of the slaves for the benefit of his heirs, could not be permitted to allege the nullity of the act, so as to deprive them of property delivered and entrusted to him for their benefit.

The plaintiff, in his representative capacity, is entitled to recover the slaves in question, together with the value of their services, since the institution of this suit, to wit, from the 8th day of September, 1857. The value of the services of the boy *Hampton*, is shown to be worth twelve dollars per month, and those of the negro woman *Esther*, four dollars per month; but on the other hand, it appears that the services for keeping and raising the children, are worth the sum of four dollars per month.

The defendants are entitled to recover from their warrantor, *William George*, the amount of the purchase money; a restitution of the fruits which were awarded to the plaintiffs; and such damages as may be proven, together with costs. C. C. 2482.

It is, therefore, ordered and decreed, that the judgment of the court below be avoided and reversed; that the plaintiff do have judgment against the defendants for the slaves *Hampton* and *Esther*, with their increase, to wit, *Felix*, *Faling*, *Mary*, *Minerva*, *Margaret*, *Levy* and *Sabia*; that the defendants do pay to the said plaintiff, the hire of these slaves, at the rate of one hundred and forty-four dollars per annum, from the 8th day of September, A. D. 1857, eighteen hundred and fifty-seven, until delivery of possession of said slaves to said plaintiff. It is further ordered, that the defendants do have judgment against *William George*, for the sum of two thousand dollars, with legal interest from the 18th day of November, A. D. 1850, until paid; and that they do further recover of him the amount decreed to be paid by them to the plaintiff for the hire of the slaves; the appellees paying the costs of appeal.

STATE v. THE HEIRS OF W. R. LECKIE, and his Sureties.

14	641
44	294
14	641
48	180

The beneficiary heir cannot stand in judgment for the succession.

Where the succession is accepted with the benefit of inventory, the appointment of an administrator becomes necessary, except when the heirs are all minors represented by a tutor, which case is made an exception to the general rule, the tutor having the right to administer, if the creditors do not require the appointment of an administrator.

Where a suit is improperly brought against the beneficiary heir as such, for a debt of the succession, and is dismissed on the exception of the heir, leave should be granted to the plaintiff to amend, by making the proper parties.

A PPEAL from the District Court of the Parish of Rapides, *Cullom, J.*
T. C. Manning, for plaintiff and appellant. *Mercer Canfield*, for defendant.

MERRICK, C. J. The proceeding in this case was commenced by rule against the representatives of *William R. Leckie* and his sureties, for defalcations in the collection of the taxes of 1846. The suit having been compromised under an Act of the Legislature as to the sureties, is now before us as an appeal taken by the State from a final judgment rendered in favor of the defendants, on the plea of prescription.

The first question presented by the record is, the exception to the action on the part of the heirs, on the ground that they have not accepted the succession of the deceased purely and simply, but only with the benefit of inventory, and praying that an administrator may be appointed.

W. R. Leckie has been dead some years. He left seven children, four majors and three minors. The right of the heirs to accept the succession with benefit of inventory, is not questioned by the State. But it is argued that the suit can be maintained against the beneficiary heir, and that it is not essential that an administrator shall be appointed.

The object of the suit is to obtain a judgment against the succession. Can the beneficiary heirs, as such, stand in judgment for the succession? Have they, as such, the detention of the effects of a succession? Can they acknowledge debts? It appears to us, under our present jurisprudence, the answers to these questions must be in the negative. The Civil Code and Code of Practice contemplate the appointment of an administrator, in the case the succession is accepted, with the benefit of inventory. C. C. 1030, 1042; C. P. 974, 982.

This administrator, thus appointed, must give bond and take an oath of office, and thus he becomes, *quasi*, an officer of court, subject, in certain cases, to the summary rules and motions of parties and the penalties denounced by law. This could not be the case if the beneficiary heirs could administer without these formalities.

As the law gives one or more of the beneficiary heirs preference in the administration, and confers upon them, by such appointment, a power over the estate, so also the extra judicial action of the beneficiary heir of age, who should attempt to acknowledge debts, collect revenues and debts by suit or otherwise, and administer the estate, would be liable to misconstruction and would end in charging him as unconditional heir.

Where all the heirs are minors, represented by the tutor, this reasoning has not the same force, and the case is made an exception to the general rule, if the

STATE
v.
LECKIE

creditors do not require the appointment of an administrator. See 2 An. 464 *Bryan v. Atchison*; 3 An. 502; Phillip's Dig. p. 3, sec. 8.

It seems to us quite clear, that the exception of the defendants to their capacity to stand in judgment, ought to have been maintained.

The dismissing of the suit as to the beneficiary heirs, will not prevent the plaintiff from proceeding to make the proper parties.

A final decree in favor of the defendants was erroneous, as we have already shown that they did not properly represent the succession.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that the suit be dismissed as to the said defendants, the beneficiary heirs of said *W. R. Leckie*, deceased, without prejudice to the right of the State to amend, by making the proper parties.

W. O. WINN v. W. W. BROWN et al.

The surviving widow of *R. W.* sold a tract of land belonging to the community, of which property her minor children owned an undivided half. The sale was made by the mother for herself, and as tutrix of her minor children, and with full warranty. In a suit by one of the children to recover his portion of the property from one holding under a title from his mother's vendee—*Held*: That although the defendant had not obtained a subrogation to his vendor's rights of warranty against the mother of plaintiff, the action could not be maintained, the fact of the price of the property having gone into the succession of the mother, of which the plaintiff was heir, making it against good conscience for him to recover.

A PPEAL from the District Court of the Parish of Natchitoches, *Chaplin, J.* *W. B. Lewis*, for plaintiff. *J. B. Smith*, for defendant.

MERRICK, C. J. "This is a petitory action, in which the plaintiff seeks to recover from the defendants, the undivided half of a certain plantation or tract of land.

"Plaintiff avers that he is the sole surviving heir of *Richard Winn*, late of the parish of Rapides. That said *Richard Winn* owned, during his life-time, the undivided half of said land. That said *Richard Winn* sold the same to *Daniel R. Hopkins*, on the 28th day of December, 1838, on certain terms of credit; and on the 2d day of November, 1840, *Hopkins* sold it to *B. B. Brazeale*, who, being already the owner of the other half thereof, became, by said sale, the sole owner of the whole tract. That on the 15th day of November, 1841, he sold the whole property to one *Samuel Quarles*, on certain credit, and transferred the notes of said *Quarles* to petitioner's mother, who by the death of his father, became the natural tutrix, and was co-tutor with *James N. T. Richardson*, (with whom she intermarried,) of himself and his sister *Ann T. Winn*, who has since died.

"That said transfer of notes was in payment of the debt due to said *Richard Winn*, for the price of said property, which was a community debt due to his mother, to himself, and to his sister—one-half to his mother, and the other half to himself, in his own right and as heir of his sister.

"Plaintiff further avers, that his said mother and her husband, *James N. T. Richardson*, acting in right of his said mother, as owner of one-half of said claim, and as co-tutors of himself and sister, and under and by virtue of the advice of a family meeting, took all of said land, together with a number of slaves, and personal property from said *Quarles*, in payment of said community debt, and whereby the undivided half thereof became the property of himself and sister,

and which is evidenced by an act of sale, or giving in payment, passed on the 2d day of March, 1846.

WILLIAMS
v.
BROWN.

"Plaintiff finally avers, that *W. W. Brown, Tally Brown and Daniel Brown*, have taken illegal possession of said land, and that they are bound to account for the fruits and revenues, which are reasonably worth ten thousand dollars. He prays that defendant be decreed to deliver up the undivided half of said land, and for judgment against them for the sum of ten thousand dollars, for fruits and revenues."

The defendant, among other defences to the action, pleaded the exception, that the plaintiff, as heir to his mother, the vendor of *Quarles*, was bound in warranty and, therefore, could not recover.

To this, plaintiff replies: The defendant claims title by virtue of a sale from *Quarles* to him. In this act of sale there is no subrogation to *Quarles'* action and demand in warranty, and, therefore, defendant cannot avail himself of it as a means of defence. It is true, as contended for by plaintiff, that it has been held, that "a vendor who has not taken an express subrogation of his vendor's right of warranty, cannot, in case of eviction, maintain an action of warranty against the vendor of his vendor."

What the defendant seeks to do in this case, is quite different. It is to avail himself of a fact as a defence to an action. He demands, strictly speaking, nothing in warranty against the plaintiff, but affirms the existence of a fact which makes it against good conscience for the plaintiff to recover. It is that plaintiff's mother expressly covenanted to warrant the title of *Quarles*, and if she did not pay the one-half of the price to the plaintiff, or for his benefit, it is still in her succession, and plaintiff has found the price therein, and is so much the richer by it. As *Quarles*, if cited in warranty, could have availed himself of this fact, as a defence to the action, so his vendee also may use it as a shield to protect his title. For it is immaterial, whether the facts which the defendants urges by way of a defence to the action, are furnished by the vendor, after a demand in warranty, or after a simple verbal notice, or are discovered by the possessors of the property without any assistance. C. C. 2494; C. P. 388; 2 Rob. 196.

The exception ought to have been maintained.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed; and it is now ordered, adjudged and decreed by the court, that there be judgment in favor of defendants, with costs of both courts.

ALEXANDER HALE V. NATHANIEL SAUNDERS.

14	643
106	577
106	584

When plaintiff propounds interrogatories on facts and articles to defendant, and in his answer he admits only a part of the demand, plaintiff may take a nonsuit, or discontinue the suit as to the residue.

Plaintiff has the right to discontinue the whole or any portion of his demand, so long as there is no reconventional demand filed by defendant.

APPEAL from the District Court of the Parish of Rapides, *Cullom, J.*
W. P. Shrophshire and Hyman & Cazabat, for plaintiff. *W. B. and J. C. Lewis*, for defendant and appellant.

HALE
v.
SAUNDERS.

MERRICK, C. J. The plaintiff brought suit against the defendant for \$1013, for cotton shipped and sold by him during the years 1854, 1855 and 1856.

The plaintiff annexed the accounts of certain sales rendered *Saunders* by his merchants in New Orleans, and interrogated him as to his indebtedness to the plaintiff under them. *Saunders* admitted only a part of the accounts of sales produced, to be sales of *Hale's* cotton.

The plaintiff thereupon proposed to take a judgment of nonsuit or discontinue as to the residue of his demand. This being objected to by defendant's counsel, and the objection being sustained by the court, plaintiff excepted. Judgment was rendered in his favor for only \$368 29, and he appeals.

We are of the opinion, that the plaintiff had the right to discontinue the whole or any portion of his demand, so long as there was no reconventional demand filed by the defendant. The unsatisfactory or even adverse answers of the defendant to the interrogatories propounded by this plaintiff were only evidence, and if the plaintiff supposed he could supply the defects of such evidence or rebut the same, he had the right to dismiss his demand in order to renew his suit for such portion of his claim under more favorable circumstances.

The defendant and appellee urges the plea of prescription in this court. But we have not found any answer praying for an amendment of the judgment in his favor. We cannot, therefore, consider the plea, so far as it applies to the portion of plaintiff's demand insisted on and in judgment. As to the residue of plaintiff's demand, the plea of prescription cannot prevent plaintiff from dismissing the same.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be amended, so as to dismiss all of plaintiff's demand contained in his petition, as in case of a nonsuit, except the account of sales of the 18th of January, 1854, of two bales of cotton marked A N ; the account of sales of four bales of cotton, 20th March, 1856, and of one bale of cotton of date July 26, 1856, amounting in the aggregate to the sum of \$368 29 ; and it is further ordered, adjudged and decreed, that the judgment of the lower court so amended be affirmed, the defendant paying the costs of the appeal.

NEW ORLEANS DECISIONS.*

SUCCESSION OF JOHN TWIBILL.

14 645
49 1137

The surety of the liquidator appointed to administer the affairs of a commercial partnership which has been dissolved by the death of one of the partners, cannot file an account in the succession of such deceased partner, of the administration of his principal, with the view of obtaining his discharge from liability as surety.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*
Durant & Hornor, for appellant. *M. Grivot*, for appellee.

MERRICK, C. J. The appeal in this case is taken by the sureties of *William Atkins*, from a judgment denying their right to file an account in the succession of *John Twibill*.

The counsel for appellant state their case as follows, viz :

"The commercial partnership of *Twibill & Atkins* was dissolved by the death of *John Twibill*, on the 28th of April, 1856. *William Atkins* petitioned for the liquidation and settlement of the partnership, which was granted to him, contradictorily with *Twibill's* widow, on his giving bond and security in the sum of \$10,000, on the 21st of May, 1856. *Atkins'* securities were *James McIntosh*, *John Thompson*, and *George Purvis*, the appellants.

"On the 2d of November, 1856, *Atkins* died, and *John M. Desmarest* was appointed his administrator. He found the succession and the partnership matters of *Twibill & Atkins* inextricably involved with each other.

"On the 11th of June, 1857, he filed his tableau in *Atkins'* succession. On the same day, in *Twibill's* succession, he filed a full tableau and account of the liquidation of the partnership of *Twibill & Atkins*, and a few days afterwards he made the sureties of *Atkins* regular parties to the proceedings.

"The attorney for absent heirs and the attorney of the widow of *Twibill* denied the right of *Atkins'* administrator to file any account of the liquidation of the partnership. The Judge sustained their exception, and dismissed the tableau.

"One of the creditors of *Twibill & Atkins* ruled *Atkins'* administrator for an account or tableau of the partnership affairs, on the 15th of September, 1857.

"*Atkins'* administrator excepts, and says that the court has already decided that he has no right to file an account; "that while such judgment lasts, respondent ought not to be held to file any account, as it would be inconsistent and unjust to deny his right to file an account, and then to compel him to file one. But should the court think he can now be called upon to file an account, which he is perfectly willing to do, then he says he has no other account to give than the one

* The three following decisions were omitted in their proper places.

SUCCESSION OF
TWIBILL.

already presented by him, and which he prays may be taken as a part of his answer.

"This rule was made absolute, the account was filed, and the same formalities and notices to creditors and others interested were gone through with, and the same result attained, to-wit: a regular judgment of homologation without opposition, except from the attorneys of *Twibill's* widow and absent heirs, who again denied the right of *Atkins'* administrator to file any account of the liquidation and settlement of the partnership. But although the lower Judge had ordered the account to be filed, no doubt through error, he sustained the exception, dismissed the tableau, and annulled all proceedings on the rule taken by the creditor. This was on the 26th of November, 1857.

"On the 4th of December, 1857, the securities, adopting the administrator's account, filed their petition in the succession of *Twibill*, and with it the said account, setting forth the foregoing facts, and praying its homologation and their final discharge from all liability as sureties of *William Atkins*, as liquidating partner of *Twibill & Atkins*.

"The attorneys of *Twibill's* widow and absent heirs denied the right of the sureties to file an account of the liquidation of the partnership; and from a judgment sustaining their exception and dismissing the sureties' petition and their account, this appeal has been taken."

It thus appears, that *Desmarest* represents the succession of *Atkins* as administrator; and he having failed in his efforts to intrude an account upon the succession of *Twibill*, of *Atkins'* administration as liquidator of the partnership affairs, the sureties of *Atkins* now attempt to do what was refused the representative of their principal.

The action is founded upon a misapprehension of the rights of the sureties and administrators of successions.

As between themselves and the creditor, *sureties* have no claims, until they are sued or have paid the debt. If sued, they are entitled to the pleas of discussion and division; and, on payment of the debt, to a subrogation to the action and rights of the creditor. C. C. 3014, 3015, 3018, 3030; 12 An. 8.

As between the principal debtor and surety even, the latter has no claim until he has paid the debt, or until one of the conditions of Art. 3026 C. C. has happened. *Taylor v. Drane*, 13 L. R. 62; *Mudd v. Rogers*, 10 An. 648.

Aside from the irregularity of filing an account for a succession they do not represent, how then can the sureties of the debtor of a succession undertake to file an account in such succession, already represented by its proper curator, concerning matters about which they have not yet acquired any legal rights? See C. P., Art. 15, and *Succession of Rachel*, 12 An. 717.

If their principal is not the debtor of such succession, but on the contrary, the creditor of that succession, it is most manifest that the condition upon which the accessory obligation of the surety was to be founded, has failed. C. C. 3004, 3006.

The judgment of the lower court was, therefore, fully sustained by law.

Judgment affirmed.

BUCHANAN, J. I adopt the following opinion, written by Judge Spofford, as my concurring opinion in the case of the *Succession of John Twibill*:

"I agree with the District Judge in regarding as wholly irregular the intrusion of the sureties of *Atkins*, liquidator of *Twibill & Atkins*, into the succession of *Twibill*, against the will of the lawful curator, to file, as belonging to that suc-

cession, an account of one *Desmarest*, who was only administrator of *Atkins'* estate, and a mere intermeddler in the partnership affairs, without notice to the representatives of *Twibill*.

SUCCESSION OF
TWIBILL.

"When these sureties are attacked by *Twibill's* succession for the gestion of their principal or liquidator, it will be time for them to show that it has not been injurious to the estate of *Twibill*."

L. ELKIN & CO. v. NEW YORK & NEW ORLEANS STEAMSHIP COMPANY.

When goods shipped on freight are damaged by water, so as to be valueless and unsalable, the shipper is not bound to send them to auction to be sold, as a prerequisite to his right of action. Either party has a right to require, in such case, a sale by auction, and the expenses will form part of the costs.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
Hunt & Denagre, for plaintiff. *Singleton & Clack*, for defendants.

BUCHANAN, J. The plaintiffs had judgment in the District Court for the value of goods shipped on board the defendants' vessel, on freight, and which were damaged by water, as testified by several witnesses, to such an extent as to render them entirely valueless.

Defendants appeal from the judgment, and rely upon the case of *Henderson & Gaints v. Ship Maid of Orleans*, 12th An. 352; in which case plaintiffs were nonsuited, because they had not ascertained, by an auction sale the difference between the invoice price of the goods shipped, and their value as delivered. The distinction to be made between the case cited and the present is, that in the former, the goods were proved to have some value (say 30 or 40 per cent. of the invoice price) at the port of delivery; whereas, in the latter, the goods are proved to have been culled over, and the suit is instituted only for that portion which the witnesses prove to be entirely valueless and unsalable. In such a case, it seems unreasonable to require of plaintiffs the useless expense of sending the goods to auction, and advertising them for sale, as a prerequisite to the right of action. As we said in *Greenwood v. Cooper*, 10th An. 797, either party had the right to require a sale by auction; and upon an application by defendants, such an order might have been made, and the expenses would have formed part of the costs. But no such application was made in the court below. The offer of defendants' clerk, of twenty-five cents a piece for the damaged window shades, "to paper his house with," does not appear to us serious; and cannot be viewed as contradicting the testimony of plaintiffs' witnesses.

Judgment affirmed, with costs.

14 648
50 624

L. FABRE v. R. W. McRAE and A. PROVOSTY, Syndic.

In a suit for the recovery of money, the defendant having made a surrender, his syndic was made a party, and judgment rendered in favor of the plaintiff—*Held*: That it was irregular, that all further proceedings should have been suspended, and the plaintiff's claim cumulated with the insolvent proceedings.

A PPEAL from the District Court of the Parish of Point Coupée, *Ratliff, J.*
F. N. Farrar, for plaintiff. *Clark & Bayne* and *A. Provosty*, for defendants.

COLE, J. This suit was commenced by plaintiff against *R. W. McRae*.
Hall, Rodd & Putnam, intervened.

Afterwards, plaintiff moved that *A. Provosty, Esq.*, be made a party defendant to the suit, on the ground, that since the commencement of the same, the defendant, *R. W. McRae*, had made a surrender to his creditors, and *Provosty* had been appointed syndic.

The judgment was in favor of plaintiff against the intervenors and defendant.

The syndic has alone appealed.

In consequence of the surrender, any further proceedings in this case ought to have been suspended, and the claim of plaintiff ought to have been cumulated with the insolvent proceedings, and settled contradictorily with the creditors of *McRae*. *Astor v. Syndics of Saul et als.*, 4 M. N. S. 632; *Marsh v. Marsh*, 9 Rob. 46; *Posly v. Weems*, 4 An. 195; *Clark v. Oddie*, 4 M. N. S. 625.

It is, therefore, ordered, adjudged and decreed, that the judgment be avoided and reversed, so far as plaintiff and the syndic are concerned, and that this cause be remanded to the lower court to be proceeded with according to law, and that plaintiff pay the costs of appeal; and that the costs of the lower court abide the final termination of the suit.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

MONROE.

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**JULY, 1859.**

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PRESENT :

HON. A. M. BUCHANAN, HON. C. VOORHIES, HON. J. L. COLE, HON. T. T. LAND,	}	<i>Associate Justices.</i>
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14 648  
44 801

### STATE V. SLAVE CHARLES.

Where a slave was prosecuted under the Act of 1857, "relative to slaves," for having struck a white man, so as to cause the shedding of blood, and the jury acquitted him of any capital offence, but sentenced him to receive corporal punishment—*Held*: That the accused, in such a case, is not debarred the right of appeal; and that Article 62 of the Constitution of this State, which grants the right of appeal in all criminal cases, where the offence charged is punishable with death, or imprisonment, at hard labor, does not make that right depend upon the nature of the verdict, or the punishment that may be inflicted by the jury, but upon the nature and punishment of the offence charged as fixed by law.

Section 28th of the Act of 1857, relative to slaves, empowers the court to inflict corporal punishment, only when the accused has not been *convicted* or *acquitted* of an offence punishable with death, and where a slave has been acquitted by the court of any capital offence, corporal punishment cannot be inflicted on him.

**A** PPEAL from a Justice's Court of the Parish of Franklin.  
*F. P. Stubbs*, District Attorney, for the State. *H. & J. H. Crawford*, for defendant and appellant.

**COLE, J.** The slave *Charles* was tried before a jury of two Justices of the Peace and ten slaveholders, in the parish of Franklin, charged with having willfully and maliciously struck his overseer, a white man, appointed by his owner, so as to cause a shedding of blood.

The verdict of the jury acquitted the prisoner of any capital offence, but sentenced him to receive corporal punishment.

The accused has appealed.

A motion has been made by the District Attorney to dismiss the appeal, on the ground that this court is without jurisdiction, because the appellant was ac-

STATE  
v.  
CHARLES.

quitted of the offence punishable with death, or imprisonment at hard labor, and condemned to receive only corporal punishment by flogging, and that a fine exceeding three hundred dollars has not been actually imposed.

The Constitution of 1852, Article 62, gives appellate jurisdiction to this court over all criminal cases on questions of law alone, whenever the *offence charged* is punishable with death or imprisonment at hard labor, or when a fine exceeding three hundred dollars is actually imposed.

This Article does not render it necessary for the right of appeal, that the prisoner should be *found guilty* of an offence punishable with death, or imprisonment at hard labor. It is sufficient to authorize the appeal, that the offence charged against him is punishable with death, or imprisonment at hard labor.

The right of appeal equally exists, if the accused has been charged with an offence punishable with death or imprisonment at hard labor, and has been found guilty of an offence not so punishable, for Article 62 of the Constitution does not make the right of appeal depend upon the nature of the verdict or the punishment that may be inflicted by the jury, but upon the fact, whether the offence charged is punishable with death or imprisonment at hard labor.

The third section of the Act of 1857, (p. 229, Sess. Acts) punishes with death or imprisonment at hard labor for life, any slave who commits the crime with which the appellant was charged. It is true, that the 28th section of the same Act, (Sessions Acts, 1857, p. 232) declares, that in case the court shall not convict or acquit the accused of an offence punishable with death, it shall have the power to decree the infliction of such corporal punishment as it may consider deserved by the prisoner.

This section does not deprive the appellant of the right of appeal, for the offence charged was punishable with death or imprisonment at hard labor for life.

The motion to dismiss the appeal is, therefore, overruled.

The verdict and judgment of the court and jury are illegal.

Section 28th, already quoted, empowers the court to inflict corporal punishment only when the court "*shall not convict or acquit*" the accused of an offence punishable with death.

In this case, the verdict of the jury was as follows :

" We, the court and jury, empanelled for the trial of *Charles*, a slave, acquit him of any capital offence, and from motives of policy and not from the justice of the case, sentence him to receive one hundred and fifty-four lashes by the Sheriff, but not so as to break the skin of the said slave, on the first Monday of September, A. D. 1859."

As, then, the jury acquitted the prisoner of an offence punishable with death, it had not the right to inflict corporal punishment.

The French text of section 28th, agrees with our construction of the English text: "*Néanmoins si la cour ne condamne, ni n'acquitte l'esclave accusé d'un crime entraînant la peine de mort, elle aura le pouvoir de lui infliger tout châtiment corporel qu'elle jugera avoir été par lui mérité.*"

The idea of the legislator seems to have been, that when the evidence was such that the jury were of opinion that the accused was not absolutely guilty of the offence charged, but, still, that he had committed an offence which ought to be punished in a lighter form, than by death or hard labor, that then they should have the right to inflict corporal punishment.

The form of the verdict ought to have been in substance, that they neither

acquit nor convict the accused of the offence charged, but from the nature of the evidence, it is proper to inflict certain corporal punishment, and accordingly sentence the accused to receive a certain amount of corporal punishment, specifying the same.

STATE  
v.  
CHARLES.

The 9th section of the Act of 1855, to regulate the mode of procedure in criminal proceedings relative to free persons, (Sess. Acts of 1855, p. 173, § 9,) is somewhat similar to section 28 of the Act of 1857, for it declares, that if upon the trial of any person for any crime or misdemeanor, it shall appear that the facts given in evidence amount in law to some other offence, he shall not, by reason thereof, be entitled to be acquitted of the offence charged.

It is, therefore, ordered, adjudged and decreed, that the verdict and judgment of the court and jury from which this appeal is taken, be amended as follows, to wit, that the portion thereof which sentences the slave *Charles* to receive corporal punishment, to be inflicted by the Sheriff, be avoided and reversed; and that the verdict and judgment so amended be affirmed, and that the slave *Charles* be discharged.

### STATE v. ARTEMUS BENNETT.

When, in a criminal case, the question was asked a juror, examined on his *voire dire*, "*Have you or not formed or expressed the opinion, from what you have heard of the case, that the defendant is guilty*?"—*Held*: That the question was not in legal form, and that the District Judge in refusing to allow it to be answered, did not abuse the discretionary power to overrule interrogatories not in legal form.

The physical and mental condition of the person, whose dying declarations are offered in evidence, is a question of fact over which the Supreme Court has no jurisdiction.

The 3d section of the Act of 1856, relative to the drawing of juries, fully recognizes the right of the court to order talesmen to be summoned after the regular panel has been exhausted; and the prisoner has no right to require that the list of talesmen summoned, should be served upon him two days before the trial.

On the examination of a juror on his *voire dire*, the question was asked him, "*In case the defendant is found guilty of murder, have you made up your mind, as to what degree of punishment ought to be inflicted upon him*?"—*Held*: That the question was not properly put, and that the District Judge did not err in refusing to allow it to be answered.

**A**PPEAL from the District Court of the Parish of Caddo, *Creswell, J.*  
*Stubbs & Williamson*, for State. *Rowland Jones*, for defendant and appellant.

COLE, J. The accused having been found guilty of murder and sentenced to be hung, has appealed, and relies upon five bills of exception:

1. The court did not err in refusing to allow the following question to be propounded to certain persons, called to serve as jurors, when they were being examined on their *voire dire*: "*Have you or not formed or expressed the opinion, from what you have heard of the case, that the defendant is guilty*?"

The question was not in legal form. It may be, a person may have formed an opinion of the guilt of an accused from rumor, yet that this opinion has not been so deliberately created, but that it may be changed by the testimony upon the trial.

The District Judge has a certain discretionary power to overrule questions not in legal form, and we cannot say that he abused it in rejecting the interrogatory.

STATE  
v.  
BURNETT.

*The State v. George*, 8 Rob. 538 ; *State v. Brown*, 4 An. 506 ; *Burr's trial*, p. 416 ; volume 1st Wharton's American Criminal Law, p. 605 et seq.

2. The counsel of the accused also propounded to the same persons, the interrogatory : " Whether, if they went into the jury-box in their present state of mind, they went there with the belief that the defendant was guilty of murder, as charged in the bill of indictment."

The District Judge properly sustained the objection to the question. It was not in the usual form ; and besides, the District Judge appends to the bill of exceptions, the following remarks : " The jurors had answered, they had neither formed or expressed any opinion as to the guilt or innocence, and had qualified themselves, as to opinion, fully."

As these persons had been already examined upon the state of their minds upon the guilt or innocence of the accused, and had shown themselves to be good jurors, a repetition of questions upon the same point, would have been useless, and the District Judge had the discretionary power to reject the question.

3. The declarations of *Jordan*, the deceased, before his death from the injuries received from the accused, were objected to on the ground, that they were not made in extremity, when the former was at the point of death, and when every hope of this world was gone.

The physical and mental condition of *Jordan*, at the time of the declarations, is a question of fact, over which this court has no jurisdiction. *State v. Haase*, 14 An. 79.

4. The counsel of the accused objected to the talesman, *J. M. Williams*, as incompetent :

First. Because, under the law prescribing the mode of drawing and summoning jurors, there is no provision made for the selection and drawing of talesmen.

Second. Because the law provides in his favor, that he shall have a list of the jury, which are to pass upon his trial, delivered to him at least two entire days before the trial, which privilege he claims and insists upon availing himself of.

Third. Because the name of the juror was not drawn from the box containing a list of the qualified jurors, but was without notice to the prisoner and without his consent, unlawfully selected and summoned at the mere arbitrary discretion of the Deputy Sheriff.

Fourth. Because, by forcing upon him talesmen as his triers, he may be deprived of the advantage of a change of *venue*, which may be ordered by the court, where it shall be made apparent that no competent juror of the parish can be had " after exhausting two successive panels."

The Act of the Legislature of 1855, section 3d, relative to the drawing of juries, provides, that " nothing herein contained shall be so construed as to prevent any person from being summoned on a special venire, or as a talesman." Session Acts, 1855, p. 299.

This proviso recognizes the right of the court to order talesmen to be summoned after the regular panel has been exhausted.

The object of the law in permitting the call of talesmen, is to effect a speedy trial, and if the objections of the accused were valid, this object would be defeated, and the summoning of talesmen would be virtually abrogated.

We are of opinion that the court did not err in overruling these objections. *State v. Reeves*, 11 An. 686 ; *State v. Bunger*, ante p. 461.

5. The counsel of the accused proposed to certain persons being examined on

their *voire dire*, the following question : " In case the defendant is found guilty of murder, have you made up your mind as to what degree of punishment ought to be inflicted on him" ?

Even if the decision in the case of *The State v. George*, be applicable to free-men, and a person be incompetent as a juror, if he has formed an opinion as to the nature of the verdict, so far as the punishment is concerned, still the question was not properly put.

The question, if admissible, ought to have been, whether he had formed such a deliberate opinion as to the nature of the punishment to be inflicted, in the event the prisoner were found guilty of murder, that it could not be affected or changed by the evidence. *State v. George*, 8 Rob. 538.

The court did not, therefore, err in refusing to allow the question to be answered.

The court erred in fixing the day of execution.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be so amended, as to reverse that portion of it which fixes the day of the execution of the sentence ; and further, that it be so amended, that the sentence shall be executed upon the day that shall be fixed by the Governor of the State of Louisiana, and that the judgment so amended, be affirmed.

LAND, J., having been retained as counsel in this case, recused himself.

BYRNE, VANCE & Co. v. WM. PRATHER—Same v. Same.

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| 14  | 653 |
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The written acknowledgment of an account places the claim on the footing of an ordinary personal debt, and subjects it to the prescription of ten years, as provided by Article 3508 C. C.

A judgment which has been appealed from cannot be pleaded as *res judicata* while the suit in which it was rendered is pending on appeal.

An exception of *its pendens* made after a plea of *res judicata* has been overruled, and before a judgment by default has been rendered, should be considered as having been made in *limine litis*, and if well taken should be sustained.

**A**PPEAL from the District Court of the Parish of Morehouse, *Richardson, J. Morrison & Purvis*, for plaintiffs and appellants. *D. C. Morgan*, for defendant.

LAND, J. These suits have been consolidated and tried together in this court, by consent of parties. The first named was commenced on an *acknowledged account*, in favor of *Byrne & Co.*, for the amount of three hundred and twenty-five dollars and fifty-four cents, to which defendant pleaded the prescription of three and five years, which was sustained, and judgment rendered against plaintiffs' demand.

The account sued on is that of a cotton factor against a planter, for plantation supplies, and was acknowledged in writing by the defendant to be correct, in the following form, to-wit :

" BASTROP, 16th May, 1853.

" I hereby acknowledge the above account for three hundred and twenty-five dollars and fifty-four cents to be correct. *Mrs. Nancy Woods*, of Bayou Rouge Prairie, agreed to pay the above by shipment of enough of her then growing crop to the address of *Messrs. J. B. Byrne & Co.* I hereby obligate myself to make *Mrs. Woods* pay the above account, and in case of her failing to do so,

BYRNE  
v.  
PRATHER.

will pay the same myself, together with eight per cent. per annum interest on the same, from 20th March, 1851.

(Signed)

WILLIAM PRATHER."

The account itself is made out against the defendant, and as appears above, was acknowledged on the 16th of May, A. D. 1853. Citation was served on the 20th of May, A. D. 1858, and the only question in this suit is, whether the prescription of three and five years pleaded is a bar to the action.

The prescription of five years is not made applicable, by Article 3505 of the Civil Code, to any class of accounts; and this court held, in the case of *Dixon, administrator, v. Lyons, tutrix*, that an acknowledged account was not an open account, and as such prescribed by the lapse of three years, under the Act of March 5th, 1852, p. 90, relative to prescription. 13 An., p. 160.

In the case of *Davis v. Houren*, 10 R., p. 403, it was likewise held, that the written acknowledgement of an account places the claim on the footing of an ordinary personal debt, and subjects it to the prescription of ten years, provided by Art. 3508 of the Civil Code.

It is, therefore, ordered, adjudged and decreed, that the judgment in the suit of *Byrne, Vance & Co. v. Wm. Prather*, No. 2618, be reversed; and it is now ordered, adjudged and decreed, that the plaintiffs do recover of the defendant the sum of three hundred and twenty-five dollars and 54 cents, with interest thereon at the rate of eight per cent. per annum, from the 20th of March, 1851, until paid, with costs in both courts.

The second named suit was commenced on the written acknowledgement and promise of the defendant to pay the account on which the first suit was instituted, and to this demand the defendant pleaded, first, the exception of *res judicata*, and afterwards, without objection, the plea of *lis pendens*. The exceptions were both overruled. The first named suit was pending on appeal, and the plea of *res judicata* was properly rejected. *Escuir v. Daboval*, 7 La., p. 579; *Turnbull v. Cureton*, 9 M., p. 38; C. C. 3522, No. 9.

The evidence shows that the name of *Vance* had been used through error in the first suit and that the real plaintiffs, in interest, in both demands, were *Byrne & Co.*; and as the exception of *lis pendens* was filed without objection, although after the plea of *res judicata* had been overruled, but before the case had been defaulted, and, therefore, *in limine litis*, it should have been sustained. C. P. Art. 333.

It is, therefore, ordered, adjudged and decreed, that the judgment in the suit of *Byrne & Co. v. Wm. Prather*, No. 2,734, be reversed, and that said suit be dismissed, at plaintiffs' costs in both courts.

### JOHN YOUNG et al. v. J. W. HAYS, Recorder, et al.

When property is sold under execution, the adjudication is made without reference to the amount of legal and judicial mortgages to which the property may be subject.

A forced sale of property, made under execution of a judgment, secured by a judicial mortgage, does not discharge concurrent judicial mortgages.

APPEAL from the District Court of the Parish of Claiborne, *Egan, J.*  
*J. Young*, for plaintiffs and appellants. *McGuire & Ray*, for defendants.  
*VOORHIES, J.* The question involved in this case is, whether a forced sale,

made under a judgment, secured by judicial mortgage, has the effect to discharge concurrent judicial mortgages. The issue is presented by the purchasers; they contend that they are entitled to the cancellation of the judicial mortgage of *J. S. Sims*, whose judgment was registered on the same day as that of the seizing creditor; and that *J. S. Sims'* only recourse hereafter is on the proceeds in the Sheriff's hands.

The Code of Practice, Art. 708, reads: "The purchaser is bound for nothing beyond the price of his adjudication; and, if after paying the suing creditor, as directed in the preceding Article, there remains nothing more due to discharge the mortgages *subsequent* to that of the suing creditor, the Sheriff shall give him a release from these mortgages." Thus it appears, that the express provisions of the Code militate against the plaintiffs' pretensions: the text speaks of *subsequent* mortgages.

The plaintiffs, however, contend that, although their case does not come within the literal terms of the Article, yet it falls within the spirit of the law. We think differently. When property is sold on execution, the adjudication is made without reference to the amount of legal or judicial mortgages, to which the property may be subject: the provisions of Article 708, with regard to *subsequent* mortgages form an exception. All other judicial or legal mortgages remain unimpaired. "The creditor with such a mortgage may, if he chooses, look to the proceeds of the sale in such a case, and enjoin the Sheriff from paying them over; but it by no means follows, that his rights cannot be exercised by pursuing the property itself." *Judice v. Ker*, 8 An. 464. The plaintiffs' counsel does not pretend, however, that antecedent mortgages are affected; but he makes a distinction between such and concurrent mortgages,—a distinction which seems never to have been recognized in our jurisprudence, and which is certainly not in harmony with our system of laws upon this subject. *Scott v. Featherston*, 5 An. 313.

Why should the separate action of one judicial mortgage creditor prejudice the right of recourse of another creditor, whose debt is secured by mortgage of equal dignity? Why should the latter be compelled to claim the proceeds of the Sheriff's sale, any more than the creditor who has an antecedent mortgage? Creditors whose rights are secured by concurrent mortgages stand upon the same footing towards each other; and the rights of the one are not to be controlled by those of the other. The adjudication is made with reference to this. The Code provides that, "when there exists a mortgage or privilege on the property put up for sale, the Sheriff shall give notice, before he commences the crying, that the property is sold subject to *all hypothecations* and privilege, of whatsoever kind they may be, with which the same is burdened." C. C. 679; C. P. 679.

As there is a special provision for subsequent hypothecations, and none made for those bearing the same date, the latter must be governed by the general rule. Judgment affirmed.

## M. O. TALIAFERRO v. L. F. STEELE, Sheriff, et al.

The rendition of a judgment on insufficient evidence is not a cause for which the action of nullity will lie, in the absence of all proof of fraud or ill practice on the part of the plaintiff.

The invalidity of a bail bond is not one of the causes for which an action will lie, to annul a judgment rendered on it.

The remedy in both of the above cases is by appeal.

When a bail bond recites the finding of a Grand Jury, the parties to it are estopped from denying its existence or contents.

If the bond, in specifying the charge in the indictment, does not follow the words used in the statute, and the indictment, and the warrant of arrest is not signed by the Clerk of the court, they are objections patent upon the face of the record, and when in such a case judgment is rendered on the bond, the remedy is by appeal, and not by an action of nullity.

**A** PPEAL from the District Court of the Parish of Bossier, *Egan, J. Looney & Fort*, for plaintiff and appellant. *F. P. Stubbs*, for defendants.

**LAND, J.** This suit is brought to annul a judgment, and at the same time, to arrest its execution during the pendency of the proceedings.

It appears that the Grand Jury of the parish of Bossier found an indictment against one *Bozeman*, for the offence of carrying "a dangerous weapon concealed on his person, contrary to the statute of the State." That he was arrested by the Sheriff, and gave bond for his appearance, in the sum of five hundred dollars, with the plaintiff, *Taliaferro, James M. Jones* and *W. Arick*, as his securities. That he failed to appear in pursuance of the condition of his bond, and that a judgment of forfeiture was entered against him and his securities. That notice of this judgment was given to the sureties, and that after the legal delays, an execution issued thereon, and the property of the plaintiff was seized and advertised under it, for sale. And that plaintiff thereupon commenced this action to annul the judgment, and to enjoin the sale.

The plaintiff assigns four different grounds of nullity, as follows :

First. Because said judgment was acquired without legal evidence, or by a quasi-fraud.

Second. Because the bond was given for the appearance of the principal on a charge not prohibited by the laws of this State, and, therefore, the judgment was absolutely null and void.

Third. Because *L. E. Bozeman* never had any citation or notice, legal or constructive, of the charge against him in the bill of indictment, and it could not, therefore, be the basis of a judgment. And,

Fourth. Because the arrest was unlawful, and without authority, and the bond given under such circumstances was null and illegal, and, therefore, neither the principal nor the securities are bound by it.

I. The rendition of a judgment on insufficient evidence is not a cause for which the action of nullity will lie, in the absence of all proof of fraud, or ill practice, on the part of the plaintiff. The remedy, in such a case, is by appeal. C. P., Arts. 605, 607.

II. The invalidity of a bail bond is not one of the causes for which an action will lie to annul a judgment rendered on it. C. P., Arts. 605, 607. The remedy is likewise by appeal.

III. The bond recites the finding of the indictment by the Grand Jury, and

estops the parties to it from denying its existence, or contents, as a matter of notice.

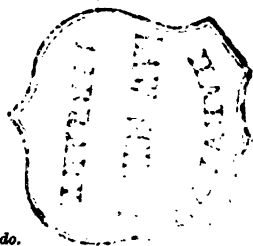
TALIAFERRO  
v.  
STEELE.

IV. This ground of objection is substantially the same as the second, and for the same reason, is insufficient to maintain the action of nullity.

The bond specifies the charge to be, "the crime of carrying concealed weapons," and the warrant describes the offence in the same language, omitting the word "dangerous" used in the statute and in the indictment. The warrant, besides, was not signed by the Clerk of the court.

If there be anything in these objections, they were patent on the face of the record, and the plaintiff's remedy was by appeal, and not by action of nullity.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.



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DYER & STEVENSON v. HARMON A. DREW.

A law partnership is an ordinary one, and the partners are bound jointly, and not *in solido*.

Objections to the authority of the plaintiff to sue, and to the non-joinder of the heirs and representatives of one who was bound jointly with the defendant, cannot be made after an answer has been filed, pleading a general denial.

When a receipt has been given by an attorney-at-law, for a claim placed in his hands for collection, the prescription of one year, provided by Art. 3501 of the Civil Code, cannot be applied where an action is brought on the receipt to make him liable for having allowed the debt to be lost by his neglect; the receipt creates a personal obligation which is only prescribed by ten years, as provided by Article 3608 C. C.

A PPEAL from the District Court of the Parish of Claiborne, *Egan, J.*
Vaughn & Vaughn, for plaintiffs and appellants. *J. D. Watkins*, for defendant.

COLE, J. This suit is instituted to recover of the defendant the amount of two promissory notes, received for collection by *Drew & Bonner*, as attorneys-at-law. The answer was a general denial.

There was judgment, as of nonsuit, against plaintiff, and he has appealed.

It is established, that a receipt was given for the notes by *Drew & Bonner*, and that the signature to the receipt is in the hand-writing of the defendant.

The defendant has not offered to return the notes, or to show what has become of them.

It was also incumbent on the defendant to establish that the failure to recover the amount of the notes was not owing to any laches on his part, but to the insolvency of the debtor. He has not proved these points.

A law partnership is an ordinary, and not a commercial one. C. C. 2796, 5797. The partners are bound jointly and not *in solido*. C. C. 2843.

The objections to the authority of plaintiff to sue, and to the non-joinder of the heirs and representatives of *Bonner* to this suit, as co-defendants, come too late after an answer pleading the general denial.

The prescription of one year, for damages resulting from offences or quasi-offences, under Article 3501 of the Civil Code, does not apply to this case.

As a written receipt was executed for the notes, this created a personal obligation, which is only prescribed by ten years. C. C. Art. 3508; *Davis v. Houren*, 10 R., p. 403.

DYER
v.
STEVENS.

It is objected, that plaintiff is obliged to show the genuineness of the notes, previous to recovery. It is for the defendant to produce them, and give plaintiff the opportunity of proving the signatures to the notes. The defendant is clearly liable for one-half of the notes for which the receipt was given.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and that plaintiffs recover of the defendant four hundred dollars, with eight per cent. interest on one-half thereof, from the 29th of June, 1850, and on the other half from the 29th of June, 1851, and also the costs of both courts.

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JAMES G. RICHARDSON v. J. E. EMSWILER et al.

A preëmtor under the Act of Congress approved March, 1851, entitled "An Act for the settlement of certain classes of land claims within the limits of the Baron de Bastrop Grant, and for allowing preëmtions to certain actual settlers, in the event of the final adjudication of the title of the said *De Bastrop* in favor of the United States," may either sell or mortgage the land after its purchase from the General Government, as in ordinary cases, there being in the Act no restriction of his right to do so.

Laws in the restraint of trade, or the alienation of property, are strictly construed, and are never extended to cases not within the express will of the law-maker.

APPEAL from the District Court of the Parish of Morehouse, *Richardson, J. McGuire & Ray*, for plaintiff. *Todd & Brigham*, for defendants and appellants.

LAND, J. This is a suit against the maker of a promissory note, secured by special mortgage on a tract of land, and also an hypothecary action against *L. P. Speaker*, third possessor of the mortgaged premises.

There was judgment in favor of plaintiff, and the third possessor has alone appealed.

His defence urged in this court is set forth in his supplemental answer, as follows, to-wit: "that the only title the said *Jno. E. Emswiler* ever pretended to hold to said land, upon which a mortgage is claimed in this suit, was under a right of preëmption from the General Government, under a settlement; that no patent had ever issued to said *Emswiler* for said land at the time the said pretended mortgage was executed, and that, therefore, the said land was not, at the time susceptible of being mortgaged; and that said alleged mortgage is consequently a nullity."

The mortgagor purchased the land in question from the United States Government, under and by virtue of the fifth section of an Act of Congress, approved March 3d, 1851, which is in these words:

"That in the event of a final adjudication in favor of the United States, of the Bastrop claim, as contemplated by the first section of this Act, every *bona fide* settler on any part of said land, at the time of the extension of the public survey over the same, who is a man of family, widow, or single man over twenty-one years of age, and an actual house-keeper thereon, and who, but for the reservation heretofore made of said land for the claim of the said *Bastrop*, would have been entitled to a right of preëmption under some one of the preëmption laws, be, and he is hereby authorized to enter the quarter section he resided on, or by adjoining legal subdivisions, so as to include his residence, and land cultivated or improved, any number of acres not to exceed one hundred and sixty acres, upon making

proof of such settlement, house-keeping, &c., to the satisfaction of the Register and Receiver, as in ordinary cases, at any time within a year after the public surveys are so extended over said land. See Acts of Congress, 1851, p. 598.

The appellant contends, that the purchaser of the land *was a præemptor*, and could neither assign nor transfer his right of præemption prior to the issuing of the patent by the General Government; and that as the land was not subject to alienation before the fee had passed out of the General Government, it was not susceptible of mortgage under Art. 3256 of the Civil Code, which declares that immovables subject to alienation, and their accessories, likewise considered as immovables, are alone susceptible of mortgage.

It is true, that the Prescription Act of 1841 declares all assignments and transfers of land by the præemptor, prior to the issuance of the patent, null and void. The præemptor in this case, however, did not acquire the land under the Præemption Act of 1841, but under the Act of 1851, which contains no such provision, declaring the assignment or sale of the land prior to the vestiture of the fee simple, by patent, in the præemptor, null and void. And as this restraint on the power of alienation is omitted in the Act of 1851, the presumption is, that such was the intention of the lawgiver, and as a consequence, the præemptor had a right either to sell or mortgage the land after its purchase from the General Government, as in ordinary cases.

Laws in the restraint of trade, or the alienation of property, are strictly construed, and are never extended to cases not within the express will of the law-maker.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

HANNIBAL FAULK v. JOHN S. HOUGH et al.

The exclusion of warranty in an act of sale, cannot avail the vendor, when it is fraudulently made, as he is bound to disclose redhibitory vices and defects in the thing sold, when he knows of their existence; and the vendee is not precluded by such exclusion, from showing that previous to the date of the sale, the vendor was aware of the existence of redhibitory defects, which he fraudulently concealed from him.

APPEAL from the District Court of the Parish of Morehouse, *Richardson, J. Todd & Brigham*, for plaintiff. *Parsons & Ludeling*, for defendants and appellants.

VOORHIES, J. The plaintiff sues for the price of a slave, which he sold to the defendant, with an exclusion of warranty.

The defence set up is, that the vendor was aware of the fact, that, at the time of the transfer, the slave was afflicted with a redhibitory disease, a fact of which the vendee was totally unaware; and that it was on account of the fraud and misrepresentations of the former, that the latter consented to purchase the slave under the circumstances.

When the case was called for trial, the defendant prayed for a continuance, on the ground, that *David M. Day*, a witness, whom he had caused to be regularly cited, was not in attendance. The affidavit states substantially, that the absence of this witness is not attributable to the defendant; that his testimony is mate-

FAULK
v.
HOUGH.

rial to the issue; that the defendant expects to prove by him the unsoundness of the slave previous to the date of the sale; that plaintiff was frequently urged by his wife to sell or dispose of this slave, on account of her unsoundness and worthlessness; and, finally, that the defendant hopes and expects to procure the testimony of this witness by the next term of the District Court.

There are two other petitions for a continuance, setting forth the absence of *A. S. Washburn* and *John H. Taylor*, witnesses summoned on behalf of the defendant, the subpoena having been regularly served upon the former, but not upon the latter, on account of his temporary absence. The petition, as to this witness, states, however, that the defendant has used due diligence. The defendant expects to prove by one of these witnesses, the plaintiff's statement, that the slave had no other disease but chills, at the time of the sale; and by the other, the fact that she died of the drcpsy, a disease which she had contracted previously to the date of the transfer.

The defendant was ruled to trial, notwithstanding these motions for a continuance. It is argued that the exclusion of warranty in the deed of sale, made it unimportant to prove the existence of a redhibitory defect, and that, in fact, the defendant was estopped from making that defence. So it would be, had the mere existence of a redhibitory defect been relied upon as a bar to the plaintiff's demand. But it is alleged in the answer, that this contract is tainted with fraud as regard the stipulation of warranty; and that is what the defendant wishes to prove by the witnesses, whose absence deprive him of the benefit of their testimony.

The Civil Code provides, Art. 2526: "The renunciation of warranty, made by the buyer, is not obligatory, when there has been fraud on the part of the seller."

Independently of this text of the law, it is evident that under the provisions of the Civil Code, upon the vitiation of all contracts in general, on the ground of fraud and error, the party would be entitled to relief upon a proper showing.

In the case of *Ogden v. Michel and Husband*, reported in 4th R. p. 156, the court said: "The case of *Turner & Renshaw v. Wheaton et als.*, 18 La. 37, relied on by the appellant, is to the same effect. In that case, the exclusion of warranty, as to every thing except title, was made with a knowledge on the part of the vendor, of redhibitory vices, which he failed to disclose at the time of the sale, and which good faith required him to disclose. The principle laid down in Art. 2480 of the Civil Code, that, *although it be agreed that the seller is not subject to warranty, he is, however, accountable for what results from his personal act, and any contrary stipulation is void*, receives its application in such cases as that above quoted. An exclusion of warranty, made fraudulently, cannot avail the vendor, because he is bound to disclose those vices and defects, within his knowledge, which are not discoverable on inspection."

The exclusion of warranty, stipulated in the deed of sale from the plaintiff to the defendant, does not preclude the latter from showing that, previous to the date of the contract, the former was aware of the existence of redhibitory defects, which he concealed from the purchaser.

The continuance prayed for should have been granted, unless the opposite party admitted that the absent witnesses would, if present on the trial, testify to the facts stated in the motion. Acts of 1839, p. 164, and 1840, p. 124, amending C. P. 466. This was not done, however. The defendant was then entitled to a continuance.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed, and that this case be remanded for a new trial; the appellee paying the costs of appeal.

FAULK
v.
HOCUM.

MELLISSA KELLY ?^r. WISEMAN & HINSON.

The vendor cannot enjoin the seizure and sale of the property of his vendee, when it is seized under execution as the property of a third person, on the grounds that his obligation in warranty may attach.

In such a suit the question of title to property is involved, and it, therefore, partakes of the nature of a petitory action, which can only be maintained by the party in whom the legal title is vested.

The vendor is only liable on this warranty for causes anterior to the sale, and if the vendee should be evicted without calling him in warranty, and he can establish the fact that he had a good defence, which he lost, in consequence of the neglect and failure of the vendee to call him in warranty, the vendee cannot recover from him.

A PPEAL from the District Court of the Parish of Morehouse, *Richardson, J. Parsons & Ludeling*, for plaintiff and appellant. *Todd & Brigham*, for defendants.

LAND, J. The facts of this case are stated by plaintiff's counsel, as follows :

"On the 26th of April, 1852, plaintiff purchased from one *T. C. Mathers*, by notarial act, certain lots in the town of Bastrop, known on the plat thereof as No. 9, 10, &c., in block No. 2, for the price of \$1000 cash. On the 4th of February, 1857, plaintiff, by act *sous seing privé*, sold a part of these lots, to *Caperton & Weeks*, under full warranty.

"On the 4th of June, 1857, defendants, *Wiseman & Hinson*, a commercial firm, obtained judgment against one *John B. Stewart*, for the sum of \$509 79, for which they caused a writ of *fi. fa.* to be issued on the 13th of July following, under which they had the property, sold by plaintiff to *Caperton & Weeks*, seized as belonging to their debtor, and advertised for sale. Plaintiff, as warrantor of *Caperton & Weeks*, her vendees, on the 4th of September, 1857, applied for and obtained an injunction arresting the sale. The questions presented are those of ownership, and whether a judgment creditor, not of the vendor, can disregard the title and possession of a third person, and seize property, owned and possessed at the time of seizure by a *bona fide* claimant.

"A motion to dissolve the injunction on the insufficiency of the bond having been properly overruled, defendants filed their exception and answer, denying in the exception that any legal grounds were disclosed for an injunction, and in the answer setting up fraud and simulation in plaintiff, and putting at issue the question of ownership. Upon these pleadings, a trial was had by the court, (the jury having been waived,) and judgment rendered in favor of defendant, dissolving the injunction, with \$50 damages, from which plaintiff appeals."

This suit, as stated, involves the question of title to real estate, and is, therefore, in the nature of a petitory action, which no one can maintain except the party in whom the legal title is vested. C. P. Art. 44.

In the suit of *Caze, Administrator, v. Robertson*, ante p. 232, which was the suit of an administrator of a deceased vendor, to recover a tract of land which he alleged had been unlawfully taken from the vendee, and in which he claimed a

KELLY
v.
WISSEMAN.

right of action, on the grounds of warranty, as set up in this case, we held, that the suit was properly dismissed, on an exception in the nature of a demurrer.

This case in principle, is the same, subject, however, to the more serious objections, that if one vendor can enjoin the sale of real estate under execution, on the ground that his obligations in warranty may attach, each vendor, back to the origin of the title, would have the same right, and thus the judgment creditor might be involved in vexations and ruinous litigation.

The vendor is only liable on his warranty for causes anterior to the sale, and if the vendee should be evicted without calling the vendor in warranty, and the latter can prove that he had good grounds of defence, which he has lost in consequence of the vendee's failure to do so; the former can not recover, and this rule of law is a sufficient protection to his rights.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

ELIZABETH DELOACH v. MARY L. ELDER. Administratrix.

If a slave sold, dies of a disease which did not exist at the time of the sale, but was produced by the effects of a disease which manifested itself within three days after the sale, the vendor is liable. All warranties to which vendors are subject in private sales, exist against the heir, in judicial sales of the property of successions.

A PPEAL from the District Court of the Parish of Bossier, *Egan, J.*
Watkins & George, for plaintiff. *R. J. Looney*, for defendant and appellant.

COLE, J. This is a redhibitory action; there was judgment for plaintiff, and defendant has appealed.

Even if the slave died of a disease which did not exist at the time of sale, but was yet produced by the effects of a disease which manifested itself within three days after the sale, still the vendor is liable. *Cornish v. Shelton*, 12 An., p. 415; *Piggin v. Kendig*, 12 An., p. 453.

It is contended that the defendant is not liable to warrant the soundness of the slave, because she was sold under seizure, by order of a court of justice.

The judgment of the District Court under which the negress, the subject of the present litigation was sold, decreed, that so much of the slave property should be sold, as would satisfy the indebtedness of the estate to the creditor who petitioned for this sale.

If the whole of the property of the estate had been sold for the purpose of paying the debts of the succession, it would have been a probate sale, and the nature of the sale is not changed, because not the whole, but a part of the effects of the succession is sold for the purpose of paying the debts of the estate. Article 2597 of the Civil Code applies to "sales on seizure or execution," and not to sales made by orders of court to pay the debts of an estate.

Article 2602 of the Civil Code declares that all the warranties to which private sales are subject, exist against the heir, in judicial sales of the property of successions."

This Article of the Code is found under the title which treats "of the Judicial Sale of the property of successions."

Judgment affirmed, with costs.

BANKS A. SMITH v. JOHN TAYLOR.

A party who permits property in his possession to be seized under execution and sold as the property of another, without objection on his part, and at the sale purchases the property, does acts inconsistent with the idea of ownership on his part, and which generally have the force and effect of an estoppel.

The claim of a surety against his principal, for re-imbusement of the amount of a note taken up by the surety, is barred by the prescription of ten years only.

A PPEAL from the District Court of the Parish of Union, *Richardson, J.*
J. T. Ludeling, for plaintiff. *Baker & Harris*, for defendant and appellant.

LAND, J. This is a suit for the recovery of a slave, and his hire from the first day of January, 1849.

The slave was purchased by the plaintiff at a succession sale, in January, 1848, on a credit of one, two, and three years; and to secure the payment of the price, he gave his three several promissory notes for equal amounts, bearing interest at the rate of eight per cent. per annum from date, with *John Taylor*, the defendant, as one of his securities, and a special mortgage on the slave purchased.

On or about the first day of January, 1851, the slave came into the possession of defendant, under an agreement between him and plaintiff, and remained in his possession, until the slave was seized by the Sheriff, and sold on the third day of June, 1858, *after the commencement of this suit*, under certain writs of *feri facias* issued on judgments against the plaintiff, *Banks A. Smith*.

The defendant had previously, to-wit, on the 18th of March, 1853, paid, as surety of plaintiff, the sum of \$1,449 on the promissory notes given for the price of the slave.

At the Sheriff's sale the defendant was present, and became the purchaser of the slave at the price of \$2,255, as the property of the plaintiff, without any notice or claim of right in himself. He afterwards filed a third opposition, and claimed a privilege on the proceeds of sale by preference over the seizing creditors of the plaintiff.

I. On this statement of the facts, in the absence of any sufficient or legal evidence of title in the defendant, the verdict of the jury, finding that the slave was the property of plaintiff in this suit, who was defendant in the executions, is well grounded, for the reason that the seizure and sale of the slave, as the property of plaintiff, in the presence of, and without objection on the part of defendant, who became the purchaser, are acts wholly inconsistent with all legal ideas of ownership on his part, and generally have the force and effect of an estoppel as to the title of defendant in execution, upon all persons present and assenting thereto. *Amonett v. Young & Bemiss*, ante, p. 175.

II. The evidence sufficiently establishes, that the verbal agreement under which the slave came into the possession of defendant, was intended by the parties as a contract of indemnity or pledge to secure the defendant against the consequences of his suretyship on the promissory notes given for the price of the slave; and under this agreement, which *had been executed*, the defendant was bound to account to plaintiff for the hire of the slave, by deducting annually the amount, first from the interest, and the balance, if any, from the principal. C. C., Arts. 3143, 3107. It is, therefore, clear, that the plaintiff had no right of action

SMITH
v.
TAYLOR.

for the recovery of the hire of the slave, so long as the debt he owed to defendant remained unsatisfied. C. C. 3145.

III. The defendant, in his answer, prayed for judgment for the amount, to-wit, \$1449, which he had paid on the notes, as security for plaintiff, with eight per cent. interest, and privilege on the slave, by virtue of his legal subrogation to all the rights of the vendor. To this demand the plaintiff pleaded specially the prescription of one, three, and five years. The prescription by which the surety's right of action for reimbursement is barred, is the prescription of ten years, under Article 3508 of the Civil Code, and not five years. *Linton v. Wikoff*, 12 An. 880.

IV. The defendant claims a privilege on the slave, which attaches to the proceeds of sale in the Sheriff's hands. The payment of the notes by him, subrogated him, by operation of law, to all the rights and actions of the creditor, including mortgages and privileges; and as the creditor was the vendor of the slave, the defendant succeeded to his right of special mortgage and vendor's privilege, as a security for his reimbursement. C. C. Art. 2157. And his privilege is superior to that of the seizing creditors, and as such, entitles him to be paid by preference out of the proceeds of the sale of the slave. C. C., Art. 3234.

The jury found the hire of the slave to be worth one hundred and fifty dollars per annum, to be computed from the 1st of January, 1851; and taking this as the basis of the calculation, and allowing the defendant interest at the rate of eight per cent. per annum on the sum of \$1449, from the 18th of March, 1853, and making the annual deductions, of the hire, as required by Art. 3143 of the Civil Code, we find that there was due the defendant on the 3d of June, 1858, the date of the Sheriff's sale of the slave, the sum of \$741 80, the balance due on the promissory notes aforesaid, paid by him as surety for plaintiff.

For this amount, defendant is entitled to a privilege on the proceeds of sale in the Sheriff's hands, and by preference over the seizing creditors of the plaintiff. But as these creditors are not before us on appeal, we can only adjudicate on the rights of the parties to this suit, as presented in the record.

The only error in the verdict of the jury, which the judgment follows, is the rejection of the defendant's privilege on the proceeds of the sale of the slave. The facts on which the judgment we are about to pronounce is based, are substantially found by the verdict of the jury.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be reversed, and the verdict of the jury be set aside; and it is now ordered, adjudged and decreed, that the plaintiff be declared to have been the owner of the slave described in his petition, from the third day of January, 1848, to the third day of June, 1858. And it is further ordered, adjudged and decreed, that the defendant do have and recover of the plaintiff the sum of seven hundred and forty-one dollars and eighty cents, the balance due him on the promissory notes given for the price of said slave, with eight per cent. per annum interest thereon, from the third day of June 1858, and that this privilege on the proceeds of the sale of said slave be recognized and enforced as against said plaintiff, *Banks A. Smith*, with the costs of this appeal. And it is further ordered and decreed, that the defendant pay the costs of the lower court, the same being allowed plaintiff on the question of title to the slave.

JAMES COOPER v. W. D. COOPER.

The date of a judgment may be fixed by reference to the record of proceedings in the case, and it is not necessary that the Judge should sign it in open court, or that it should be stated that it was read in open court.

When the plaintiff is the payee of the note sued on, he may strike out or not his special endorsement of the note, and is not bound to show a transfer back to him of the note.

APPEAL from the District Court of the Parish of Union, *Richardson, J.*
Todd & Brigham, for plaintiff. *W. J. Z. Baker*, for defendant and appellant.

COLE, J. This action is based upon a draft drawn by the defendant on *Messrs. Cleveland & Bro.*, New Orleans, payable to plaintiff or order.

There was judgment for plaintiff, and defendant has appealed.

1. The first objection of appellant is, that the judgment appears to have been rendered without any default having been rendered. That the record shows the evidence to have been taken down, and the case tried on the 12th of April, 1859; that the order granting an appeal was taken on the 12th of April, 1859, and it is not shown that any default had been taken before this time. That the record shows that a default was taken on the 13th of April, 1859.

It appears clearly that the latter date is a clerical error. The record shows that the case was taken up and tried on the 12th of April; and as the judgment states that two judicial days had elapsed since the judgment by default was taken, it is thus shown that the default was taken at least two days before its confirmation.

2. The second objection is, that the judgment has no date, and does not appear to have been signed or read in open court.

The record establishes that the case was tried on the 12th of April, 1859, and that on the same day a motion for an appeal was granted to the defendant in open court. The date of the judgment is thus fixed, and it would appear also that it was signed in open court; but the Code of Practice does not require that the judgment should be dated, or that it should be signed in open court.

Article 543 of the Code of Practice declares, that all judgments must be read by the Judge in open court, but this Code does not require that it should be stated in the judgment, that the judgment has been read in open court; and the District Judge must be presumed to have done his duty and to have read it, as the law directs.

3. It is contended that the plaintiff has not shown himself to be the owner of the draft sued on because the payee, the defendant, had endorsed it to *A. J. Bobo* or order; and that there is no allegation or proof that the draft was endorsed to *Bobo* for collection or as agent; that there is no proof of retransfer from *Bobo* to the plaintiff.

As the plaintiff was the payee and holder of the note, he had the right to strike out or not his subsequent endorsement to *Bobo*, and he was not bound to prove any transfer back from the subsequent endorser. *Dugan v. United States*, 3 Wheaton, 183; *Story on Notes*, §§ 452, 246; *Squier v. Stockton*, 5 An. 121. Although there is a special endorsement in this case to *Bobo*, it appears evident that it was so endorsed for the purpose of collection; the draft is endorsed in blank

COOPER
v.
COOPER.

by *Bobo*, and the notary states that it was at the request of *Bobo* it was protested. As plaintiff is the payee of the draft and in possession thereof, and as it has been endorsed in blank by *Bobo*, it is *prima facie* evidence that the plaintiff is the lawful owner of the same. *Wood v. Tyson*, 13 An., p. 105.

Judgment affirmed with costs.

POWELL & HOPKINS v. MATILDA HOPSON & HUSBAND.

When it is apparent that a party intended to offer in evidence a paper, or document, but failed to do so through inadvertence, or mistake, and the document is copied in the transcript of the record, the Supreme Court will consider and give effect to the evidence, as if it had been formally introduced, if it is admissible.

APPEAL from the District Court of the Parish of Morehouse, *Richardson, J. McFee & Mathews*, for plaintiffs. *McGuire & Ray*, for defendants and appellants.

LAND, J. This suit was commenced on an account-current in favor of plaintiffs as cotton factors, kept in the name of the husband, against the wife, for the amount of \$3,440 02 cents, on the allegations that the account had been contracted by the husband as agent of his wife, who had been separated in property from him by a judgment, and that the items of the account had enured to her separate benefit and the improvement of her separate estate; and that the husband, without any property or assets in his own name, had managed and controlled the plantation and slaves of his wife, during the period covered by the account, as her general agent.

There was judgment against the wife for \$2,858 61, with five per cent. interest on the same, and she has appealed.

This case was formerly before this court, on the appeal of the wife, and was remanded for a new trial, because of the insufficiency of the evidence to establish her liability.

On the new trial, the plaintiffs' counsel filed an affidavit for a continuance, as follows:

"The plaintiffs in this case move the court for a continuance, on the following grounds, to-wit: the mandate of the Supreme Court rendered in this case, at its last term, ordered a new trial for the purpose of allowing plaintiffs to produce the invoices and items thereof as charged in the account sued on. That since said mandate was filed and ordered to be made executory, and at this term of the court, plaintiffs have filed an amended petition, with the invoices called for, so far as they can at this time produce them. That all the items of the invoices, as charged in the account, are produced, except the invoice of April 4th, 1854, of \$200 77, the items of which are not now produced in consequence of the absence of the parties who furnished said invoices to plaintiffs for defendant,—being absent from the city of New Orleans during the late epidemic of yellow fever. That plaintiffs expect to produce, by the next term of the court, the items of said invoice, and the full proof of all the invoices; that the items thereof enured to the benefit of *Matilda Hopson* and her separate estate; and expect to prove by *G. F. Girault* and *S. H. Gardiner*, and other competent witnesses in New Orleans, that

all of said invoices and items were furnished defendant, and were for her benefit, &c."

POWELL
v.
HORSOW.

The defendant admitted, that if the witnesses named were present, they would swear to the facts stated in the affidavit, and thereupon the parties proceeded to trial. The plaintiff's counsel omitted to offer in evidence, and to have the same filed and marked as testimony in the case, the *admission* and *affidavit*, and the defendants' counsel contends that they cannot be considered as evidence before this court, although they form a part of the record before us.

When it is apparent, a party intended to offer in evidence a paper or document (as it is in this case), but did not do so, through inadvertence or mistake, and the document is copied in the transcript, the court will consider and give effect to the evidence, as if formally introduced in the court below, if it do not appear, nor is shown to be inadmissible.

Considering the facts stated in the affidavit to be true, or proved by witnesses, the judgment of the lower court is sufficiently sustained by the evidence.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

STATE v. MARION FULLER.

The objection, that the defendant did not have a copy of the venire and indictment served upon him two entire days before his trial, must be urged before going to trial; it can have no effect when the defendant seeks to avail himself of it after the verdict has been rendered.

The general repealing clause of the Act of 1855, relative to crimes and offences, does not repeal the former statutes denouncing crimes and offences, upon which the Act is silent.

APPEAL from the District Court of the Parish of Union, *Richardson, J.*
F. P. Stubbs, District Attorney, for the State. *McGuire & Ray*, for defendant and appellant.

VOORHIES, J. This case comes up on a motion in arrest of judgment.

The objections, as stated in the motion are: 1st, "That there is no law in this State, making the inciting, moving and procuring of a person to inveigle, steal and carry away any negro or other slave, an offence, as is charged in the indictment, upon which judgment is rendered in this case; 2d, That this defendant did not have a copy of the venire and indictment served on him two entire days before he was tried, as appears by the return of the Sheriff on the back of the indictment."

The last objection, however good it may be when urged before going to trial, loses its efficacy when the party seeks to avail himself of it after verdict rendered in the case. This right is waived when not claimed before trial. *State v. Hernandez*, 4 An. 379; *State v. Price*, 6 An. 691; *State v. Benjamin*, 7 An. 47; *State v. Holmes*, 7 An. 567; *State v. Kentuck*, 8 An. 308; *State v. Mazent & Guesmon*, 10 An. 743; and *State v. Jackson*, 12 An. 679.

The indictment charges that the prisoner "did feloniously and maliciously *incite, move, procure, aid, hire and counsel* the said Robert Fuller and the said Robert H. Holmes alias W. B. Hall, in manner and form aforesaid, to inveigle, steal and carry away....." The prisoner contends that six different offences, three of

STATE
v.
FULLER.

which are unknown to our laws, are charged in the same count; and that, consequently, this defect is not cured by general verdict.

The statute of 1819 (Acts p. 62-3) reads as follows: "All and every person and persons, who shall inveigle, steal, or carry away any negro or other slave or slaves, or shall hire, aid, or counsel any person or persons to inveigle, steal, or carry away," &c. The addition in the indictment of the terms *incite, move and procure*, far from changing the nature of the offence charged under the statute, is merely explanatory. The indictment is couched in the very words of the statute, which, in this respect, denounces the offence committed by accessories before the fact; and although it would have been sufficient to have inserted the expression used by the statute to define the offence of an accessory before the fact, to the inveigling, stealing and carrying away of slaves, yet, there can be no impropriety in adopting the common law form of charging the offence, as it embraces the precise terms of our statute.

It is contended, in the last place, that the statute upon which the present indictment is framed, has been repealed by the Act of 1855, relative to crimes and offences. The failure to reenact this statute in the Act of 1855, above mentioned, is not affected by the repealing clause, "that all laws contrary to the provisions of this Act, and all laws upon the same subject-matter, except what is contained in the Civil Code and Code of Practice, be repealed." In the list of offences, comprised in the 125 sections of this Act of 1855, there is not one upon the same subject-matter as the offence under consideration. We have already held, that the Act of 1855 does not, by omitting any particular crime or offence, existing previously, repeal the same. *State v. Wilson*, ante, p. 446.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed.

PAULINA PICKET v. S. W. VANCE.

When interrogatories on facts and articles are annexed to a petition, and an exception is made to the vagueness of the petition, and sustained with leave to amend—*Held*: That the interrogatories not being pertinent to the issue, the defendant should not be compelled to answer them.

A PPEAL from the District Court of the Parish of Caddo, *Creswell, J.*
Landrum & Williamson, for plaintiff. *B. L. Hodge*, for defendant and appellant.

LAND, J. The late *James B. Gilmer* and the plaintiff, his wife, entered into an act of partition and settlement, of all their property, rights and credits, which was specially authorised by an Act of the Legislature, and the 19th Article thereof declares:

"That if hereafter any community property, or any property right, or claim acquired since the marriage, be discovered to exist, of any nature soever, and not herein recited, or specially disposed of hereinafter, whether the same be real, personal, movable or immovable, whether situated in this State or elsewhere, such property, right, claim or credit, when discovered, shall vest in, and become the individual, absolute and irrevocable property and rights of the said *Paulina Gil-*

mer, her heirs and assigns, forever, together with all the rents, revenues, issues, profits, &c., accrued since the date of the final agreement entered into by said *Gilmer and wife*, to wit, 4th of October last past," that is 1855.

The present action is founded on this article or stipulation in the act of settlement and partition against the defendant, the son-in-law of *Gilmer*, for the recovery of two specific sums, to wit, \$115 and \$550, alleged to have been acquired by *Gilmer* since his marriage with plaintiff, and to have been received by defendant. And also, for the further sum of fifty thousand dollars alleged to have been received by him at various other times, in collections and notes and other property belonging to plaintiff by virtue of said stipulation. The plaintiff concludes her petition by propounding interrogatories to the defendant.

The defendant excepted to the petition, upon the grounds that the allegations contained in it, were too vague, indefinite and uncertain, to be answered, except those relating to the two specific sums first mentioned, and which the petition charged to have been received from a certain named person.

The general allegation to which the exception applied, was in these words : "Petitioner further represents, that said *Samuel W. Vance*, who is familiar with the affairs of said *Gilmer*, about which your petitioner was not fully informed, has, at various other times, collected various sums of money which constituted property acquired since said marriage, and also has in his possession, notes and other property belonging to petitioner, by virtue of said settlement above mentioned, to the amount and value of fifty thousand dollars, all of which he refuses to deliver up, or account for, though amicably requested so to do."

The exception was sustained and the petition dismissed as to the demand for fifty thousand dollars.

The District Judge did not err.

Although great latitude is allowed in pleadings under our system of practice, yet the plaintiff is required to make, in his petition, a clear and concise statement of the object of his demand, as well as of the nature of his title, or *the cause of action on which it is founded*. C. P. Art. 172.

The cause of action alleged by plaintiff, is the collection of monies, and the receipt of notes and other property belonging to her by defendant. It cannot be said in such a case, that there is a clear and concise statement of the cause of action, when there is *no allegation of time, place or person, or of items making up the gross sum demanded*.

After the exception had been sustained, the plaintiff's counsel moved the court for an order on defendant, to answer the interrogatories on facts and articles propounded in the petition, to which defendant, by his counsel, objected, and the objection was sustained on the ground, "*that the exception to the vagueness of the petition had been sustained, with leave to amend*." The Judge did not err.

After the exception had been sustained, the interrogatories *were not pertinent to any issue before the court*, and the answers of defendant would have been a vain and useless thing in the suit pending.

The defendant answered the petition, as to the two specific items claimed, and admitted that in the spring of 1856, *Gilmer* placed in his hands for collection, a note for \$450, for loaned money, bearing eight per cent. interest from date ; and that he had received on it \$115, but nothing more ; and alleged his willingness to account to plaintiff for the note and the money received, if she were entitled to the same, and that he had so notified her agent before the institution of this suit, but averred that the note and money received on it, belonged to *Gilmer*.

POKEY
v.
VANCE.

There was judgment for the money collected, and the note, and defendant appealed.

His learned counsel contends, in bar of this action, that the partition and settlement were intended as a *finality* between the parties, and to preclude a resort to the courts, for the ascertainment of their respective rights and obligations. This is certainly true, and the solemn acts which they executed, under the express authorization of the Legislature, are *final* and *conclusive upon their rights*, but this suit is not for the ascertainment of the rights of plaintiff, or the obligations of *Gilmer*, but for the recovery of money which the act of partition and settlement expressly declares belongs to plaintiff.

It is, therefore, decreed, that the judgment be affirmed, with costs.

JAMES WALLING v. HIS CREDITORS.

The syndic of an insolvent may plead in his answer to oppositions filed to his tableau of distribution, any legitimate defence against the claims of the opposing creditors, such as usury and want of consideration, &c.

The opposition in such case is a suit to establish a money demand, and the defence cannot be barred by prescription.

A PPEAL from the District Court of the Parish of Caddo, *Creswell, J.*
Landrum & Williamson, for plaintiff. *A. B. Levisse*, for defendants and appellants.

BUCHANAN, J. The late *Samuel Bennett* and *Mrs. Alexander*, filed oppositions to a tableau of distribution in this insolvency. They claimed to be mortgage creditors of the insolvent; the syndic filed an answer to their oppositions, in which he pleads that the contracts were usurious. This plea has been, after full investigation, sustained to a great extent by the District Judge; and the opponents have appealed.

Their counsel relies in this court, principally, upon the argument that the defence interposed by the syndic, is equivalent to a revocatory action, and is subject to the rules governing that action, as the prescription of one year, &c.

We do not think this argument well founded. The opposition is a suit to establish a money demand founded upon contracts; and the syndic has full right to repel such suit or demand, by any legitimate defence, as for instance, usury and want of consideration.

Upon the facts, embracing many and complicated transactions between the insolvent and the opponent *Bennett*, the elaborate and laborious examination which the District Judge has given them, in his reasons for judgment, have led him to conclusions which appear to us to conform to the evidence in the cause.

We are of opinion, with the Judge *a quo*, that the different notes and mortgages which figure in the evidence, although executed partly in the name of *Samuel Bennett*, and partly in the name of *Mary D. C. Cane*, (*Mrs. Alexander*.) as payees and mortgagees, were in reality obligations held by *Samuel Bennett*, arising out of transactions between the insolvent and *Bennett*, and for the account and behoof of the said *Bennett*.

There is one particular in which there appears to be error in the judgment of the District Court. No interest is allowed upon the amount (\$3,638) for which

the succession of *Bennett* is ordered to be placed upon the tableau of distribution, with right of mortgage taking date from the 6th of September, 1851.

By the terms of the mortgage, the debt, to secure which it is given, bears interest at the rate of eight per cent. per annum.

It is, therefore, adjudged and decreed, that the judgment of the District Court be amended; that the syndic of the creditors of *James Walling*, place the appellant, *Mrs. Alexander*, in her capacity of executrix of the last will of *Samuel Bennett*, as a mortgage creditor, upon the tableau of distribution herein, for the sum of \$3,638, with interest at eight per cent. from the 6th of September, 1851, date of the mortgage, until paid; that in other respects, the judgment appealed from be affirmed; and that the costs of appeal be borne by the mass.

LAND, J., recused himself in this case, being a creditor of the insolvent.

WALLING
v.
CREDITORS.

J. P. ELAM, Tutor, et al. v. HEIRS A. S. BARR et al.

Where the tutor was bound to furnish another surety, in place of one who had died or become insolvent, and without any order of court, voluntarily furnished a new bond, with other surety, which was filed and approved by the Clerk of the court—*Held*: That the surety on the new bond was bound, although it was not executed in pursuance of any order of court "*volenti non fit injuria*."

APPEAL from the District Court of the Parish of Catahoula, *Richardson, J. J. G. Taliaferro* and *W. B. Spencer*, for plaintiffs and appellants. *McGuire & Ray* and *R. H. Cuney*, for defendants.

BUCHANAN, J. The appellee, *Sarah J. Glenn*, administratrix of the succession of *Isaac T. Glenn*, moves to dismiss the appeal taken by the plaintiffs herein, on the ground that *Elizabeth Glenn*, one of the defendants, was not made party to the appeal.

It was not necessary to make her a party. She had no interest in maintaining the judgment of the court below, which condemned her to pay the plaintiffs a large sum of money, while it exonerated the co-defendant and appellee from all liability. *Dow v. Hardy*, 13 An. 441; *Saux v. Lefevre*, 12 An. 757.

Our decision upon this point renders it unnecessary to notice the other grounds of the motion to dismiss.

The principal question to be determined is the validity and binding effect of a bond given on the 10th of December, 1850, by *Samuel Glenn*, as principal, and *Isaac Thomas Glenn*, as his security, in the sum of twelve thousand seven hundred and seventeen dollars, conditioned for the faithful performance, by *Samuel Glenn*, of the duties of tutor of the minors *Elam*. The appellee, *Sarah Jane Glenn*, administratrix of the estate of *Isaac Thomas Glenn*, security named in said bond, defends this suit, on the ground, (among others,) that said bond was executed several years after *Samuel Glenn's* appointment as tutor to the plaintiffs, and was not provoked by any legal proceedings, and was not executed in pursuance of any law or order of court, and is a *nude pact*, and is in no manner binding on the estate of *Isaac T. Glenn*.

The record shows that *Samuel Glenn* was appointed tutor to the minor heirs of *L. W. Elam*, in November, 1849, and gave as surety on his bond, *Elizabeth Glenn* and *Alfred S. Barr*.

Barr died in February, 1850. *Elizabeth Glenn* became insolvent about the

ELAM
v.
BARR.

same time, her estate being sold on a twelve month's bond. At this juncture of affairs, *John A. Bray*, uncle of plaintiffs, demanded of *Glenn* other and better security for his tutorship, which *Glenn* complied with, by executing the bond above mentioned, with *Isaac T. Glenn* as security, which bond was approved by the Clerk of the District Court.

It seems to us that the bond given under these circumstances, is a legal bond. The obligation of a dative tutor, to give good and sufficient security for the fidelity of his administration, is recognized by Article 330 of the Civil Code.

Now, nothing is more likely to happen in the series of years during which a charge of tutorship may last, than that the surety originally given by the tutor, may die or become insolvent. In either case, the security for the minor's rights, which the law contemplates, no longer exists. There will be, virtually, no one bound for the fidelity of the tutor's administration, but himself.

It cannot be doubted, that upon suggestion of this fact to the Judge of Probates, the tutor would be ordered to furnish another surety in the place of him who has died or become insolvent. And if, without any order of court, the tutor voluntarily furnishes another bond, with other security, under the circumstances, and files the same with the Clerk of the court, he has done no more than he was obliged to do, and it does not lie in the mouth of the surety who has signed such bond, nor of the representatives of such surety, to repudiate the obligation. This is not, in terms, the case of the third paragraph of Article 330 of the Code, which authorizes the tutor's bond to be increased or diminished on the demand of the under-tutor, or of any relation of the minor, when there shall be an augmentation, or a diminution of the funds of the minor, in the tutor's hands. Such increase or diminution of the amount of security for administration, must, probably, be ordered by the Judge; particularly would that seem necessary, when a diminution of the security was made. But that paragraph more particularly points to the case when the person of the surety is unchanged; the amount of the suretyship being the only thing mentioned in the text.

With regard to the present case, the maxim will apply, that in whatever manner a man binds himself, he shall remain bound; and the other maxim "*volenti non fit injuria*."

In the case of *Canal Bank v. Brown*, an administrator's bond was held to be valid and binding on the sureties, under circumstances of much greater irregularity than those of the present case. See also *Bryan v. Austin*, 10 An. 613.

The amount of the indebtedness of the tutor seems to have been correctly settled by the District Judge, under the evidence, in rendering judgment against the surety, who is not before us. Under the views taken by us of the effect of the bond signed by *Isaac T. Glenn*, the same judgment must be rendered against the estate of the latter.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, as to the defendant, *Sarah Jane Glenn*, administratrix of *Isaac T. Glenn's* succession; and that plaintiffs recover of the said *Sarah Jane Glenn*, in her quality aforesaid, the sum of seven thousand two hundred and eighty-three dollars and fifty eight cents, subject to a credit of two thousand three hundred and twenty-eight dollars and thirty-two cents; and costs of both courts.

STATE v. WARD.

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On appeals in criminal cases, the court will take cognizance only of unmixed questions of law.

In criminal cases the parties have not the right to require the Clerk to take down the evidence and certify it to the Supreme Court, and the court will not take notice of the facts thus taken down, although certified both by the Clerk and the Judge of the inferior court.

A list of the jurors, headed "List of Jurors for the third and fourth weeks of the October term of the District Court of the Parish of Caddo," duly served on the prisoner, held to be a sufficient compliance with the law.

A question of fact, of which the appellate court cannot take jurisdiction, is necessarily involved in determining whether the prisoner had used due diligence in procuring the attendance of his witnesses.

It is in the discretion of the District Judge to determine whether or not a case should be postponed or continued on account of the ill health of the prisoner.

An impression entertained by a juror as to the guilt of the accused, is not sufficient to disqualify him.

Held: That the court below did not err in refusing to allow the prisoner's counsel to ask a juror whether he had not made up his mind as to what punishment should be inflicted in case the prisoner should be convicted. The question also was properly overruled, whether, if the juror went into the jury-box in his present state of mind, he went there with the belief that the defendant was guilty of murder, as charged in the indictment.

A PPEAL from the District Court of the Parish of Caddo, *Creswell, J.*
Stubbs & Williamson, for the State. *M. A. Jones*, for defendant.

VOORHIES, J. The prisoner being indicted for the crime of murder, was found guilty by the verdict of the jury, and was sentenced to capital punishment by the judgment of the court.

Before expressing any opinion upon the numerous bills of exception which are presented for our consideration, it is proper that notice should be taken of the extent of our jurisdiction in criminal matters. By constitutional provision, it is limited to questions of law; and, in giving effect to this limitation of our appellate jurisdiction, we have on five different occasions held, that we could take cognizance only of unmixed questions of law; that these questions should be submitted upon bills of exception taken to the ruling of the inferior courts, or upon assignment of errors, unless the defects are patent on the face of the papers; and finally, that, though certified by the District Judge, or the Clerk, the facts of the case did not fall within our jurisdiction, and we were not justified in giving them our consideration.

It has been remarked by Mr. C. J. Merrick, in the case of the *State v. Henderson*, 13 An. 489, (and this ruling meets the unqualified approbation of the court,) that "it is apparent, that inasmuch as the testimony is never taken down by the Clerk in criminal cases, the record cannot be certified, as in civil cases, to contain all the evidence. This was known to the framers of the Constitution when they conferred the appeal, and to the Legislature also when it authorized an appeal in criminal cases, without giving bond. The Articles of the Code of Practice, which gives either party the right to require the Clerk to take down the testimony in civil cases, and to require him to certify the same to the Supreme Court, are not applicable to appeals in criminal cases. See *State v. Brunetto*, 13 An., p. 45; *State v. Bunker*, ante, p. 461.

We will now proceed to dispose of the bills of exception that are in the record, without taking any notice whatever of the facts, which are certified both by the Clerk and the Judge of the District Court.

STATE
v.
WARD

1. The prisoner objected going into the trial of the case, on the ground that he had not had a proper service of the venire, as the law contemplates. His counsel states in his brief, that the list served upon his client "contained thirty-two names, headed 'List of Jurors drawn to serve as petit jurors for the third and fourth weeks of the October term, 1858, of the District Court for the Parish of Caddo.'"

This we consider to be a sufficient compliance with the law; such a course did not tend in the least to embarrass the accused in his researches for information as to the jurors who were to pass upon him, in order to prepare his challenges. He was informed by the very list served upon him, and besides, he must have known the plain provisions of the law, that the jurors of the third week could not be called to serve during the fourth week; and that those of the fourth week were in a similar situation as to the trial of cases during the third week. He could not plead ignorance of the law, and his own showing establishes his knowledge of these facts. This is not a case analogous to the one quoted in 3 An. 51, *State v. Howell*.

2. For the purpose of compelling the prisoner to go to trial, notwithstanding his right to a continuance on the ground of the absence of the witness, *Martin*, the District Attorney "admitted, for the purposes of this trial, that the facts set forth in the affidavit, to be proven by *Evan Martin*, are true; and if the trial is not gone into at this term of the court, the State reserving the privilege of withdrawing the admission." It appears, by a bill of exceptions taken by the District Attorney to another ruling of the District Judge, that during the trial the witness, *Martin*, was present, but that the court, upon the opposition of the defendant, refused to the District Attorney the privilege of withdrawing this admission.

The appellant then, appears before this court, in this instance, in an inconsistent position, and, from his own manner of proceeding, has precluded himself from the relief which he claims at our hands. In the first place, he is not satisfied with the admission made by the defendant, and then he will not consent to permit its withdrawal, when he has in court the very witness whose absence was urged as a ground for a continuance. If the admission was not such a one as the law contemplates, and did not reach his expectations, his remedy was reached by eliciting the truth from the witness, who happened to be present during the trial.

3. With regard to the other witness, it is evident that the District Judge was not satisfied that the prisoner had used due diligence to procure his attendance. This question necessarily involves one of fact; we will, therefore, not disturb the ruling of the court below.

4. It is left to the discretion of the District Judge, to determine whether, or not, a case should be postponed or continued, on account of the ill health of the prisoner; this is a matter which he must decide by going into the facts, upon which must be predicated the exercise of this discretionary power.

5. The prisoner contends that *John Walters* was not a competent juror; but the bill of exception taken to the adverse ruling of the District Judge, does not show affirmatively that he had formed or expressed an opinion as to the guilt or innocence of the prisoner, from the narrative of the witnesses. His impression upon the subject does not amount to such an opinion as will disqualify him to sit as a juror. There must be a deliberate opinion, and not an impression, as to the guilt of the prisoner, in order to disqualify a juror.

6. The following question was propounded to one of the jurors, *John Walters*:

"In case of conviction of the prisoner, of murder, as charged against him, have you not made up your mind as to what punishment ought to be inflicted upon him?" The prisoner's counsel contests the correctness of the ruling of the District Judge.

The object of examining a juror on his *voir dire*, is to ascertain the state of his mind, in order to determine whether he stands indifferent between the State and the prisoner. He is considered indifferent when he has no bias for or against the prisoner, when he has not formed or expressed an opinion as to the guilt or innocence of the prisoner, after having heard the narrative of the witnesses, and finally, when he entertains no conscientious scruples that will prevent him from carrying the law into effect.

But such is not the case presented by the interrogatory propounded to the juror, *Walters*. A hypothetical statement is made, that the jury brings in a verdict of guilty of murder, and the prisoner then wishes to know whether the juror has made up his mind as to the manner in which he will exercise the discretion vested in the jury to bring in a qualified verdict. It is not even hinted that the juror has any bias against the accused, nor that he has formed or expressed an opinion as to the guilt of the accused, either upon the declarations of witnesses, or upon rumor; nor that the juror has any conscientious scruples as to the penalties denounced by law in such cases. If there existed any bias or prejudice in his mind in the case at bar, it was lawful for the prisoner to interrogate him directly upon the subject; and he could pursue the same course, if the juror entertained on the merits of the case any opinion which operated a disqualification.

It is the duty of the District Judges to direct the proceedings in their courts, so that the ends of justice may be attained; and a great deal of discretion is vested in them for that purpose. Nor can we say that this discretion was not properly exercised by the Judge *a quo* in refusing to allow the prisoner to interrogate the juror as to hypothetical cases. If the juror has not formed an opinion as to the guilt of the prisoner, it is idle to inquire whether he has made up his mind as to the degree of punishment that should be awarded. If, on the contrary, such an opinion has been formed, that would be a more appropriate ground of opposition. *State v. Bennett*, ante, p. 651; *State v. Melvin*, 11 An. 536.

With regard to the ruling in the case of the *State v. George*, 8 R. 538, see our opinion in the case of the *State v. Bennett*, ante, p. 651. See also *State v. Nolan*, 13 An. 276.

7. The following question was propounded to the jurors *Wm. Flannagan, Sr., Wm. Flannagan, Jr., Wm. Blakey, Andrew Scott, and Benjamin Stephens*, to-wit:

"Whether, if they went into the jury-box in their present state of mind, they went there with the belief that the defendant was guilty of murder, as charged in the indictment."

This question was properly overruled, for the reasons given in the foregoing pages.

8. The court below properly rejected the challenge for cause to the juror, *Lafoy*. Although he had conversed with two witnesses, yet he had not formed a deliberate opinion as to the guilt of the prisoner. It appears from the statement of the District Judge, in his reasons for overruling the prisoner, that *Lafoy*, although he had conversed with two witnesses, was not aware of the fact of their being witnesses, and that the slight opinion which he entertained as to the guilt of the accused, was based upon rumor. *State v. Bunker*, ante, p. 461.

9. The prisoner's counsel states, that when jurors were sworn on the *voir dire*,

STATE
v.
WARD.

he requested that their testimony be taken down; but that the District Judge refused to accede to his demand. This objection is fully answered by the preliminary remarks in this opinion.

10. We cannot examine the question raised by the accused, on the motion in the court below for a new trial, based upon the ground that one of the jurors who sat in the case had not the legal qualifications. This was an issue to be raised before the juror was sworn and empanelled. *State v. Bunger*, ante, p. 461; *State v. Nolan*, 13 An. 276.

It is, therefore, ordered and decreed, that the judgment of the District Court be amended, inasmuch as it fixes a day for the execution of the defendant, *E. Ward*; that it be further amended, so that the sentence shall be executed upon a day to be fixed by the Governor; and that the judgment so amended be affirmed.

JEFFERSON G. BROOKS v. ELIZA J. WIGGINTON & HUSBAND.

A married woman may sign a note or draft in payment of a debt created for the benefit of her individual estate, without the authorization of her husband.

A draft given for such a debt by a married woman is an act of administration, and in giving it, she may be considered as having resumed, as she may do at will, the administration of her paraphernal property.

APPEAL from the District Court of the Parish of Catahoula, *Mayo, J.*
J. Hawkins and *J. G. Taliaferro*, for plaintiff. *Smith & Spencer*, for defendants and appellants.

COLE, J. The plaintiff sues *Eliza J. Wigginton* for services as overseer of a plantation which was her paraphernal property.

For \$686 38½, a part of the amount claimed, *Mrs. Wigginton* executed her draft on a commercial house, which was protested for non-payment.

It is contended, she was not authorized by her husband to sign the draft.

This was unnecessary in this instance.

The debt was created for the benefit of her individual estate, and as the wife is entitled to resume at will the administration of her paraphernal property, she may be considered to have done so in giving this draft, for this was an act of administration.

If the wife could not, without the authority of her husband, pay the debts made for the benefit of her separate estate, when she conceived it necessary for the welfare of that estate, her right of administration would be a vain thing and without any vitality.

Besides, it seems probable from all the circumstances of this case, that the husband acquiesced in the execution of the draft by the wife; the body of the draft is in his handwriting.

Judgment affirmed, with costs of appeal.

SUCCESSION OF J. H. POOL—Opposition to Account and Tableau.

The appraisement of notes and accounts in the inventory of the effects of a succession, is required by law.

An administrator is not bound to attempt the collection of *bad debts*.

Where notes and accounts due the succession are numerous and small in amount, and constitute, as it were, a mass of *bad debts*, the discretion of the Judge of Probate in ordering their sale at public auction, will be considered as legally and properly exercised.

APPEAL from the District Court of the Parish of Morehouse, *Richardson, J. McGuire & Ray*, for plaintiff. *S. G. Parsons* and *J. P. Ludeling*, for opponents and appellants.

LAND, J. *John B. Stewart*, whose rights to certain real estate inventoried as the property of the succession of the deceased, were recognized in the suit of himself against *Daniel Newton*, administrator of the estate of *J. H. Pool*, reported in 12 An. 622, filed an opposition to the account and statement of debts presented to the court by the administrator, for homologation, and obtained a judgment amending the same, in several particulars, but being dissatisfied with the decree, has appealed.

He offered no evidence in support of the grounds of his opposition, whereon the burden of proof was upon himself, and the amendment to the account and tableau, were in consequence of the failure of proof on the part of the administrator, in those particulars wherein the opposition imposed on him the *onus probandi*.

He appeals, however, on a question of law, and asks a reversal of the judgment on this ground: It appears that a large number of small accounts and notes were due the deceased, and which were inventoried in a very large majority of instances, as *valueless*, or *bad debts*; and that the administrator, on the order of the court, caused them to be advertised and sold for the purposes of the payment of the debts and settlement of the succession.

The opponent contends that the notes and accounts due the succession, should not have been appraised in the inventory; that the administrator should have proceeded to collect them in the course of administration, and that the sale of them, under the order of court, was illegal and void, and did not relieve him from his obligations to collect and account for the same.

The appraisement or estimation of the notes and accounts in the inventory, was not only proper in itself, but seems to be required by law, in order to ascertain the amount of bond to be given by the administrator.

Article 1041 of the Civil Code, provides: That "the security to be given by every administrator thus named, shall be one-fourth beyond the estimated value of the movables and immovables, and of the credits comprised in the inventory, *exclusive of bad debts*. By bad debts are understood, those which have been prescribed against, and those due by bankrupts who have surrendered no property to be divided among their creditors."

It is not the duty of an administrator to attempt the collection of debts of the character above mentioned, and thereby incur, as he necessarily would do, costs and attorney's fees without any benefit to the creditors or heirs of the succession.

In a case like the present, wherein the notes and accounts due the deceased, are

SUCCESSORS OF
POOL.

numerous and small in amounts, and constitute, as it were, a mass of bad debts, the discretion of the Judge of Probate, in ordering their sale at public auction, will be considered legally and properly exercised.

G. C. Martin also filed opposition to the account and tableau, on similar grounds, but as he is before this court as appellee, and has not answered the appeal and prayed for an amendment of the judgment, it is unnecessary to consider his opposition asking to be placed as a creditor on the tableau of distribution.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

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STATE v. W. H. DAVIS.

The Act of 1858, making it the duty of the District Judges to empanel the Grand Jury on the *first day* of the term, is merely *directory*, and if any sufficient obstacle exists to prevent the empanelling on the first day, it may be done on a subsequent day.

Slaves are regarded, in our law, both as property and persons, and the 9th section of the Act of 1855, relative to crimes and offences, which punishes an assault upon a person by "willfully shooting at him," &c., applies to an assault upon a slave, as well as a free person.

A PPEAL from the District Court of the Parish of Morehouse, *Richardson, J. F. P. Stubbs*, for State, appellant. *Newton & Hall* and *McGuire & Ray*, for defendant.

COLE, J. The defendant was indicted by the grand jury of the parish of Morehouse, for having feloniously made an assault upon a slave, by willfully shooting at him with a shot-gun, loaded "with gunpowder and divers leaden shot."

The motion to quash the indictment, was sustained, and the State has appealed.

The grounds urged by the appellee for quashing the indictment, will be considered in their order.

1. It is not a valid objection that the Grand Jurors, who found the indictment, were not empanelled upon the *first day* of the term of court.

The Act of 1858, declares that it shall be the duty of the District Judges of the several District Courts, (the First and Second Judicial District Courts excepted,) on the first day of each jury term in their respective districts, to select from the forty eight jurors summoned, a juror, who shall be and act as the foreman of the Grand Jury; that immediately thereafter, it shall be the duty of the Sheriff to place in a box, prepared for that purpose, the ballots upon which are written the names of the remaining forty-seven jurors, and proceed to draw said ballots therefrom, in open court, and to call the same as they are drawn, and the first fifteen jurors who shall answer to their names when called, shall, with said foreman, constitute the Grand Jury.

This Act is an amendment of that of 1857, which did not direct that the Grand Jury should be empanelled upon the *first day* of each jury term.

The Act of 1858, making it the duty of the District Judges to proceed to the empanelling of the Grand Jury, is merely *directory*, and if any sufficient obstacle exists to prevent the empanelling on the first day, then it may be done on a subsequent day. The object of this Act is to have the Grand Jury empanelled, as soon as possible, so as to promote a speedy administration of justice. *Sen. Acts*, 1857, p. 179; 1858, p. 170.

2. That the foreman was not selected from the forty-eight jurors summoned, and there were sixteen jurors drawn and empanelled on the Grand Jury, in addition to the foreman.

The record shows that *James Monette*, one of the jurors summoned for the first week of court, was appointed foreman of the Grand Jury, whereupon the Sheriff then proceeded to draw from the regular panel of jurors sixteen persons, among whom the name of *James Monette* appears.

The Sheriff ought to have put only the names of forty-seven jurors in the box, omitting the name of the foreman, but as his name was drawn with the fifteen, and the record shows that the Grand Jury was composed of but sixteen jurors, no injury could be suffered by the accused.

3. The appellee contends that the offence charged is not indictable, because there is no statute providing a punishment for or forbidding the assault upon a slave by a free person, by willfully shooting at him.

The ninth section of the Act of 1855, declares : "That whoever shall assault another, by willfully shooting at him, or with intent to commit murder, rape, or robbery, shall, on conviction thereof, be imprisoned at hard labor, not exceeding two years." Sess. Acts, 1855, p. 131.

This section is found under an "Act relative to crimes and offences."

Slaves are treated in our law as property, and, also, as persons ; this section then applies to an assault upon a slave or upon a free person. *State v. Dick*, 4 An. 182 ; *The State v. Kitty*, 12 An. 805.

It is, therefore, ordered, adjudged and decreed, that the order of court quashing the indictment, be set aside and reversed ; and that the indictment be reinstated and restored to its full force and effect, and the case be remanded to be proceeded with according to law, and that appellee pay the costs of appeal ; those of the lower court to abide the final decision of this prosecution.

STATE v. W. HAMPTON, Collector, et al.

When the sureties on a Tax Collector's bond obligate themselves, each for a specific sum, the State is entitled, in case the Collector becomes a defaulter, to a judgment against each surety for the whole amount for which he is bound, although more than the amount due the State by the principal in the bond cannot be collected from his sureties.

Under a bond of a Sheriff and Tax Collector, conditioned that he shall collect and pay over "all the State, mill and poll taxes, together with all fines," &c., according to law—*Held* : The surety is liable for the amount of licenses for which the Sheriff is defaulter.

It is not necessary to put a Tax Collector formally in default, to enable the State to recover the two per cent. per month interest, which is the penalty by law for the non-payment of the taxes to the State by the Collector.

A PPEAL from the District Court of the Parish of Franklin, *Mayo, J.*

M. A. Jones, for plaintiff. *McGuire & Ray*, for defendants and appellants.

COLE, J. This is an action instituted by the State against *W. Hampton*, Sheriff and Tax Collector, and his securities upon his bond for taxes for 1853, and for licenses for 1854. The amount of the bond is \$4,628 93.

There was judgment against the principal for \$3,964 47, with two per cent. per month thereon, from the 1st of December, 1854, and against the securities, each for the amount he bound himself for in the bond. Defendants have appealed ; they urge various errors.

STATE
v.
HAMPTON.

1. It is not a valid objection that the total amount of the judgment against the securities, exceeds that against the principal upon his bond of State Tax Collector. In this bond, each of the securities obligated himself for a specific sum; and for that sum bound himself to guaranty the State against loss from the infidelity of her officer, and the State is entitled to a judgment against each, although she cannot collect from the securities more than that due by the principal.

If the State could only have a proportionate judgment against each, according to the amount of the defalcation of the Tax Collector, then the condition of the bond would not be accomplished; for each has bound himself to pay a specific sum in case the officer should not fulfill his duties, and be a defaulter, to the amount of that specific sum. Each having so bound himself, the State cannot be deprived of a judgment against each for that amount. *Sess. Acts of 1855, p. 82, § 5.*

Otherwise, the State might lose, and the condition of the bond would not be accomplished. For if the securities on a Tax Collector's bond are entitled to have a deduction made from each specific sum for which each has subscribed the bond, so that the total amount of the liability of all of the securities should be only equal to the amount of the defalcation of the officer; then if only half of the securities were solvent, and the principal were insolvent, the State would lose one-half of the defalcation, and the securities would not have complied with their obligations, for the obligation of each is that he shall protect the State from loss to the amount for which he has signed the bond. *Copely v. Dinkgrave, 7 An. 595; State v. Breed, 10 An. 492.*

2. It is contended that the securities are not bound for the amount of the licenses for which the Sheriff is a defaulter, because they did not stipulate so in their bond. The condition of the bond was, that *Hampton*, as State Tax Collector for the parish of Franklin, should collect and pay to the proper authorities, all the State, mill and poll taxes due in and for the parish of Franklin, for the year 1853, together with all fines, &c., according to law.

Licenses may be considered as taxes within the meaning and intent of this bond; besides the 70th section of the Act relative to "Revenue," uses the word taxes as synonymous with licenses. It is as follows:

"On or before the first day of December, annually, the several Tax Collectors shall make their final payments into the Treasury for the taxes due on the rolls, and on trades, professions and occupations, and all other objects due in said year." *Rev. Stat. p. 474, § 70.*

3. The judgment is correct in charging *Hampton*, the principal in the bond, two per cent. per month on the amount of the judgment, from the 1st of December, 1854, the day when the amount of the taxes became due.

There is no necessity of putting the Tax Collector formally in default. The 71st section of said Act provides, that interest at the rate of two per cent. per month, shall be charged against the Tax Collector on the sum withheld, to be computed from the time the same ought to have been paid, until actual payment. *Sec. 71, Rev. Stat. p. 474.*

Judgment affirmed, with costs.

MAUNSEL WHITE v. CHARLES JONES.

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115	1088

The liquidating partner of a commercial firm may sue in his own name, by representing the claim sued on as arising out of the business of the late firm, so as not to deprive the defendant of any means of defence to which he would be entitled in a suit in the name of all the partners.

The liquidating partner, to whom the assets have been assigned, cannot, by a release in favor of his late partner, render him a competent witness in his favor.

In a suit on an account, a special denial by defendant of the correctness of the charges for interest, discount and commissions, is restrictive of the general denial, and proof that no other objection was made to the account when presented, when thus corroborated, will suffice.

When the defendant offers in evidence the credit side of an account copied from the merchant's books, the whole account must be taken together, but the defendant is not excluded from showing the incorrectness of particular items of debit.

In the absence of a written agreement to pay eight per cent. interest on an account, legal interest only can be recovered from judicial demand.

Compensation cannot be allowed for services rendered, when the procurement is gratuitous.

Where a draft is drawn by a planter on his factor, for the benefit of the latter, the former is entitled to commissions at two and a-half per cent. for the risk incurred as drawer of the draft, according to the mercantile usage established in such cases.

In the absence of any allegation or proof of fraud, the acknowledgment of payment and release of a partnership debt by one of the partners, by an act under private signature, during the existence of the partnership, will be binding on the liquidating partner.

A PPEAL from the District Court of the Parish of Catahoula, *Mayo, J.*
Smith & Spencer, for plaintiff. *McGuire & Ray*, for defendant and appellant.

BUCHANAN, J. This is a suit for balances of three accounts-current, and balances of interest, due the firm of *Maunsel White & Co.* by the defendant.

The house of *Maunsel White & Co.* was dissolved by the following notice, published in the newspapers on the 2d February, 1852 :

"The copartnership heretofore existing between the undersigned, under the firm of *Maunsel White & Co.*, is this day dissolved by mutual consent. The affairs of the late firm will be liquidated by *Maunsel White*, to whom its assets are transferred for that purpose.

(Signed)

MAUNSEL WHITE,
CUTHBERT BULLITT,
THEODORE RION."

This suit is instituted by the liquidating partner in his own name ; and an exception was filed by defendant to his right to proceed in this form. The exception was properly overruled. The petition sets forth the fact of the claim being one arising out of the business of plaintiff's late firm ; and the defendant is deprived of no right which he could have exercised had the suit been brought in the name of all the partners.

The plaintiff offered one of his late partners as a witness ; but this testimony was objected to, and was properly rejected. For the witness was, really, although not nominally, a party plaintiff in this suit. The written release by *Maunsel White* was a vain thing. He could not release *Rion's* liability to the creditors of the late firm of *Maunsel White & Co.* *Rion* was, therefore, directly interested in increasing the assets of said firm, from which to pay the creditors in course of liquidation. Besides, *Rion* is defendant in reconvention, as will be hereafter seen.

Defendant, in his answer, denies generally all the items to his debit in the ac-

WHITE
v.
JONES.

counts sued upon, and specially denies "in any event" that the charges for interest, discount and commissions are legal.

This special denial is restrictive of the general denial, and corroborates the testimony of *Miller*, plaintiff's witness, who swears that the accounts were rendered to defendant, who made no other objections to them, except that excessive interest and discount were charged.

On trial, defendant offered in evidence the credit side of the three accounts-current sued upon.

Those accounts-current are proved to be exact transcripts from the books of *Maunsel White & Co.* Defendant's offer of the credit side of those accounts was, then, the same thing, as if the defendant had offered the books from which the accounts-current were copied. A merchant's books, says Article 2244 of the Civil Code, are good evidence against him; but if used in evidence, *the whole must be taken together.* Hen. Dig., p. 512.

The accounts are, therefore, evidence before this court, of all that they contain; but we do not understand Article 2244, as excluding the right of defendant to show the incorrectness of particular items, either upon their face, or by proof, under the general and special denials contained in his answer. And,

1st. His objections to the charges of interest appear to us to be well taken. The interest charged is eight per cent., the highest rate of conventional interest; but the circumstances of this case do not bring it within the doctrine of *Flower v. Millaudon*, 19th La., and of several other decisions, so as to dispense plaintiff with the written proof of an agreement to pay this rate of interest. In the absence of such agreement, the only interest that can be allowed, is legal interest from the judicial demand. C. C. 1935, 2895.

2d. There is a charge in account B, under date of the 31st July, 1850, of \$5000, for a draft of defendant in his own favor, payable at four months date from the 25th of July. There appears to be an error in the date of this draft. It was dated 29th August, 1850, and is proved to have been drawn by defendant on account of disbursements for a steamship which was being built in New York by *Maunsel White & Co.*, to whose benefit the proceeds of the draft accrued. This item must, therefore, be deducted from plaintiff's claim.

3d. As to the discounts which are objected to by defendant, we have not found any such items in the accounts.

The deduction, as above, for interest (\$1821 95), and for the draft (\$5000), reduce the grand balance of accounts A, B, and C, (\$16,384 24,) to \$9,562 29.

In his answer and amended answer, defendant sets up claims in reconvention and compensation against plaintiff and against plaintiff's late partners, *Cuthbert Bullitt* and *Theodore Rion*, for a total amount exceeding forty thousand dollars, upon seven distinct specifications.

The jury who tried the cause in the court below rejected all these reconventional demands, with the exception of the second, which they reduced from five thousand four hundred dollars to five hundred dollars.

We think that, under the evidence, if any allowance be made defendant, as compensation for his services in effecting a sale of the steamship in New York, it ought, in reason, to exceed five hundred dollars. Indeed, a witness who seems to have had an intimate acquaintance with the whole transaction, estimates the value of defendant's services to plaintiff's firm, in this matter, at two thousand seven hundred dollars, exclusive of his traveling expenses. But we are of opinion, that under the law of mandate, as laid down in our Code, Art. 2960, the defend-

ant has not made out a case for the allowance of a compensation for these services. We would allow him his traveling expenses, but there is no proof in the record of their amount.

We concur with the jury in rejecting items 1, 3, 4, 5 and 6 of defendant's claim.

We are of opinion, that defendant is entitled to commissions of two and a-half per cent., as charged by him (item No. 7), for drawing bills upon *Maunsel White & Co.*, for the accomodation of the latter, as shown by the evidence, to the amount of \$166,820 84. Defendant, as drawer of these bills, incurred a liability to pay them, in case they were not honored at maturity by the acceptors. For this risk, incurred by defendant for plaintiff's benefit, the former is entitled to that remuneration which mercantile usage in this State has fixed as adequate and proper in such cases.

In accordance with the views above expressed, we state the rights of the parties as follows :

Balance of account-current C in favor of plaintiff, rectified by the deduction of certain items, as above, in that account, and in the accounts

A and B.....	\$9,562 29
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PER CONTRA.

Commissions of two and a-half per cent. due by plaintiff to defendant, on \$166,820 84.....	4,170 50
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Balance in favor of plaintiff.....	\$5,391 79
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The last question to be considered relates to two notes of defendant in favor of, and endorsed by *John G. Cocks*, secured by mortgage of property of defendant. The notes and mortgage were assigned and transferred by *Cocks* to plaintiff's late firm, on the 21st March, 1849. This transfer, although absolute on its face, is alleged by plaintiff to have been made as a collateral security for advances made and to be made by plaintiff's firm to defendant. By a paper bearing date the 8th of May, 1850, *Cuthbert Bullitt*, a partner of the late firm of *Maunsel White & Co.*, acknowledged payment of the notes of defendant in favor of *Cocks*, and released the mortgage in the name of his firm.

This release was recorded in the parish of Catahoula, where the mortgaged premises are situated, on the 23d of June, 1853. The present suit was instituted in February, 1854. It is argued by plaintiff's counsel, that the release of this mortgage, being an act under private signature, has no date except that of its registry, which was after the dissolution of the copartnership of *Maunsel White & Co.*; and that *Bullitt* was without authority to make a release at that date, the assets of the firm having been assigned to plaintiff, as liquidating partner. But we are of opinion, that plaintiff is bound by the date which the instrument of release bears. That date is more than eighteen months anterior to the dissolution of partnership; and plaintiff, in the absence of any allegation or proof of fraud, cannot be allowed to repudiate the act of his partner, which was his own act, so long as the partnership endured.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed; that plaintiff recover of defendant five thousand three hundred and ninety-one dollars and seventy-nine cents, with legal interest from the 12th February, 1854, until paid, and costs of the District Court; those of appeal to be paid by plaintiff and appellee.

J. EAGER v. G. A. J. BROWN AND WIFE.

14	684
51	1664

14	684
107	559

A deed of trust is the common law form of securing property to the wife.

Under the common law, a married woman cannot possess personal property independently of her husband, except when a trust is created for her sole benefit.

A deed of trust creates for the wife a separate estate, and her husband, as trustee, cannot reduce the property into his possession, so as to make it his own; if he sells it while trustee, he holds the proceeds in trust, and not as owner.

A deed of trust executed in Alabama, vesting title in the wife to property, is valid after the removal of the parties to this State, and if the husband's affairs become embarrassed, the wife may claim a separation of property and the administration of her separate estate.

When property of the wife is sold in a foreign State, and the proceeds thereof are received by the husband in that State, the wife has no privilege upon the property of her husband for the same in this State.

If he receives the proceeds of the sale, while trustee of his wife, he is personally liable for the amount so received by him—but in a contest for the amount received by him, between the wife and his creditors, his personal liability to the wife, must yield to the rights of the creditors.

A PPEAL from the District Court of the Parish of Ouachita, *Richardson, J. McGuire & Ray*, for plaintiff and appellant. *Baker & Ludeling*, for defendants.

COLE, J. Plaintiff, a judgment creditor of *Brown*, brings this suit against defendants, to set aside, on the ground of fraud, a judgment of separation of property obtained by his wife, *F. L. Bledsoe*, against him on the 5th of May, 1856, for \$1,955, with interest, and which also declared her to be the owner of several slaves.

He also seeks to set aside a Sheriff's sale under *fi. fa.* in the case, by which she purchased two slaves and a carriage, seized and sold as the property of her husband, for \$1,534, two-thirds of their appraised value, and credited her judgment by that amount.

The District Judge considered that the amount of her judgment against the husband for personal property, ought to be reduced to six hundred dollars, but rendered a judgment of nonsuit against plaintiff. The District Judge was of opinion that plaintiff was bound to pursue, by a different proceeding, his claim for a part of the proceeds of the sale, and relied upon the case of *Henderson v. Trousdale*, 10th An. p. 548.

The record shows, that *Brown* had no property at the time of his marriage with the defendant, *F. L. Bledsoe*, and before the celebration of the marriage, an ante-nuptial act of settlement was executed in the State of Alabama, in which it is declared, that a marriage is about to be solemnized between *George Brown* and *Frances L. Bledsoe*, and that the latter is possessed in her own right of a considerable personal estate, consisting of slaves; also, a considerable amount of household and kitchen furniture, together with some stock, and an undivided interest or portion in the estate of *Samuel J. Bledsoe*, deceased, to which she is of right entitled, as the widow of said deceased, and which estate has not yet been fully administered.

That the said *Brown* being desirous of settling and securing this property, before described, as also the undivided interest in said deceased's estate, together with all the future increase of the female slaves, now owned by said *Frances L. Bledsoe*, or of those that may be drawn, as the distributive share in the estate of

EAGER
v.
BROWN.

S. J. Bledsoe, to the said *Frances L. Bledsoe*, for her sole, separate use and benefit, free from any debts, liabilities, contracts, or agreements, which the said *George Brown* may now owe, or which he may hereafter contract and owe, for the sum of five dollars in hand paid, and in consideration of the premises, the said *Frances L. Bledsoe* gave, granted and delivered to *George Brown*, all her right, title and interest to the said property, in trust, nevertheless, and for the following uses, interest and purposes, and no other, that is to say, in trust for the separate use and benefit of the said *Frances L. Bledsoe*, free from the claims, or demands, debts, liabilities, or contracts of him, the said *Brown*, now existing or that may hereafter exist.

And it is further agreed, between the said two parties to this indenture, that the said *Brown* may have the entire use and disposal of the money arising from the labor of said slaves, but shall have no power or authority to sell or dispose of any of the aforementioned property, or of its future increase. And the said *Brown* does hereby agree and promise to take said property into possession as trustee, with no other interest or claim than before stated.

It is further agreed, that the said *Frances L. Bledsoe* is not, by this indenture, to be debarred from making any future disposition of her property, different from that contained in these presents.

We have thus extracted from the indenture, what is necessary for this decision.

This deed of trust is the common law form of securing property to the wife. 2 Kent, 161 et seq.

As the common law prevails in Alabama, the general principle obtains there, that a married woman cannot possess personal property independently of the husband, except when a trust is created for her sole benefit.

The deed of trust aforesaid, created a separate estate for *Mrs. Brown*; and her husband, as trustee, could not reduce the personal property of the wife into his possession, so as to make it his own, for as he got possession of her property as trustee, he could not change the nature of his tenure of the same, and if he should sell it, when he was the trustee of his wife, he would hold the proceeds, as trustee, and not as owner.

The evidence shows that the defendant was entitled to the slaves, of which she was decreed to be the owner by the judgment of separation, and also to a claim for personal property belonging to her, and received by her husband.

The debt of plaintiff originated in the State of Louisiana, and several years after the execution of the deed of trust in Alabama, and the delivery of the property of the defendant to her husband as trustee. This property was, by the deed of trust, her separate property and estate after marriage.

As it was her property in the State of Alabama, she still retained her title to the same, when she and her husband came to reside in Louisiana, and she was entitled, therefore, to claim a separation of property, as her husband's affairs were embarrassed, and also, the separate administration of her property.

The principal point upon which appellant relies for a reversal of the judgment of separation, is the correctness of the part of the judgment, which allows the defendant \$1,935, and as she is obliged to sustain the validity of her judgment against the creditors of her husband, we shall now consider it.

It appears from the evidence, that *Mrs. Brown* was in part the owner of a note on *James Taylor*, being a part of her inheritance from the estate of her first husband, *B. F. Bledsoe*; and that, after the removal of herself and husband to

EAGER
v.
BROWN.

Louisiana, she instituted suit upon the same, and obtained judgment for \$580, which was appropriated to the payment of her husband's debts. As this amount was received, or presumed to have been received, as head of the community, by the husband, in Louisiana, and as it belonged to his wife, she had a privilege upon his estate for the same. 2 An. 824.

Besides this sum, the appellee has asked us to amend the judgment, by allowing her \$240 for household furniture and \$335 for cattle.

It appears that the furniture and cattle were sold in the State of Alabama; she has not, therefore, a privilege upon the property of her husband in the State of Louisiana, for the reimbursement of the proceeds of their sale.

When property of the wife is sold in a foreign State, and the proceeds thereof are received by the husband in that State, the wife has no privilege upon the property of her husband in Louisiana for the same. But as the husband was trustee, he is, therefore, personally liable to the defendant for the proceeds so received by him; but in a contest with creditors, this personal liability to the wife must yield to the rights of the creditors of the husband.

We are of opinion, that under the prayer for general relief, we can now finally settle the rights of the parties to this suit. It would be useless to put them to the expenses of future litigation, when the evidence enables us to decide finally upon their respective rights at the present time.

As plaintiff is the only creditor contesting the judgment of separation of property, the rights of the defendant to that judgment can only be affected by the present judgment, so far as it is necessary, in order to secure the rights of plaintiff.

The amount that the defendant, *Mrs. Brown*, is really entitled to with privilege upon her husband's estate, independantly of the slaves, is \$580, with five per centum interest thereon, from the 1st of September, 1855, till paid, and the costs of the suit of separation of property.

The property of her husband seized in satisfaction of the money part of the judgment of separation, was adjudicated to her for \$1,534, on the 19th of May, 1856.

The amount of the judgment of plaintiff against *George Brown*, is \$1,435, with five per cent. interest thereon, from the 4th of March, 1855, and costs of suit.

Plaintiff is, therefore, entitled to have the judgment of separation reduced so far as his rights are concerned, to the sum of \$580, with five per cent. interest and costs, as aforesaid, with privilege upon her husband's property, and to obtain judgment against her for the difference between said sum of \$580, with interest and costs as aforesaid, and the sum of \$1,534, the proceeds of the sale of the property of her husband; this difference being the amount of the funds of her husband, which is in her hands and subject to the payment of his debts.

The interest upon the \$580 is to be calculated up to the 19th of May, 1856, when she really received the same by purchasing the property of her husband, and crediting her debt against him by the price of his property bought by her.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; that the judgment of separation of property between *George A. J. Brown* and his wife, *F. L. Bledsoe*, be amended, so far as plaintiff is concerned, by reducing the money part of the same in favor of said *F. L. Bledsoe*, to the sum of \$580, with five per centum interest thereon, from the 1st of September, 1855, until the 19th of May, 1856, and the costs of

the suit of separation aforesaid, with privilege and mortgage upon her said husband's property, to secure the same.

EAGER
v.
BROWN

It is further ordered, adjudged and decreed, that plaintiff recover of the defendant, *Mrs. Brown*, the difference between \$1,534 and \$580, with five per cent. interest thereon, from the 1st of September, 1855, until the 19th of May, 1856, and the costs of suit of separation, including all the subsequent costs of writs of seizure, sale of property, and any other costs connected with the satisfaction of the judgment of *Mrs. Brown*.

It is further ordered, that the judgment of separation of property aforesaid, so amended, be affirmed, so far as plaintiff is concerned; and that the defendant and appellees pay the costs of both courts.

14 687
110 831

ROBERT S. YOUNG v. CHAMBERLIN et al.

An interlocutory order dismissing a call in warranty is one calculated to work an irreparable injury, and consequently, may be appealed from.

A party in possession of property as a lessee, when sued in a petitory action for the property, should make his lessor a party defendant to the action, and ask to be discharged; he cannot defend the suit by calling in warranty his lessor's vendor, without making the lessor a party, or entering an appearance for him.

A PPEAL from the District Court of the Parish of Catahoula, *Mayo, J.*
McGuire & Ray, for plaintiff and appellant. *R. H. Cuney* and *J. G. Tuliaferro*, for defendants.

BUCHANAN, J. The defendant appeals from the dismissal of a call in warranty, in a petitory action instituted against him. The appellee moves to dismiss the appeal, on the ground that the dismissal of the warranty is an interlocutory order, and does not work an irreparable injury.

This ground is not tenable. The Code of Practice authorizes a party in possession of land, who is sued for the same, to make his vendor a party to the suit, and to transfer its defence to such warrantor. It is evident, that a subsequent order, by which his warrantor is put out of court, may cause him an irreparable injury, and is, consequently, appealable.

On the merits, it is to be determined, whether or not, the exception to the call in warranty was well taken.

Defendants are sued, as party in possession, for certain land of which plaintiff alleges himself to be the owner; and for rent of the same.

They answer, by declaring themselves to be lessees of one *Hollister*, a resident of Michigan, who is owner of the land, by purchase from one *McGraw*, a resident of Mississippi.

By an amended answer, defendants pray that *McGraw* be cited to warrant *Hollister's* title. *McGraw* was cited through a curator *ad hoc* appointed to him, as an absentee, by the court. *McGraw* appeared by the curator *ad hoc*, and called his vendor, *Benjamin F. Young*, in warranty.

B. F. Young appeared, and excepted to the call in warranty of *McGraw* by defendants, on the grounds:

1st. That defendants had no legal right to call in warranty the vendor of *Hollister* to defend this suit.

YOUNG
v.
CHAMBERLAIN.

2d. That defendants are not the lessees of *Hollister*, as they allege.

I. The course to be pursued by a lessee of real estate, who is sued in the petitory action, is indicated in Art. 43 of the Code of Practice, and Art. 2674 of the Civil Code. Both these Articles contemplate that the lessee, thus sued, shall cause his lessor to be made a party. The Article of the Civil Code says, that he shall call his lessor in warranty, or to defend the suit, and shall thereupon be himself dismissed. The Article of the Code of Practice says, the lessee shall make known the name and place of residence of his lessor, who shall be made a party if he reside in the State, or is represented therein; and that the lessee shall, thereupon, be discharged from the suit. In this case, the defendants, supposing them to be in possession as lessees, have not pursued the course indicated by law. They have named their lessor, but they have not called him in warranty, neither have they asked to be thereupon discharged from the suit. They have put in evidence a power of attorney, which shows that one of these defendants is the agent of *Hollister* in this State. The defendants might, therefore, have made *Hollister* a party to this suit; but they have not thought fit to do so. In place of that, they have proceeded to defend the suit, by calling in warranty *Hollister's* vendor, without making *Hollister* a party, or entering an appearance for *Hollister*. It is plain, that this course is unwarranted by law. *Hollister* is not bound by these proceedings. As to him, any judgment that may be rendered will be *res inter alios acta*.

II. The defendants have introduced no proof whatever that they hold this land as lessees of *Hollister*, although that fact was put directly at issue by the exception.

Judgment affirmed, with costs.

JOHN TAYLOR v. A. M. CALLOWAY, Sheriff, et al.

Where a party as third opponent, claiming a privilege upon the proceeds of a sale, over the seizing creditors, appeals from the judgment rendered against him, the appeal will be dismissed if all the seizing creditors are not made parties to it.

A PPEAL from the District Court of the Parish of Union, *Richardson, J. Baker & Barrett*, for plaintiff and appellant. *J. T. Ludeling*, for defendants.

LAND, J. This is a third opposition, in which plaintiff claims a privilege on the proceeds of the sale of a slave, over the seizing creditors. There was judgment against the third opponent, and he has appealed.

B. A. Smith, the judgment debtor, has filed a motion to dismiss the appeal, on the grounds, that neither the Sheriff nor seizing creditors, have been made parties to the appeal. The creditors are interested in maintaining the judgment appealed from, and are, therefore, necessary parties. There is no appeal bond in their favor, which is necessary to make them parties appellees.

It is, therefore, ordered and decreed, that the motion be sustained, and the appeal be dismissed at costs of appellant.

J. R. MARSHALL v. PARISH OF MOREHOUSE.

An agreement to transfer personal effects vests the property in the transferee, but the effect of the transfer is strictly confined to the parties to it until the actual delivery of the object.

Personal property transferred by contract, but not delivered, is liable in the hands of the transferor to seizure and attachment by his creditors.

An assignment without delivery is conclusive against the assignor and his legal representatives.

APPEAL from the District Court of the Parish of Morehouse, *Richardson, J. Todd & Brigham*, for plaintiff and appellant. *Compton and McGuire & Ray*, for defendant.

COLE, J. This suit is instituted upon three several bonds, executed by the President of the Police Jury of the parish of Morehouse, and made payable to *A. D. Peck*, his heirs and assigns.

Plaintiff alleges, his title to these bonds was acquired in the following manner, to-wit: That under two judgments of *Marshall & James v. A. D. Peck*, rendered in the District Court of the parish of Morehouse, writs of *fi. fa.* were issued, directed to the Sheriff of the parish of Orleans, and the bonds in suit were seized in the hands of *H. M. Wright*, under process of garnishment issued from the Sixth District Court of the parish of Orleans,—the bonds having been previously pledged by *Peck* to *Wright, Williams & Co.*, of which firm the garnishee was at the time a member, to secure them for advances made to *Peck*,—that after answer made by said garnishee, and due proceedings had before said court, the bonds were ordered to be sold; the proceeds to be applied, first, to the payment of the debt of *Wright, Williams & Co.*, and the balance to the satisfaction of the writs under which they were seized; and at the sale made in accordance with the decree, plaintiff became the purchaser of the bonds for eighteen hundred dollars cash; of which \$1,588 72 were paid to *Wright, Williams & Co.*, and \$84 45 for costs, leaving \$126 83 to the credit of the writ.

There were three interventions, to-wit, those of *Boatner, McLeish* and the administrator of *Peck's* succession. *Boatner* claimed one of the bonds by title derived from *McLeish*; the latter having transferred it to his attorneys in a certain suit, and *Boatner* having become the sole owner for a valuable consideration.

McLeish intervened, alleging title to all the bonds, except the one which he had transferred to *Boatner*, and averring that the bonds had been transferred to him by the payee, *Peck*, for a good and valuable consideration.

Bussy, the administrator of *Peck's* estate, sets forth in his intervention, that the bonds were purchased by plaintiff at a sale decreed in proceedings which had been provoked by *Marshall & James* against *Peck & Wright*, garnishees; that plaintiff was a member of this firm, and all said proceedings originated and were carried on after the death of *Peck*, and were illegal; he, therefore, prays to be decreed the owner of the three bonds.

There was judgment, decreeing that the bonds should be paid by the defendant to the administrator of *Peck's* succession, dismissing the interventions of *Boatner* and *McLeish*, as in case of nonsuit, and reserving the right of plaintiff to assert his privilege on the judgment, or its proceeds.

Plaintiff and *Boatner* appealed.

The decision of this cause requires us to notice but one point.

MARSHALL
v.
P. OF MOREHOUSE.

McLeish, the assignee of *Peck*, and *Boatner*, the transferee of *McLeish*, cannot contest the title of plaintiff, because the bonds were never delivered by *Peck* to his assignee.

In the transfer of debts, rights or claims, to a third person, the delivery takes place between the transferor and the transferee by the giving of the title. C. C. 2612.

The transferee is only possessed, as regards third persons, after notice has been given to the debtor of the transfer having taken place. The transferee may, nevertheless, become possessed by the acceptance of the transfer by the debtor in an authentic act. C. C. 2613.

With respect to personal effects, although the consent to transfer vests the property in the obligee, yet this effect is strictly confined to the parties until the actual delivery of the object. If the vendor, being in possession, should by a second contract transfer the property to another person, who gets possession before the first obligee, the last transferee is considered as the proprietor, provided the contract be made on his part *bona fide*, and without notice of the former contract. C. C. 1916.

In like manner, if personal property be transferred by contract, but not delivered, it is liable in the hands of the obligor to seizure and attachment, in behalf of his creditors. C. C. 1917.

As these bonds were seized before delivery to the assignees, the seizure is, therefore, valid against their claims.

The assignment by *Peck* is, however, conclusive against him and his legal representatives, notwithstanding there was no delivery; for a sale is perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object, and for the price thereof, although the object has not yet been delivered, nor the payment made. C. C. 2431.

The assignment of the bonds by *Peck*, even without delivery to his assignee, divested him and his heirs of their ownership; without, however, depriving his creditors of the right to seize them as his property, and acquire a lawful title thereto under the seizure.

It is, therefore, ordered, adjudged and decreed, that the judgment be avoided and reversed, and that the plaintiff, *John R. Marshall*, recover of the defendant, the parish of Morehouse, two thousand three hundred and twenty dollars (\$2320), with eight per cent. interest thereon from the 19th day of December, 1849, and that the interventions of the intervenors in this suit be dismissed, at their costs, as in case of nonsuit; that defendant pay the costs of the lower court, less those of the interventions which are to be paid by the intervenors, and that the appellants, *Boatner*, and the administrator of the estate of *Peck*, pay the costs of appeal.

JAMES BOYD v. J. M. FRANTOM.

The right of a minor emancipated by marriage, to contract debts within the amount of his annual revenues, is not affected by the fact that the minor ran away and contracted marriage without the consent and against the will of the tutor.

A PPEAL from the District Court of the Parish of Ouachita, *Richardson, J. Todd & Brigham*, for plaintiff. *J. T. Ludeling*, for defendant.

LAND, J. This is a suit on a promissory note for three hundred dollars, and the interest thereon. The defence is *minority*, and is pleaded by the administrator of the succession of the minor, deceased.

Reuben Frantom, the maker of the note, was twenty years of age on the 13th of January, 1857, and was emancipated by marriage prior to the date of the note, to-wit, the 9th of September, 1857, and his annual revenue was between three and four thousand dollars.

The only question in the case is, whether he had the legal capacity to bind himself by the promissory note in controversy.

A minor is emancipated of right by marriage, and has the full administration of his estate; he may pass all acts confined to such administration, grant leases, receive his revenues, and monies, and bind himself legally by promise or obligation, for any sum not exceeding the amount of one year of his revenues. C. C., Arts. 367, 373, 374.

The emancipated minor is not only legally capable of binding himself, as above stated, but has no right to claim a restitution for a mere lesion against obligations or promises which do not exceed the amount of one year of his revenue. C. C., Art. 375.

It is, however, contended, that as the minor ran away, and contracted marriage without the consent and against the will of his tutor, his right to contract debts within the amount of his annual revenue did not attach or vest in him, and that the note did not impose on him any legal obligation to pay the same.

The authorities cited by defendant's counsel do not go to the extent contended for, nor do we perceive any sufficient reason why they should; besides, the evidence does not show affirmatively, that the marriage was without the consent or against the will of the tutor, but is left to inference from the act of running away, which may or may not be correct, as opposition on the part of the wife's family may have been the cause of it, as well as opposition on the part of the tutor.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be reversed; and it is now ordered, adjudged and decreed, that the plaintiff do have and recover from the defendant in his representative capacity, the sum of three hundred dollars, with eight per cent. per annum interest thereon, from the 9th day of September, 1857, to be paid in due course of administration, with costs of both courts.

HENRY SHELDON & Co. v. J. H. REYNOLDS.

Where there has not been an active abandonment of a suit by the plaintiffs, prescription is interrupted, notwithstanding there be a judgment of nonsuit.

The stipulation by a surety on a promissory note, that the holder shall exhaust all the legal remedies against the drawer of the note, before having recourse upon such surety, amounts to a simple reservation of the right of discussion, and has no other effect. So that where it is shown that the drawer is and has been for a considerable time insolvent; that he has left the State without leaving any property, and that it is impossible, from the circumstances of the case, that the plaintiffs could make anything by proceeding against such drawer, an action by the holder against the surety will lie immediately.

A PPEAL from the District Court of the Parish of Caddo, *Creswell, J.*
G. A. & F. P. Austin, for plaintiffs. *A. B. Levisse*, for defendant.

VOORHIES, J. The plaintiffs' demand is based upon the following instruments, to wit:

"\$288 67.

SHREVEPORT, May 26, 1852.

"Twelve months after date, I promise to pay to the order of *S. A. Robeson*, two hundred and eighty-eight dollars and sixty-seven cents, value received. Interest eight per cent after maturity.

(Signed)

"*J. H. WHITE*.

(Endorsed) "*S. A. ROBESON*, per *JONAS ROBESON*, Agent.

(Endorsed) "I do hereby guarantee payment of the within amount after the legal remedies against the drawer shall have been exhausted.

(Signed)

"*J. H. REYNOLDS*."

"\$288 67.

SHREVEPORT, May 26, 1852.

"Nine months after date, I promise to pay to the order of *S. A. Robeson*, two hundred and eighty-eight dollars and sixty-seven cents, value received. Interest eight per cent. after maturity.

(Signed)

"*J. H. WHITE*.

(Endorsed) "*S. A. ROBESON*, per *JONAS ROBESON*, Agent.

(Endorsed) "I hereby guarantee payment of the within amount, after the legal remedies against the drawer shall have been exhausted.

(Signed)

"*J. H. REYNOLDS*."

The defence is a failure to exhaust legal remedies against the principal debtor, want of consideration, and prescription.

As five years had not intervened between the dates of the institution of this suit and of the falling due of the second note, the plea of prescription was not maintainable. C. C. 3505.

As to the other note, prescription was interrupted by the institution of the first suit, in which, however, the plaintiffs were nonsuited. C. C. 3484, 3485.

There was not an active abandonment of the suit by the plaintiffs; consequently prescription was interrupted, notwithstanding the judgment of nonsuit. *Norwood v. Duval*, 7 An. 523.

It is contended, that the promissory note was executed without consideration; the note itself purports to have been made for value received. It is no objection that the defendant, when binding himself as the drawer's surety, should have participated in the consideration of the note. "Suretyship is an accessory promise

SHELDON
v.
REYNOLDS.

by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation, if the debtor does not." C. C. 3004.

It is, therefore, no objection that the promissory note under consideration was executed some time previous to the assumption of the defendant. In fact, suretyship is a species of unilateral contract, as the person who binds himself by such an agreement, does so without any corresponding obligation on the part of the creditor. C. C. 1758, 1766.

The stipulation that the plaintiffs should exhaust the legal remedies against the drawer of the note, before having recourse upon the defendant, amounts to a reservation of the right of discussion; it has no other effect. Now, it is shown that the drawer is, and has been for a considerable time, an insolvent; that he has left the State without leaving any property; and that it is impossible, from the circumstances of the case, that the plaintiffs should make any thing by proceeding against this party. The court would then be requiring of plaintiffs a vain thing, by dismissing their action as premature.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; and that the plaintiffs do recover judgment against the defendant, for the sum of two hundred and eighty-eight dollars and sixty-seven cents, with eight per cent. per annum interest thereon, from the first day of June, A. D. eighteen hundred and fifty-three, and the further sum of two hundred and eighty-eight dollars and sixty-seven cents, with like date of interest from the first day of March, A. D. eighteen hundred and fifty-three; the defendant and appellee paying the costs in both courts.

LAND, J., recused himself, having been of counsel.

TAYLOR, KNAPP & Co. v. W. J. HANCOCK & Co.

A defendant named in the petition, but not cited, is not in reality a party to the suit, so as to render him incompetent as a witness.

When there is a prayer in the petition for general relief, and the partnership sued is alleged to be a commercial one, a judgment rendered against the parties *in solido*, will not be disturbed on the ground that a joint judgment was claimed in the petition.

APPEAL from the District Court of the Parish of Bossier, *Engan, J.*
A. B. Levisse, for plaintiffs. *Looney & Fort*, for defendants and appellants.

COLZ, J. Plaintiffs instituted this suit against several persons as composing the commercial firm of *W. J. Hancock & Co.*, and prayed that judgment might be rendered against them for their demand.

Two only of these persons were cited, and upon the trial *R. J. Hancock*, who had been named in the suit as a party defendant, but who had not been cited, testified that *W. J. Hancock* and *Morgan O. Tuliaferro*, were the only members of the firm of *W. J. Hancock & Co.*

There was judgment *in solido* against *W. J. Hancock* and *M. O. Tuliaferro*; they have appealed.

Appellants contend that the testimony of *R. J. Hancock* was improperly admitted, because he is a co-defendant, and it was his interest to release himself from responsibility by establishing himself not to have been a partner.

In answer to this objection, we would observe, that appellants did not file any

TAYLOR
v.
HANCOCK.

answer, and the testimony was introduced without objection on the part of the court. If the testimony had been objected to and excluded, plaintiffs might have been able to have proved by other witnesses, that which was established by *R. J. Hancock*, and it does not appear to be just to nonsuit plaintiffs in this court, on account of the laches of appellants in not defending the suit in the lower court.

Besides, the witness, *R. J. Hancock*, was not cited, and was not, in reality, a party to the suit, and as no judgment could have been obligatory upon him, there does not seem to be any good reason why his testimony should be inadmissible. It is true, that by putting his name in the petition as one of the defendants, the plaintiffs, in fact, aver that he has an interest in the suit, yet by not having him cited, they show they were mistaken in their allegation.

It is also contended, that the judgment ought to have been against them jointly, and not *in solido*, because the prayer was only for a joint judgment; but as there was a prayer for general relief, and as the partnership sued was alleged to be a commercial one, and as appellants, although cited, had thought proper to let the case go by default, we do not feel ourselves authorized, under the evidence and circumstances of this case, to disturb the judgment.

Judgment affirmed, with costs.

R. H. DRAWN v. W. P. CHERRY.

When the obligation is conditional, the party to whom it is transferred by endorsement before maturity, is bound to prove the performance of the condition before he can recover on it.

APPEAL from the District Court of the Parish of Catahoula, *Richardson, J. R. K. Hendry*, for plaintiff. *Smith & Spencer*, for defendant and appellant. *COLE, J.* This suit is instituted by plaintiff as third holder of the following note:

"\$500.

BAYOU SARA, May 31st, 1856.

"Twelve months after date, I promise to pay *James H. Muse*, or order, five hundred dollars; this note is given in consideration, that said *Muse* will assist in the prosecution of the *State of Louisiana v. James R. and Leon D. Marks*, and attend to the same, until brought to a final conclusion. Said note bears interest at the rate of eight per cent. per annum after due until paid.

(Signed)

"Wm. P. CHERRY.

(Endorsed) "JAMES H. MUSE, D. P. HARDEE."

There was judgment for plaintiff, and defendant has appealed.

The obligation sued upon was a conditional one; the consideration is, that "*Muse* will assist" in a certain prosecution.

Plaintiff has produced no proof of the execution of the consideration.

A part of the answer of *Kernan* to the second interrogatory, tending to prove the performance of the consideration, was properly ordered by the District Judge to be erased, because there was nothing in it responsive to the interrogatory, and the defendant had, therefore, no means of cross-examining the witness, upon this part of his answer.

As the obligation was conditional, the endorsee, before maturity, is bound to prove the execution of the condition, the same as if he had received it after maturity.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; and that there be judgment against plaintiff, and in favor of defendant, as in case of nonsuit; and that plaintiff pay the costs of both courts.

DRAWN
V.
CHERRY.

J. H. BOATNER, Tutor, v. DANIEL WADE.

A sequestration obtained on the ground of the plaintiff's apprehension, that the slave sued for, will be removed out of the jurisdiction of the court, cannot be set aside by proof of the defendant's long residence in the parish and possession of ample means.

APPEAL from the District Court of the Parish of Caldwell, *Mayo, J.*
W. H. Hough, for plaintiff. *T. L. Crawford*, for defendant.

BUCHANAN, J. This is a suit in revendication of a slave, commenced by sequestration, upon oath made, according to law, that plaintiff feared the defendant would send the slave out of the jurisdiction of the court, or would conceal, part with, or dispose of the slave pending the suit.

Immediately upon the execution of the writ of sequestration, the defendant bonded the slave, under Article 279 of the Code of Practice; and a few days thereafter, took a rule upon plaintiff to dissolve the sequestration, on the ground, that the plaintiff was without reason to fear that the slave would be removed out of the jurisdiction of the court, concealed, or disposed of by the defendant, pending the suit.

On the trial of this rule, defendant proved by several witnesses, that he had been a resident of the parish for many years; that he was generally considered solvent, and that he is assessed upon the parish assessment roll for \$14,905.

The District Judge dissolved the sequestration upon this evidence. We think he erred.

The evidence did not touch the matter in controversy, which was the apprehension of plaintiff, that the slave would be removed pending the litigation. No fact was given in evidence, tending to show, either, that the plaintiff did not, in reality, entertain the apprehension by him declared on oath, as aforesaid; or that it was impossible that such an apprehension could be realized.

The evidence that the defendant, and that his security for the forthcoming of the sequestered property, possess property in the parish, very far exceeding the value of that which is sequestered, sufficiently demonstrates that the plaintiff is amply secured by the bond which has been furnished to release the sequestration, but it is not seen how it tends to prove that the sequestration improperly issued. The defendant and appellee relies upon the case of *Johnston v. Johnston*, 13 An. 581, to sustain the judgment appealed from. But the language of the court in that decision, scarcely meets the case which this record presents.

The court say: "This (the affidavit) constitutes *prima facie* evidence of the cause which entitled her to the issuance of the writ. It then behooves the defendant to rebut this presumption, by showing that it was not his intention to part with these slaves and immovables."

Besides, it may be observed, that the case of *Johnston v. Johnston*, was one of very peculiar circumstances—a sequestration, by a wife suing for the administra-

BOATNER
v.
WADE.

tion of her paraphernal effects, and not only of those effects, but of all the separate property of her husband. As to the effects of the husband, the claim of the wife was merely that of a privilege; and a comparatively feeble showing would suffice to quash the harsh process by which the husband was stripped at once of all the property confessedly his own, and part of it, real estate, which it was impossible for him to recover. The present plaintiff presents a very different case. He claims to be the owner of a slave, and that his slave is wrongfully detained from his possession.

The slave is a kind of property which may be removed from place to place, with the utmost facility; and a very strong case, indeed, would be required to enable us to pronounce that the remedy of sequestration did not apply to such a case.

It is proper that we should add, that there is no danger that, by maintaining this sequestration, we will consign the slave to an imprisonment in the parish prison of Caldwell, until the termination of this suit; for, as already observed, the defendant has the slave in possession under his bond.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed; that the writ of sequestration herein issued be reinstated, without prejudice to the rights acquired by the defendant, by his bond given, as mentioned in the Sheriff's return of the writ; that the cause be remanded to be proceeded in according to law; and that defendant and appellee pay the costs of this appeal.

HENRY CHEATHAM v. JOANNA T. CARRINGTON.

An attachment will not lie against the property of a succession in this State; the creditor is bound to provoke an administration of the estate in pursuance of law, to collect his debt.

A PPEAL from the District Court of the Parish of Ouachita, *Richardson, J. Baker & Harris*, for plaintiff. *Slack & Benton*, for defendant and appellant.

LAND, J. This suit was commenced by attachment against the succession of *Robert Carrington*, deceased. A curator *ad hoc* was appointed to represent the absent heirs. There was judgment dismissing the suit at plaintiff's cost.

This judgment is correct. An attachment will not lie against the property of a succession in this State; the creditor is bound to provoke an administration of the estate in pursuance of law. *Debuys v. Yerby*, 1 N. S. 381.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

B. PRICE, Guardian, v. JOHN RAY, Executor.

It is no objection to a slave's right to manumission by act *inter vivos* or *mortis causa*, that she was the concubine of her owner at the time the act was passed.

An acknowledgment by the father of natural children by his own slave, has no legal or binding effect.

Where a will was made prior to the passage of the Act of 1857, prohibiting the emancipation of slaves, in which a slave was manumitted by his master—*Held*: That under the will the slave acquired only an *inchoate right* to his freedom, to be perfected in accordance with the existing laws and regulations upon the subject; and that when the slave, who had acquired this right under the will, did not perfect it under the existing laws, he cannot be a party to the suit, nor have his rights under the will enquired into, since the passage of the Act of 1857.

A PPEAL from the District Court of the Parish of Ouachita, *Richardson, J. Morrison & Purvis*, for plaintiff. *J. T. Ludeling* and *John McEnergy*, for defendant and appellant.

VOORHIES, J. *Simeon S. Hyde*, deceased, left two wills, directing the manumission of his slave *Minnie* and of her eight children, making them his universal legatees.

The plaintiffs, as heirs-at-law of the deceased, claim at the hands of the executor, the delivery of the estate, notwithstanding the provisions of the will, which they allege to be null and void, on the ground that the legatees cannot be manumitted under our laws, and on the further ground, that the testator lived in concubinage with the slave *Minnie*.

The defendants set up the plea of three and five years' prescription to the plaintiff's demand.

It is no objection to the slave's right to manumission by act *inter vivos* or *mortis causa*, that she was the concubine of her owner. "The law has declared what causes shall be sufficient to render the enfranchisement of a slave null and void, and this is not one of them." *Césaire v. Himel*, 10 An. 188; C. C. 184 et seq.

With regard to the children of the woman *Minnie*, the petition does not allege that they were the natural children of the deceased; and the only thing we find in the record, on that subject, is, that the deceased had stated, in conversation, that such was the case, a declaration then of no legal or binding effect. *Turner v. Smith et als.*, 12 An. 417.

There is no allegation that the wills under consideration, are in violation of the provisions of the Civil Code, establishing the disposable *quantum* which a natural father may give to his natural child, and the conditions attached thereto. C. C. 1496. This question, although adverted to in the brief, is not legitimately raised by the pleadings.

At the time of the death of *Simeon L. Hyde*, it was lawful for him to manumit his slaves by last will and testament; but the rights acquired by them were inchoate, subject or conditioned to be perfected according to the existing regulations and laws upon this subject-matter. In the meantime the *status* of these parties was that of slavery; and their inchoate right of freedom was subject to be defeated by subsequent legislation, rendering impossible its consummation. Such is the effect of the legislation of the year 1857, by which it is provided, "that from and after the passage of this Act, no slave shall be emancipated in this State." See Acts of 1857, p. 55.

Prace
v.
R. v.

Unless this law be repealed, and provision made by which the last wills and testaments of *Simeon L. Hyde*, deceased, might be carried into effect, it is evident that the slaves he directed should be manumitted, cannot stand in court for any purpose. They could not, before the Act of 1857, be heard, except with reference to their freedom and emancipation; and now this very privilege is withdrawn from them by legal enactment. *Henriette, alias Mary, v. Heirs of Charles Barnes*, 11 An. 453; *Maranthe, Genie et als. v. C. G. Hunter et als.*, 11 An. 734; *Jamison v. Bridge et al.*, ante 31.

It does not follow, however, that these slaves forfeit absolutely the inchoate right, acquired by them under the will; for if the law should happen to be changed, their remedy might be revived. At the time the will took effect, the right of owners to emancipate their slaves was recognized. The slaves of the deceased have not acquired a vested right to become free at a future period; nevertheless, they have acquired an inchoate right, which may yet be perfected, should a change of legislation permit. *Delphine v. Guillet*, 13 An. 248.

But, in the meantime, their status is neither that of freemen, nor that of *status liberi*; it is inevitably that of slavery. *Pelagie Brown, f. w. c., v. Ursin Raby*, ante 41; *Pauline, f. w. c., v. Hubert et al.*, ante 161.

The prescription of five years, applicable to the action in nullity of a will, cannot avail in this instance, as the record does not show that five years have elapsed before the institution of this suit, since the probate of the wills of the deceased. *Calais v. Semère*, 8 An. 462.

Besides, the question involved is one of State policy; and the mere lapse of five years since the probate of the will, could not have the effect to defeat the intervening provisions of the Act of 1857, forbidding all manumissions in this State. *Heirs of Provost v. Wm. Provost*, 13 An. 574.

Judgment affirmed.

R. B. JONES v. CAPERTON & WEEKS.

Where the citation of appeal has been improperly served on the appellee's counsel, the appellee being a resident of the State, it is not a fault imputable to the appellant, for which the appeal may be dismissed.

Where the order of appeal has been obtained, the appeal bond given, and the transcript filed in due time, a defective service of citation may be remedied by a new service, although more than twelve months have elapsed since the judgment of the lower court was rendered.

APPEAL from the District Court of the Parish of Morehouse, *Richardson, J. Newton & Hall*, for plaintiff. *J. T. Ludeling*, for defendant and appellant.

VOORHIES, J. The appellee moves the dismissal of this appeal. The citation of appeal was served upon his counsel, the order having been granted at chambers. As the plaintiff was a resident of the State, the citation of appeal should have been served upon him in person, or by leaving it at the place of his usual domicil. C. P. 582; *Sears, Administrator, v. Wilson*, 4 An. 525; *Ludeling v. Frells.n*, ib. 534.

But this defect is not, however, imputable to the appellants; and, under the ruling in the case of *Lewis v. Hennen*, the only order which we could render would be one for a continuance. At the same time, it is proper to notice

JONES
v.
CAPERTON.

that two of the appellees, *James C. Weeks* and *E. B. Pittis*, have not been cited on this appeal, although their names are inserted in the bond furnished by the appellants. Although more than one year has elapsed since the rendition of the judgment of the District Court, it is not too late to grant relief to the appellant. This point is expressly ruled in the case of *Lewis v. Hennen*, 13 An. 260.

It is, therefore, ordered and decreed, that this cause be continued until the first day of the next regular term of this court, in order that the appellees be cited to answer the appeal taken in this case.

W. R. LASSITER v. J. BUSSY.

A promissory note not transferred by endorsement and delivery in the usual mercantile mode, is subject to seizure, under the rule which governs the sale of movables not accompanied with delivery.

The doctrine of notice is not applicable to the sales of personal or movable property, and the creditors may seize and sell when there is no delivery of possession, although informed of an agreement to sell.

APPEAL from the District Court of the Parish of Morehouse, *Richardson, J. W. A. Carpenter*, for plaintiff and appellant. *Todd & Brigham*, for defendant.

LAND, J. A promissory note made by *James Bell*, for the sum of \$1,060 83, payable to the order of *Hansford Dean*, and by him, *endorsed in blank*, was placed in the hands of defendant, to indemnify the maker, *Bell*, as surety of *Dean*, on an injunction bond, and further, to indemnify him against a judicial mortgage for \$500, on a tract of land purchased by *Bell* from *Dean*.

After the decision of the injunction suit, which was in favor of *Dean*, and which released the surety on the bond, *Dean* gave an order on defendant, for the note, to plaintiff, which defendant refused to act on, by a delivery of the note, and this suit was brought for its recovery.

E. P. & J. H. Overby and Miltenberger & Co., after the date of the order, caused the note to be attached in the hands of defendant, by process of garnishment, founded on executions in the Sheriff's hands against *Dean*, and the question for decision is, whether the plaintiff, or these judgment creditors of *Dean*, are entitled to the note or its proceeds.

The note was in defendant's possession for the benefit of the surety, and *Dean* had no right to withdraw the note before the full performance of the contract of indemnity, and transfer it to a third person, without the consent of *Bell*; and if defendant had delivered the note to plaintiff, he would have remained liable for it to *Bell*, for whose security he held it under a special agreement.

Although *Bell* was released on the injunction bond, it does not appear that the judicial mortgage on the land had been cancelled, and it cannot, therefore, be affirmed that defendant acted improperly in refusing to make delivery of the note to plaintiff.

A sale of personal or movable property not accompanied with delivery, but still in the possession of the seller, has no effect as to creditors, and the property may be seized and sold for their debts. C. C., Arts. 1917, 2241, 2457. And a promissory note, not transferred by endorsement and delivery in the usual mercantile mode, but by a collateral agreement, as in this case, is subject to the same

LESTER
v.
Bussy.

rule; and delivery of possession to the buyer is necessary to perfect the sale, and to defeat the pursuit of creditors. The possession of *Bussy* was the possession of *Dean*, subject to the claims of the surety, *Bell*, and the note was, therefore, seized by the judgment creditors before a delivery to plaintiff.

We do not understand that the doctrine of notice is applicable to sales of personal or movable property, but that the creditor may seize and sell, *when there is no delivery of possession*, although informed of the *agreement to sell*. Notice of transfer given to the debtor does not affect the creditor's right to seize, when there is no delivery of the note.

The judgment is in favor of the creditors, and is correct.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

SAMUEL LEE v. MARY J. CAMERON.

The wife, although separated in property from her husband, cannot be made liable on a note signed by her with her husband, which did not enure to her separate benefit.

APPEAL from the District Court of the Parish of Morehouse, *Richardson, J. Newton & Hall*, for plaintiff and appellant. *S. G. Parsons*, for defendant.

VOORHIES, J. The defendant is sued upon two promissory notes, which she signed with her husband, *John D. Cameron*, since deceased. The notes purport on their face to be an obligation *in solido*, the husband and wife promising to pay jointly and severally. At the time of the execution of these notes, the parties were separated in property.

The defence set up is: 1st, a want of consideration; 2dly, that the consideration did not enure to the benefit of the defendant, but was the husband's contract; and 3dly, that this was a security debt on the part of the defendant, for the benefit of her husband.

It appears that these notes were given in consideration of a deed of sale, by which the plaintiff's transferrer purported to convey to the defendant his improvements on a tract of land belonging to the U. S. Government, and the rights which he had acquired to the land, so as to enable the vendee to complete the title so conveyed by a subsequent entry. The deed stipulates:

"And it is hereby further agreed, and especially understood by and between the same parties, that, in case it should be, from any cause, impracticable for the vendor to execute this agreement so fully as to secure to the said purchaser the possession of the above described North-East quarter of Section No. thirty-four, which is intended to be embraced in the agreement, then, in that case, the amount or sum of eight dollars per acre, for each and every one of said quarter sections, is to be deducted from the amount above recited as the consideration; and the amount due is to be calculated with reference to this provision, the vendor reserving the vendor's privilege upon all the land herein actually conveyed."

The deed is signed by the vendor and his wife, and also by two subscribing witnesses.

The evidence shows, that the sale was in reality made to the defendant's husband.

LEE
v.
CAMERON.

band, or at least to both of these parties; for suit was instituted against the husband on the first note, and judgment rendered against him, after deducting certain claims of which he was the owner, and which he plead in compensation. This judgment, it is proper to notice, reserves the right of the transferee of the notes to proceed against the present defendant. On execution, part of the property in question was sold by the Sheriff in satisfaction of this judgment, and adjudicated to her. That is the property upon which she was living then, and continued to live afterwards. It is evident, that this contract has not enured to her benefit, and that the contract of sale was entered in reality between her husband and the vendor. In answer to interrogatories propounded to her, she answers that she signed the notes sued on through the influence of her husband. The course pursued by the opposite party in suing the husband for the whole amount, and levying upon the property sold, indicates that he was the contracting party, and that in reality the sale was made to him. We have no hesitation in saying that the defendant signed these notes as her husband's surety, although the sale purports to have been made to her: the deed of sale was not executed at the same time and place that the wife was prevailed upon to sign the notes; nor does her signature appear in the deed of sale. It is a matter of no moment, that the parties were at the time separated in property. "The wife, whether separated in property by contract, or by judgment, or not separated, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during marriage. C. C. 2412.

It is, therefore, ordered and decreed, that the judgment of the District Court be affirmed, with costs.

ANDREW J. DYKE v. D. H. DYER et als.

14
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Article 2417 of the Civil Code, which provides that a sale of immovables or slaves by act under private signature, has effect against creditors only from the day of its registry, and the actual delivery of the thing sold, controls Article 2242, which declares such sales to be valid from the date of their registry or from the time of the actual delivery of the thing sold.

Property cannot be seized by a judgment creditor of the vendor, when the private act has been recorded previous to the issuance of execution.

If the property remains in the hands of the vendor, the legal consequence resulting therefrom would be a presumption of simulation, which it is incumbent on the vendee to rebut.

The plaintiff in an injunction suit cannot claim from the defendant the amount of fees paid his counsel.

APPPEAL from the District Court of the Parish of Claiborne. *Eagan, J.*
Vaughan & Thomasson, for plaintiff. *J. Young*, for defendants and appellants.

VOORHIES, J. The appellee moves the dismissal of this appeal on the grounds, 1st, That the amount in controversy does not give jurisdiction to this court; and 2dly, That the appellants have not signed the appeal bond.

The record shows that the amount in controversy exceeds the sum of three hundred dollars, and that the appeal bond is signed by the surety. The motion to dismiss must, therefore, be discharged. 11th An. 113, *Williams v. Hood*, and cases there quoted.

This is an injunction suit. The plaintiff, a third person, enjoined the seizure and sale of certain property levied upon by the Sheriff, by virtue of an execution

DTKS
v.
DYER.

issued on a judgment in the case of *W. H. Nations v. S. Butler and E. P. Jones, Ad'r.* The plaintiff had purchased from the seized debtor the property in question, by a private deed, which he caused to be recorded prior to execution. There is no doubt of the reality of this sale, as shown by abundant evidence in the record; but it is contended by the appellants, that their rights accrued before the recordation of the private deed of sale, the vendor being yet in possession of the property sold.

The Civil Code provides :

" Art. 2417. The sale of any immovable, or slaves, made under private signature, shall have effect against the creditors of the parties, and against third persons in general, only from the day such sale was registered in the office of a notary and the actual delivery of the things sold took place. But this defect of registering shall not be pleaded between the parties who shall have contracted in such act, their heirs or assigns, who are as effectually bound by a sale made under private signature, as if it were by an authentic act."

There is a conflict between this Article and the 2242d Article, the latter of which gives effect to sales or exchanges of real property and slaves, by instruments made under private signature, against *bona fide* purchasers and creditors, only from the date of registry in the office of a notary, or from the time of actual delivery. We have, however, already decided that, in this respect, the 2242d Article must yield to the 2417th Article. *Lindeman et als. v. Theobalds et als.*, 2 An. 912; *Stephens v. Wellington*, 1 An. 72; *Thompson v. Mylne*, 11 R. 349.

Such being the law on this point, the sincerity of the sale from *Nations* to the plaintiff could not protect the latter against the execution of the judgment against the former, had the property been levied upon, or the judgment recorded, prior to the recordation of the private act of sale in the Recorder's Office. From that moment, the private deed became an authentic instrument, and gave notice to creditors and third persons; and, if the property continued to remain in the possession of the vendor, in compliance with peculiar arrangements between the parties, the only legal consequence resulting therefrom, would be a presumption of simulation, which it were incumbent on the vendee to rebut. C. C. 2456, 1915; *Lindeman et als. v. Theobalds et als.*, 2 An. 913.

But, as we have stated in the outset, the plaintiff has proven the sincerity and good faith of this purchase. The appellants not having, in the mean time, acquired any rights over the property in question, either by having their judgment recorded, so as to acquire a judicial mortgage, or by levying upon the property in time, the verdict of the jury, relieving the plaintiff in this respect, should not be disturbed.

The judgment must, however, be amended as regards the allowance of counsel fees. Besides the absence of proof that they have been paid, it is proper to state that there is no law authorizing the plaintiff in injunction to recover from the defendant the amount paid for counsel fees. Vide the case of *Bienvenu v. Deblanc, Sh'ff*, in the list of unreported cases, in 12th An., from the Opelousas District.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be amended, by striking out the item of fifty dollars, allowed to the plaintiffs by the verdict; and that the judgment so amended be affirmed, with costs, the appellee paying the costs of appeal.

MADISON M. DENSON v. H. T. STEWART et al.

When an interlocutory order is made, that a motion to dissolve an injunction should stand as part of the answer, it cannot cause an irreparable injury, and consequently cannot be appealed from—*Held*: That when the motion puts at issue the truth of the allegations of the petition for injunction, it is proper that such an order should be made.

A PPEAL from the District Court of the Parish of Caddo, *Crestwell, J.*
A. B. Levisse, for plaintiff. *Landrum & Williamson*, for defendants and appellants.

LAND, J. The plaintiff sues the defendant, *Stewart*, for the sum of four hundred and twenty dollars, with interest, for the alleged balance of the price of a slave sold by him, as agent for plaintiff; and enjoins *John Walters*, a merchant of Shreveport, from paying said sum of money over to said *Stewart*, on the allegations of ownership in himself, deposit by defendant with *Walters*, the insolvency of *Stewart*, and of his fear and belief that if the money is paid to defendant, that he will convert the same to his own use, and thereby defraud him, plaintiff, of his just rights.

The defendant filed a motion to dissolve the injunction on the following grounds:

First. Because the bond is not signed by the plaintiff, or any duly authorized agent or attorney at law.

Secondly. That the affidavit is not made by the plaintiff, or any duly authorized agent or attorney-at-law.

Thirdly. Because the plaintiff does not make any averments or allegations, that entitle him to the writ of injunction, and if he does make such allegations, they are untrue.

Fourthly. That a final judgment has been rendered by your honorable court, dissolving plaintiffs injunction upon the same issues presented by the present pleadings; which last ground defendant pleads as a peremptory exception.

Defendants further aver, they have sustained seventy-five dollars general damages by the loss of the use of the money enjoined, and the trouble and vexation of this suit, and fifty dollars special damages for counsel fees. Whereupon they pray the injunction may be dissolved at plaintiff's costs, and that they have judgment against plaintiff and his security *in solido*, for the said sums of seventy-five and fifty dollars, general and special damages, &c.

The District Judge ordered this motion to stand as a part of the defendant's answer, and from this order formally signed by the Judge, the defendant, *Stewart*, has appealed.

The plaintiff's counsel has filed a motion to dismiss the appeal, on the grounds that the judgment appealed from is not a final one; and, secondly, because it will not work an irreparable injury to defendant.

The judgment is interlocutory, and could have caused no injury to defendants, and was, besides very proper in itself, because the *third ground* taken in the motion to dissolve, puts at issue the truth of all the allegations in the petition, as well as the law arising upon them, and was in itself the general issue or denial,

DENSON
v.
STEWART.

for under our system of pleading, the general denial puts at issue both the law and facts of the plaintiff's case.

It is, therefore, ordered and decreed, that the motion be sustained, and the appeal be dismissed at costs of appellant.

JAMES F. NEWTON v. JOHN KER.

When the jury find for the plaintiff "the full amount claimed," the amount must be ascertained from the allegations and prayer of the petition.

A PPEAL from the District Court of the Parish of Catahoula, *Mayo, J. Smith & Spencer*, for plaintiff. *Crawford & Hawkins*, for defendant and appellant.

LAND, J. The plaintiff, a practising physician, sues to recover the amount of his medical bill against the defendant.

On the prayer of the defendant, the cause was tried by a jury, who found the following verdict: "We, the jury, find for the plaintiff the full amount claimed." The court rendered a judgment on this verdict for the sum of \$639 75, with interest at the rate of five per cent. per annum, from the 1st day of January, A. D. 1857.

The defendant seeks a reversal of the judgment on two grounds, to-wit:

1st. Because the verdict of the jury is not sustained by the evidence.

2d. Because the judgment does not follow the verdict.

I. The evidence on which the verdict was found is general, and perhaps vague; but in cases of this kind, wherein it is impossible to procure, in a large majority of instances, specific and certain evidence of the correctness of each item of the account; and wherein the plaintiff must recover, if at all, upon testimony of a general and somewhat indefinite character, the verdict of a jury, (who had a formal knowledge of the witnesses and parties), is justly of great weight with the court, and will not be lightly disturbed. In this case, we are not satisfied that the verdict of the jury is unsustained by, or contrary to the evidence.

II. The amount claimed in the petition is the sum of \$639 75, with interest at the rate of five per cent. per annum, from the 1st of January, 1857. The verdict of the jury is for the *full amount claimed*. The judgment condemns the defendant to pay the full amount of plaintiff's demand, which includes the *interest* as well as the principal, and is, therefore, responsive to, and follows the verdict.

No greater certainty is required in a verdict than in a judgment; and when the judgment does not mention the sum adjudged, it is sufficient, if the precise amount due appear in the pleadings. *Melançon v. Duhamel* 3 N. S., p. 7; *Decker v. Bradford*, 4 M. 312.

The verdict, in this case, is made certain by the allegations and prayer of the petition.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

ANDREW & SIERAU v. HUGH KEENAN.

14	705
105	710

Prescription does not run on a merchant's account for advances made in the shape of acceptances of drafts, and disbursements for necessary supplies, insurances, freights, &c., upon each separate item of the account, but the account as a whole is prescribed in three years.

In regard to an account for goods sold, by the terms of the law, each item of the account is subject to its own prescription.

The evidence of one witness, without corroborating circumstances, is not sufficient to establish an item in account of over \$500, for amount of a draft paid by the merchant, which is alleged to be lost or mislaid.

Articles 2258 and 2259 C. C., in regard to lost instruments, do not apply to an action for reimbursement of money paid by a merchant upon an accommodation acceptance, when the draft is lost or mislaid.

APPEAL from the District Court of the Parish of Catahoula, *Mayo, J.*
Smith & Spencer, for plaintiffs. *Cuny & Hawkins*, for defendant and appellant.

BUCHANAN, J. This is a suit for balance of a factor's account-current with a planter.

The defence is, a general denial; a special denial of certain items of the account; prescription of three years; and compensation.

Plaintiffs had a verdict for the full balance by them claimed, with interest at eight per cent. from the date of the verdict. The jury also allowed defendant a portion of his claim in compensation, with eight per cent. interest. Plaintiffs entered a remittitur of one hundred and fifty dollars upon this verdict, for charges of commission and interest in their account; they also remitted three per cent. of the interest, as allowed by the verdict, thus reducing it to five per cent.

Defendant appealed, and plaintiffs answer the appeal, praying that the judgment be amended by rejecting the claims of defendant *in toto*.

The first point made by appellant in this court concerns the plea of prescription. It is contended by the counsel of defendant, that the prescription of this account, under the statute of 1852, p. 90, should run upon each item of the account separately, from the date of the item. But we do not thus construe the Act of the Legislature in question. Its first section evidently refers to accounts for goods sold. As to such accounts, it is apparent that each item, by the terms of the section, is subject to its own prescription. But this is not such an account. The charges, here, are for advances made, in the shape of acceptances of drafts, and disbursements for necessary supplies, insurances, freights, &c., upon the proceeds of crops consigned, and to be consigned, by a farmer to a merchant. This account is included in the class contained in the second section of the Act of 1852, p. 90, in relation to which the expression of the Article is, that *the account*, as a whole, is prescribed in three years; and the doctrine of *Toledano v. Gardiner*, 2 An. 779, in relation to the prescription of factors' accounts, is thus confirmed by subsequent legislative enactment.

There is a charge in plaintiffs' account, under date of 20th December, 1854, for bills payable due December 19th, 1854, of \$540 84. The answer specially denies the execution and existence of such bill or draft. The proof adduced by plaintiffs in support of this item, is insufficient. It consists in the evidence of one witness, who declares that the draft is mislaid or lost; that it was in the possession of the plaintiffs, and was signed by defendant. Being above five hundred

ANDREW
v.
KEENAN.

dollars in amount, this evidence of one witness required corroboration to give it effect. C. C. 2257.

There is another item similar in character, being for a draft of \$67, of which defendant disputes the existence, and which is also mislaid or lost; and which is proved by the same witness. The evidence, as to this draft, is sufficient. The Articles 2258 and 2259 do not apply.

This is not an action upon a lost note; but for reimbursement of money paid upon an accommodation acceptance. *Succession of Guillemain*, 2 An. 634; *Toledo v. Gardiner*, 2 An. 779.

Upon the subject of the reconventional demand of defendant, we are of opinion, that the verdict of the jury has done justice, according to the evidence. The interest upon this portion of the verdict must, however, be reduced to five per cent from judicial demand.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be amended; that plaintiffs recover of defendant eighteen hundred and sixty-nine dollars and nineteen cents, with legal interest from the 10th November, 1858, subject to a credit of two hundred and fifty dollars, with legal interest from judicial demand; that defendant pay costs of the District Court, and plaintiffs pay costs of appeal.

W. W. FORD et al. v. JACOB NEWCOMER et al.

The misnomer in the petition for administration of a succession, by calling it a vacant one, will not affect the proceedings which have been regularly conducted as in a succession not vacant, and administered with the benefit of inventory.

Although a judgment of homologation, recognizing the verity of claims set up against the succession, may not be technically, as to the heirs, *res judicata*, yet it constitutes *prima facie* proof, and imposes upon the heirs the burden of establishing fraud and deception in obtaining it.

A PPEAL from the District Court of the Parish of Franklin, *Richardson, J. Morrison & Purvis*, for plaintiffs. *M. A. Jones and Smith & Spencer*, for defendants.

BUCHANAN, J. Certain children and heirs of *Mrs. Penelope Ford*, sue (in 1854,) to set aside a sale of slaves belonging to their mother's succession, made by order of court, to pay debts, in 1848, by their brother and co-heir, now deceased, the administrator or curator of *Penelope Ford's* estate.

The petition also prays for a partition of *Penelope Ford's* estate, and for general relief.

The grounds of nullity alleged in the petition are :

1st. That the succession of *Mrs. Ford* had been administered as a vacant estate, when in fact it was not vacant, but a succession of which all the heirs were known, and which none of them had renounced.

2d. That the pretended debts, to pay which the property of *Mrs. Ford* was sold, were not due by said estate, but were fictitious, and the sale a fraudulent contrivance of the curator, *George W. Ford*, to appropriate to himself the estate, and defraud his co-heirs.

There are two defendants : one, the administrator of *George W. Ford's* estate

and the other, the tutor of *G. W. Ford's* minor child. They both plead the general issue, *res judicata*, and prescription.

Ford
v.
Newcomer.

The tutor moreover pleads, that this suit is prosecuted, in reality, for the interest of the other defendant, the administrator, who is alleged to have purchased the shares of plaintiffs in the inheritance of *Penelope Ford*; to establish which fact, interrogatories were propounded by the former to the latter.

The District Judge sustained the plea of *res judicata*, as to the verity of the alleged debts of the succession of *Penelope Ford*, upon the authority of Article 1057 of the Civil Code, and the cases reported in 6th La. 225, and 3d An. 383.

The evidence shows, that a statement of the debts of the estate of *Penelope Ford* was filed by the administrator, *George W. Ford*, on the 22d August, 1846, and that the same was homologated by two judgments of court of the 12th December, 1846, and the 10th September, 1847.

This appears to have been in conformity to the Articles 1056, 1057 and 1058 of the Code.

But it is objected by counsel of plaintiffs, that the judgments of homologation and orders of sale were null, because not preceded by a notice to the counsel of absent heirs, as required by Article 1157 of the Code.

This Article applies to the case of a vacant succession; and although the succession of *Mrs. Penelope Ford* was styled vacant in the petition of *G. W. Ford* for letters, yet, this was evidently a misnomer, not intended, nor having the effect, to deceive any person. For in the same petition, it is declared, that the deceased was the mother of petitioner, and that he is one of her heirs. There was, therefore, no advertisement during ten days, of the petitioner's application, neither was there any appointment of an attorney to represent absent heirs, as would have been the case, had this been really a vacant succession, according to the definition contained in Article 1088 of the Civil Code. But the Judge proceeded at once to appoint the petitioner to the administration, as a beneficiary heir of age, according to the Articles 1034 and following.

The plaintiffs were at the time, and have been since, residents of the parish where those proceedings took place.

We are, therefore, of opinion, that neither of the grounds of nullity alleged by plaintiffs should prevail. For, as to the first, the misnomer in the petition for administration, of calling the succession a vacant one, will not avoid proceedings which have been regularly conducted as in a succession not vacant, administered with benefit of inventory; and as to the second, although the judgments of homologation, recognizing the verity of the claims set up against the succession, may not be technically, as to these plaintiffs, *res judicata*, which excludes all proof to the contrary, yet they constitute, especially at this distance of time, *prima facie* proof, which imposes upon plaintiffs the burden of establishing the fraud and deception by them alleged. But they have offered no proof whatever upon this subject.

Under the prayer for general relief, the District Judge has allowed plaintiffs five hundred and sixty-eight dollars, being for one year and five months hire of slaves belonging to the succession of *Penelope Ford*, while they remained in *George W. Ford's* possession previous to the judicial sale.

The defendants and appellees have filed answer to the appeal, praying an amendment of this part of the judgment. And we think they are entitled to relief in this respect. The hire allowed is the whole value, as proved, of the services of the slaves. But *Mrs. Penelope Ford* had six children, of whom *G. W.*

FORD
v.
NEWCOMER

Ford was one. He, therefore, represented in his own right, one-sixth of the succession; and his administrator has acquired the interest of two others, *William* and *Robert Ford*, as proved by answers to interrogatories, given in evidence against plaintiffs, without objection. The interest of these two heirs, who are two of the plaintiffs in the present suit, was thus acquired by *George Ford's* administrator for account of the estate by him administered, as is alleged by him.

It is, therefore, adjudged and decreed, that the judgment of the District Court be amended, and that plaintiffs recover of defendants, in their capacity of tutor and administrator, the sum of two hundred and eighty-four dollars and thirty-seven cents, with interest from judicial demand, and costs of the court below; those of appeal to be paid by plaintiffs.

CRAWFORD v. ALEXANDER et al.

The appellant will not be allowed to amend the appeal bond in the Supreme Court.

He is not entitled to relief even when it is shown that the omissions in the bond were attributable to the Clerk of the court who filled up the blanks in the bond; in doing this, the Clerk will be regarded as not acting in his official capacity, but as the mere agent or scribe of the appellant.

Where the judgment appealed from was rendered against the defendant, both personally and in a representative character, and the appeal bond is given in the representative capacity exclusively, the appeal will be dismissed.

A PPEAL from the District Court of the Parish of Bossier, *Creswell, J.*
Terrell & Hodge, for plaintiff. *Crain & Nutt* and *A. B. Levisse*, for defendant and appellant.

On motion of appellant to amend:

BUCHANAN, J. The counsel of appellant has moved this court to allow him to alter the record, by inserting another obligor in the appeal bonds.

The order for appeal is in the following words:

"*Crawford and Husband v. M. D. C. Cain et al.*, No. 5165—*M. D. C. Cain v. Crawford et al.*, No. 5300—Cumulated with the above.

"In District Court, parish of Caddo, comes *M. D. C. Alexander*, in her own right, and as administratrix and executrix, &c., and prays the court for an order granting a suspensive and devolutive appeal in these two cases, returnable to the next term of the Supreme Court, to be holden at Monroe, on the 2d Monday of July next. She prays the court to fix the bond required for devolutive appeal, and that for the suspensive, it be fixed according to law."

Two appeal bonds follow this entry in the transcript; one purporting to be furnished in suit No. 5165, and the other in suit No. 5300.

They both commence as follows:

"Know all men by these presents, that we, *M. D. C. Alexander*, executrix, as principal, and *W. M. Fulson*, as security, are held and firmly bound," &c.

This application cannot be entertained. It is very clear that the copy of these bonds in the transcript, here in Monroe, cannot be changed, while the original, on file in the Clerk's office of the District Court in Caddo, are unchanged. It is equally clear, that the liability of the surety for appeal is to be determined by the bond which he has signed, and cannot be extended and increased without his

consent. It may be, that he was willing to become bound as surety for an executrix, with a recourse over against the succession administered by the executrix ; but would be unwilling to bind himself for the same person in her individual capacity.

Again, supposing the surety to be willing that the proposed alteration should be made, it cannot be done without the consent of the appellee ; and we have the strongest presumption against such consent, in the fact that a motion to dismiss the appeal, for the want of proper parties, among other grounds, was filed before this application was made. *Percy v. Millaudon*, 6 La. 586.

It is alleged by the mover, and the allegation is supported by affidavit, that the omission of *Mrs. Alexander*, in her individual capacity, as obligor in the appeal bonds, is attributable to the Clerk of the District Court, to whom the filling up of the blanks in the printed bonds, was entrusted by appellant's counsel.

In this, the Clerk must be regarded as not acting in his official capacity, but as the mere agent or scribe of the appellant. 2 An. 452 ; ib. 902.

Motion refused.

On the merits :

LAND, J. This suit was commenced in July, 1851, by the wife of *J. B. Crawford*, against the defendant, in her *individual* capacity, for the recovery of certain slaves claimed by the plaintiff, *Catherine Crawford*, in her own separate right. Afterwards, in December, 1851, the defendant, *M. D. C. Alexander*, as *administratrix* of the successions of *James H. Cain* and of *John R. Cain*, instituted a suit of attachment against *J. B. Crawford*, plaintiff's husband, on certain promissory notes made by him, and caused the slaves claimed by plaintiff, to be seized as the husband's property.

These suits were *consolidated* and *tried* together, and judgment rendered against defendant, *Mrs. Alexander*, in both cases. She has appealed, and the plaintiff moves to dismiss the appeal on the grounds, among others, that *she*, as *plaintiff* in the *petitory* action against *Mrs. Alexander*, in her *personal* capacity, can have no right of action on the appeal bond, for the reason that the bond is given by defendant *exclusively* in her *representative* capacity, and is only applicable to the attachment suit in which her husband was sued by defendant, as the *administratrix* of the successions of *J. H.* and *J. R. Cain*.

Can the plaintiff sue on this bond ? She has no judgment against the successions of *Cain*, nor was she a party to the suit in which the judgment on the notes was rendered against the successions. There is no priority of judgment between plaintiff and defendant as the *administratrix* of these successions, and there cannot be, therefore, any priority of contract created by the appeal bond signed by her as *administratrix*, and consequently no right of action in favor of plaintiff. If the plaintiff has a right of action on the appeal bond, the consequence of a judgment on it against defendant, as *administratrix*, would be to make the successions of *Cain* liable for the *individual* obligations of defendant, when the plaintiff had no claim, nor pretended to have any against them.

It cannot be said that the addition "*administratrix*" to her name, is a mere *description of the person*, and is, therefore, surplusage, for the reason that there is a judgment in this case against the successions of *Cain*, in the attachment suit consolidated with this action, from which the defendant, as *administratrix*, has *appealed*.

The bond is made payable to *J. B. Crawford*, the defendant in the attachment suit, and to plaintiff in this the *petitory* action.

CRAWFORD
v.
ALEXANDER.

It has already been decided, that the error or omission in the bond cannot be cured.

It is, therefore, ordered, adjudged and decreed, that the motion be sustained, and the appeal dismissed, at costs of appellant.

J. M. TILLMAN v. CLEMENT MOSELY.

14 710
106 712

A party is not concluded by his declaration of residence in an act of conveyance, and evidence is admissible to contradict the recital, when the domicile is not one of the causes of the contract.

It is necessary to give validity to a deed of gift made in another State, but designed to have effect in Louisiana, that it should be clothed with the formalities required by our law, and its effect will also be governed by the laws of Louisiana.

A donation under our laws is not valid, when the usufruct of the property donated is reserved to the donor.

APPEAL from the District Court of the Parish of Claiborne, *Eagan, J.*
W. C. Copes, for plaintiff and appellant. *J. Young*, for defendant.

BUCHANAN, J. The first question to be decided in this case is, whether the District Court erred in admitting testimony to prove that defendant was a resident of Louisiana at the date of the conveyance to plaintiff, which is the basis of this action; the said deed of conveyance reciting that defendant was "of said county and State above named," Perry county, State of Alabama.

The evidence was properly admissible under the doctrine in *Davis v. Binion*, 5 An. 248. The recital in question, in the deed of conveyance, was not one of the causes of the contract.

The present case differs from those of *Holloman v. Holloman*, 12 An. 607, and *McCall v. White*, 10 An. 577, in this, that the contract between the present parties, although made in Alabama, was intended to have effect in Louisiana. Its effect must, therefore, be governed by the laws of Louisiana. Civil Code, Article 10.

It is a donation of negroes and their increase by defendant to plaintiff, and is revoked, up to the disposable portion, by the subsequent birth of three legitimate children to the donor. C. C. 1556.

The evidence shows, that the slaves in question constitute the greater part of the estate of the defendant.

Neither is this donation clothed with the formalities required by Articles 1523 and 1529 of the Civil Code, to give it validity, and to make it binding upon the donor, in Louisiana.

Lastly, it is bad, under the Article 1520 of the Code, because the usufruct of the property donated, is reserved to the donor. 12 An. 721; 5 An. 433; 4 An. 36.

Judgment affirmed, with costs.

R. C. CUMMINGS & Co. v. HENRY HARSABRAUCH.

Where the knowledge of the failure of the consideration of a note is brought home to the agent of the party to whom the note is transferred in settlement of a debt due the principal by the payee, at the time of the transfer, it will be considered notice to the principal.

A PPEAL from the District Court of the Parish of Caddo, *Creswell, J.*
Landrum & Williamson, for plaintiffs and appellants. *Wells & Winans*, for defendant.

BUCHANAN, J. Plaintiffs sue as endorsers, upon a promissory note made by defendant, payable to the order of *W. A. Lacy*.

The defence is, that the consideration of the note has failed : that it was given for the price of a slave woman, who is affected with a redhibitory malady ; and that plaintiffs, when they became holders of the note, were notified of the want of consideration of the same.

The evidence is, that the note in question was transferred by endorsement and delivery to an agent of plaintiffs, for their account, in settlement of a debt due plaintiffs by the payee of the note ; that the agent was informed by payee, at the time of the transfer of the note, that its consideration was the sale of a slave, and that the agent was fully cognizant of the fact of the slave being unsound.

These facts are established by the testimony of the agent himself. He declares, that he enquired of the payee of the note, in the conversation which took place at the time of the transfer, whether he had sold *Martha* as a sound negro ; and he answered that he had. The witness thereupon expressed some astonishment, because he did not regard her as sound. And from other parts of this witness's testimony it is seen that he had peculiar opportunities of knowing the condition of the slave in question.

We are of opinion, that the notice thus brought home to the agent, of the failure of consideration of the note, was notice to the principals, plaintiffs herein. Story on Agency, 140, 451 ; *Kemp v. Rowley*, 2 An. 319. See also *Lupin v. Clifton*, 17 La. 158, and *Maurin v. Chambers*, 16 La. 210.

Judgment affirmed, with costs.

LAND, J., recused himself in this case, having been of counsel.

H. McLEAN v. J. FULFORD.

Among the apparent defects which do not, under the Civil Code, give rise to the action of redhibition, must be classed the mental weakness of a slave approaching imbecility.

A PPEAL from the District Court of the Parish of Jackson, *Richardson, J.*
Thompson & Defrance, for plaintiff. *Reves, McGuire & Ray*, for defendant.

BUCHANAN, J. Plaintiff sold defendant a slave, warranted sound in mind and body, in March, 1857, for eight hundred dollars, in two notes ; one payable thirty days after the sale, and the other on the 1st of January, 1858, of four hundred

McLEAN
v.
FULFORD.

dollars each. The first note was paid at maturity. This suit was instituted upon the other note in September, 1858.

Defendant pleads, that the consideration of the note has failed; that the slave is so imbecile and unsound of mind, as to be entirely worthless; which fact was concealed from defendant by plaintiff.

The evidence of the redhibitory defect is vague. One of the two witnesses called by defendant on this point, is a physician, who attended the slave for dysentery, in October, 1857. He says, "I came to the conclusion, that if she was not imbecile, she was not far removed from it." The other witness, a subscribing witness to the bill of sale, says that he has known the slave since 1851 or 1852, and "did not think she was sound in body or mind, so far as I could judge."

From the evidence given by these witnesses, as well as by a witness called by plaintiff, we think the mental weakness spoken of by them is to be classed among those apparent defects which, according to Art. 2297 of the Civil Code, do not give rise to the action of redhibition. The evidence negatives the allegation of concealment of the mental condition of the slave by plaintiff. She appears to have been known to the parties previous to the sale, and was probably raised in the neighborhood.

As the defendant paid the first note without objection, the defence has the appearance of an afterthought.

Judgment affirmed, with costs.

ROBSON & ALLEN v. MARTHA SHELTON & HUSBAND.

Where a suit was instituted on the obligation of a married woman, and after the joinder of issue a peremptory exception was filed to the petition, on the ground that it was not alleged that the defendant was separate in property from her husband, or that the obligation enured to her separate benefit—*Held*: That the exception was properly sustained.

APPEAL from the District Court of the Parish of Morehouse, *Richardson, J. McGuire & Ray*, for plaintiffs and appellants. *S. G. Parsons*, for defendants.

BUCHANAN, J. This is a suit upon a draft drawn by the defendant, a married woman, upon a third party, in favor of plaintiffs, which was protested for non-acceptance.

Defendant, after answering to the merits, filed the peremptory exception, that plaintiffs had not alleged in their petition, that the defendant is separate in property from her husband, or that the consideration of the draft sued upon enured to her separate benefit.

This exception was properly sustained by the District Court. The petition, in a suit of this kind, must state a case of legal obligation on the wife to pay the debt claimed. *Dubose v. Hall*, 7 An. 568; C. P. 118; C. C. 2364, 2409.

Judgment affirmed, with costs.

C. H. MORRISON v. H. F. WIMBERLY.

14	713
47	213
14	713
115	836

After the purchaser has been put *in mora* for the non-payment of the price, his offer to execute his engagement comes too late.

But where there is no danger that the seller may lose the price and the thing itself, in an action of rescission, the Judge may grant to the buyer a longer or shorter time, according to circumstances, provided such time exceed not six months.

APPEAL from the District Court of the Parish of Ouachita, *Richardson, J. Morrison & Purvis*, for plaintiff and appellant. *J. T. Ludeling*, for defendant.

VOORHIES, J. On the 10th day of October, A. D. 1857, *C. H. Morrison* conveyed to the defendant, *H. F. Wimberly*, a tract of land for the sum of seven hundred and twenty dollars, payable in two equal annual installments falling due on the first day of March, 1858 and 1859. Two notes were accordingly furnished by the vendee.

Suit was instituted by the vendor on the 11th day of October, 1858, to cancel this contract of sale, on the ground alleged, that the vendee, notwithstanding amicable demand, had failed to comply with his obligation to pay the first note, which had matured several months past. This party filed an exception to the plaintiff's demand, on the ground that the latter had not placed him *in mora*, which exception was sustained by the District Court, dismissing the plaintiff's demand.

No appeal was taken from this decree; but the plaintiff proceeded to put the defendant in default, and brought the present action, which is substantially the same as the previous action.

After the institution of this suit, the defendant offered to the plaintiff to make him a tender of payment in gold pieces; but the latter declined receiving the money.

Giving full effect to the tender made by the defendant, the case is with the plaintiff. "After the debtor has been put *in mora*, his offer to execute his engagement comes too late, and cannot be listened to. 6 Toullier, No. 255." *Moreau v. Chauvin et al.*, 8 R. 161.

Toullier says: "S'il ne paye pas à l'instant, la résolution est irrévocablement acquise au vendeur, sans que l'acquéreur puisse purger la demeure par des offres tardives postérieures au demandement. La sommation a le même effet que le protêt, qui n'est pas autre chose que la sommation destinée à constater le défaut de paiement d'un billet." C. C. 1907; *Stephens v. Chamberlin*, 5 An. 656. But there is provision made by the Civil Code on the subject of the dissolution of sales of immovables, to the effect that this remedy is summarily granted, "when there is danger that the seller may lose the price and the thing itself. If that danger does not exist, the Judge may grant to the buyer a longer or shorter time, according to circumstances, provided such term exceed not six months." C. C. 2540. The evidence justified the District Judge to exercise his discretion in allowing the defendant time to pay the price of the sale, as there was no danger of the vendor losing either the property sold or the price itself, as exhibited by the tender made by the defendant to the plaintiff on two occasions since the institution of the present action.

MORRISON
v.
WINDRELL.

We are not satisfied that these tenders were made in such a manner as to throw the costs upon the plaintiff. Besides, the extension of time prayed for by the vendee would seem to preclude him from being relieved in that respect.

It is proper to state, that the delay granted by the District Judge has already expired. As the defendant appears before this court as appellee, further time should be granted to him to pay the amount due to the plaintiff.

It is, therefore, ordered and decreed, that the judgment of the District Court be amended so as to read as follows, to-wit: It is decreed, that the defendant deposit with the Clerk of the District Court, on or before the 20th day of the month of August next, the amount of capital and interest due on the notes given by him to the plaintiff for the purchase of the property in controversy; and that, in case of his failure so to do, that the plaintiff do have judgment for the cancellation of the said contract of sale.

It is further decreed, that the defendant pay the costs of both courts.

SAME CASE—ON A RE-HEARING.

VOORHIES, J. The appellee was entitled to costs of appeal; it is, therefore, ordered, that our former judgment be amended in that respect, and that in all others, the same be affirmed.

JOSEPH LALLANDE v. LAURA JONES & HUSBAND.

An appeal from a judgment rendered on a written consent signed by the attorneys of the parties to the suit, will be dismissed when it is not pretended that the action of the attorneys was fraudulent, or that they were not employed in the suit.

APPEAL from the District Court of the Parish of Catahoula, Mayo, J. McGuire & Ray, for plaintiff. J. T. Ludeling and Cuny & Hawkins, for defendants and appellants.

COLE, J. Plaintiff sues defendant for \$9,914 17, which is alleged to be due to him as a balance on his account with petitioner, as his factor and commission merchant, from the 1st of December, 1856, to the 23d of March, 1857.

There is an account and two acts of mortgage annexed to the petition.

The petition alleges that the amount due him, as aforesaid, is secured by the said acts of mortgage.

The defendants, *Laura Jones*, and her husband, *Charles Jones*, were regularly cited on the 6th of May, 1857.

A judgment by default was afterwards entered.

On the 20th of January, 1858, the defendant, *Mrs. Jones*, assisted by her husband, filed, through their attorneys, *Smith & Spencer*, a motion for the production by plaintiff of certain papers, documents, bills, receipts, drafts, account-sales of cotton sold by plaintiff for defendant, and all the letters comprising the correspondence between the plaintiff and defendants, relating to their business dealings during the period embraced in the account sued on.

These were produced and filed by plaintiff, and are comprised of drafts, bills,

notes and receipts; also fifty-nine letters from *Jones* to *Lallande*, and ten checks, with plaintiff's answer to the order.

LALLANDE
v.
JONES.

Plaintiff also filed an account-current and bills for supplies.

The affidavit of both of the defendants was appended to the said written motion of *Smith & Spencer*, which was also signed by them.

Afterwards, on the 7th of January, 1858, *Smith & Spencer* filed an elaborate answer for *Mrs. Laura Jones*, in which they allege usury, and errors in the account sued on, and set up a reconventional demand, and file certain interrogatories to be answered under oath by the plaintiff.

To this answer is appended the affidavit of *Laura Jones* and her husband to the materiality of the interrogatories.

This answer is signed by *Smith & Spencer*. The plaintiff responded to these interrogatories.

About the 18th of January, 1858, an amended answer signed by *Smith & Spencer*, as attorneys, was filed, containing interrogatories. The affidavit of *Laura Jones* and her husband to the materiality of the interrogatories was appended to the answer. These interrogatories were answered by plaintiff.

On the 5th of May, 1858, an affidavit for a continuance was made by *Charles Jones*, and the continuance was granted.

On the 8th of May, 1859, the following agreement was entered into :

" In this case, the parties have agreed to the following consent judgment. That plaintiff, *Joseph Lallande*, is to have judgment against the defendant, *Laura Jones*, for the sum of nine thousand five hundred and fifty-five dollars (\$9,555), with eight per cent. per annum interest thereon, from the 23d March, 1857, and all costs of this suit, with a recognition of plaintiff's mortgage on the property described in plaintiff's petition, and the act of mortgage thereto annexed, and that execution be stayed on this judgment until the 1st day of January, 1859.

" This agreement is signed by the undersigned attorneys of the parties to the above entitled suit.

(Signed)

" MCGUIRE & RAY, Att'ys for Plaintiff,
" SMITH & SPENCER, for Defendants."

In the minutes of the court in the record, the following entry appears :

" In this case, a judgment was rendered by consent. For particulars, see decree."

Afterwards, a judgment was rendered, in which it is declared as follows : " By reason of the law and the evidence in this case being in favor of the plaintiff, and by further reason of the within consent of the parties, filed in this case, it is ordered," &c. " It is further ordered, that execution be stayed on this judgment until the 1st day of January, A. D. 1859."

This judgment was signed the 8th of May, 1858.

On the 19th of January, 1859, a petition of appeal, signed by *R. H. Cuny*, attorney, was filed by *Laura Jones*, assisted by her husband, in which she represents that the judgment was erroneous; that it was rendered without the introduction of any evidence whatever to sustain the same; that it was rendered by the consent of the attorneys in the case, and without her wish or consent; that she had no knowledge whatever of the action of the said attorneys for some weeks after the rendition of said judgment; that the acts of the said *Smith & Spencer*, in consenting to the rendition of the judgment, were unauthorized by her; and that she had no knowledge of the rendition of said judgment until the fifteen days allowed her by law to take a suspensive appeal, had elapsed. That she has a le-

LALLANDE
v.
JOHNS.

gal defence against the demand of the plaintiff, which would have been sustained if her attorneys had properly defended her suit.

We are of opinion, that this appeal must be dismissed.

Article 567 of the Code of Practice declares, that the party against whom judgment has been rendered, cannot appeal, if such judgment have been confessed by him, or if he have acquiesced to the same, by executing it voluntarily.

Appellant does not pretend that the action of her attorneys was fraudulent, or that they were not employed by her in the suit.

The whole record shows that they exerted themselves with skill and vigor to defend her suit, and it seems probable that the stay of execution was one of the reasons why the judgment was confessed.

Appellant avers in her petition, that she became cognizant of the judgment some weeks after it was rendered; yet, she does not appeal until after the stay of execution had expired, and thus permits one term of the Supreme Court at Monroe to pass.

We are of opinion that, under these circumstances, and under the facts of this record, before stated, that she must be considered to have ratified the action of her attorneys, and is now precluded from appealing.

It is, therefore, ordered, adjudged and decreed, that this appeal be dismissed, at the costs of appellants.

MCDONOLD & COON v. JAMES VAUGHAN.

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Before the institution of an action for the rescission of a sale, the party seeking relief must offer to place his adversary in the same situation that he was before the act of sale was passed.

The plaintiff, in an action for rescission, must establish the loss of the whole or part of the thing sold; the loss must be certain—it will not suffice if it appears probable.

The loss will be considered as certain, if a perfect outstanding title in a third person is shown to exist. A statement of the Commissioner of the General Land Office in a letter, to the effect that he has canceled a certificate, does not amount to an eviction which should rescind a sale between third persons.

When, in an action for the rescission of a sale, it appears that the plaintiff has not suffered any actual disturbance, but it is shown that he is in danger of being disturbed in his possession—*Held*: That under the prayer for general relief, the court may order the defendant to give security as provided in such cases, by Art. 2536 of the Civil Code.

A PPEAL from the District Court of the Parish of Ouachita, *Mayo, J. Morrison & Purvis*, for plaintiffs. *J. T. Ludeling*, for defendant and appellant.

Opinion of the District Judge.—"The plaintiffs sue to rescind a sale of a tract of land made to them by the defendant, *Vaughan*, on the 28th of April, 1857, on the ground that he had no title to the greater and most valuable part of the tract.

"The sale was made for fifteen thousand dollars, for which the vendors executed their notes to the order of *Vaughan*, but as they had not been delivered at the time this suit was instituted, they were sequestered. A curator *ad hoc* has been appointed to represent the defendant, who resides in Camden, Arkansas. The defendant, however, has appeared in court by his attorneys-at-law, and first excepts and says, the defendant has never been put *in mora*, that no allegation

to that effect is contained in the petition, and that plaintiffs have never offered to return the land purchased.

McDONALD
v.
VAUGHAN.

"The principal grounds of defence set up by defendant in his answer, are that the present suit was instituted with the fraudulent intent to delay the collection of the notes given for the price of the land, while they enjoyed the fruits and revenues of the property sold; that the plaintiffs 'well knew the condition of the lands and titles at the time they bought; that they knew them better than he did, who is an absentee,' that the V., S. & T. R. R. Company has obligated itself to make to him a title for such portions of the lands as it may own, whenever it shall have been ascertained that said company are the owners thereof.

"The defendant further sets forth, that so soon as he heard of the present suit, (which was the first intimation he had of the plaintiffs' intentions not to carry out their contract,) he offered to give the plaintiffs any security they might require for the titles, and that he afterwards, through his agents and attorneys, offered to cancel the sale or give security; that he also informed them of the fact above stated, that the V., S. & T. R. R. Company had obligated itself to make him a title to the lands aforesaid, should it ever become the owner thereof. He denies that the plaintiffs have been disturbed in their possession, or that there is any just reason to fear eviction.

"The law is well settled, not only by the textual provisions of the Civil Code, but by repeated decisions of the Supreme Court, that in all actions of rescission, the party seeking relief must first offer to restore his adversary to the situation he was in before the contract. See C. C. 1906; 3 Rob. 400; 9 Rob. 52, 184 and 510; 3 An. 208; 6 N. S. 229.

"No offer to return the land has been alleged or proved. It is, however, contended, that for the reason that the defendant was an absentee, no such allegation or proof was necessary. The law, in terms, has made no distinction between a party present in the State, and one absent from it. It is true, the courts have held, that when an offer to return a thing appeared from the facts disclosed, to have been impossible, it might be dispensed with, for neither reason, justice or the law requires an impossibility; but so far from its being impossible in the present case to put the party in default, it could have been done without great difficulty, for the plaintiffs allege that he resides in Camden, Arkansas, a place easy of access and very near the northern limits of our State.

"It is contended, however, on the part of the counsel for the plaintiffs, that this is not, strictly speaking, an action to be governed by the rules applicable to actions of rescissions. That the defendant had no title to a large portion of the land sold, the title to which was in the United States or in the V., S. & T. R. R. Company, and that the sale to that extent was the sale of the property of another, and under the Art. 2427 of the Civil Code, was absolutely null and void. If this were so, still the plaintiffs claim and demand, that the entire sale be canceled, it is, therefore, in terms and effect, an action of rescission, and must be governed by the rules applicable to such actions. But if it were admitted, that no demand was necessary, let us see if, from the evidence, the plaintiffs could legally demand a rescission of the sale.

"The eviction which gives rise to the action of rescission is, 'the loss suffered by the buyer of the totality of the thing sold, or of a part thereof, occasioned by the right or claims of a third person.' C. C. 2476.

"No active disturbance is shown to have occasioned in this case, nor was it necessary; it suffices for the plaintiffs to establish the loss of the whole or a part

McDONALD
v.
VAUGHAN.

of the thing sold—this loss must, however, be certain, it does not suffice that it appears probable. The loss would be certain, if a perfect outstanding title existed. Has the plaintiffs shown that such outstanding title does exist?

"The plaintiffs have failed to establish any well grounded defence of title, with the exception of a part of the tract falling within the limits of the V., S. & T. R. R. Company. It appears by the letter of the Commissioner of the General Land Office, bearing date April 22d, 1857, that the internal improvement warrant, No. 5464, calling for lots Nos. 2, 3 and 4, S. E. quarter of N. W. quarter, S. W. quarter of N. E. quarter, W. half of S. E. quarter, and N. E. quarter of S. W. quarter of section 31, township 16, N. of range 4 East, containing 314 95-100 acres, falling within the railroad reserve and Maison Rouge claim, and being part of the land sold by the defendant, *Vaughan*, to the plaintiffs, was cancelled and returned to the local office at Monroe, to be delivered to the owners thereof.

"In the case of *Barton's Executrix v. Hemphkin*, 19 La. 314, the court remark, in a case somewhat similar to the present, 'we do not consider the mere statement of the Commissioner of the General Land Office, that he has cancelled a certificate, an eviction which should rescind a sale between third persons. The United States has not disturbed the plaintiffs in the possession of the land; the purchase money has not yet been refunded, and the act by no means complete. It may be there will be no disturbance, and, it is possible, that Congress, upon a representation of the facts, and proof of the good faith of the parties, would pass an act affirming the sale.'

"It seems to be considered, that should the action of the Commissioner be confirmed by the Secretary of the Interior, these lands would become the property of the railroad company. That company, as shown by the evidence, have passed a resolution to convey and deliver the lands to *James Vaughan*, at the price of two dollars and fifty cents per acre, so soon as the company may be in a condition to dispose of them and make title.

"There is, therefore, a reasonable hope and expectation that the plaintiffs' title will eventually be perfected; but of this there is no absolute certainty. The railroad company may fail to comply with the conditions of the grant and, in that event, it would be out of the power of the company to make a title.

"It is true, 'it is not necessary that a party should be actually dispossessed to constitute eviction. It may take place while he continues to hold the property, if under a different title from that transferred to him by his vendor, as when he inherits it, or acquires it by purchase from the true owner.' 1 R. 362; 11 R. 397. Or if a perfect title exists in some third person, whereby it is rendered legally certain that his vendor had no title. The present plaintiffs have not shown themselves to be in either of these positions, or that they have suffered any actual disturbances; they are not, therefore, in a position to claim a rescission of the sale.

"The plaintiffs have clearly mistaken their remedy. They should have proceeded under Article 2535 of the Civil Code, which declares: 'If the buyer is disturbed in his possession, or has just reason to fear that he should be disturbed, by the action of mortgage or any other claim, he may suspend the payment of the price until the seller has restored him to quiet possession, unless the seller prefers to give security.

"From the evidence, it is clear that the plaintiffs are in danger of being disturbed in their possession. The notes executed for the price are negotiable in form. The defendant is an absentee, and there is danger that if they are delivered

to the vendor, they will pass into the hands of third persons, who may enforce them, and leave the purchasers without a remedy.

"It is manifest, that should the present suit be dismissed, the plaintiffs would at once (to protect their rights) be forced to resort to an action to compel the vendor to give security against eviction.

"This suit has already been taken to the Supreme Court, and it seems the imperative duty of this court to terminate the controversy, by the decision now rendered, if legally possible to do so.

"The petition concludes with a prayer for general relief, and the question is presented, whether this court, under that prayer, can grant a remedy not asked for in the pleadings, and compel the vendor to furnish security before the notes executed for the price, are delivered to him."

"In the case of *Smith v. Corcoran et als.*, 7 La. 50, the plaintiffs instituted a petitory action to recover a tract of land of four hundred arpents. The defendant, who had purchased a larger tract, including that sued for, called his vendor in warranty. The plaintiff showed a complete title to the four hundred arpents sued for; the defendant, under the pleadings, had a right to recover against his vendor the part of the price in the proportion that the four hundred arpents bore to the whole tract of six hundred and forty arpents. The court, in that case, remark: 'This has seemed to the court a proper case for the application of that provision of the Code which authorizes the buyer to demand the rescission of the contract, when the part evicted is so considerable, that it is not to be presumed he would have bought without the part evicted'; and remark the only difficulty to us was a doubt whether the proceedings would justify the judgment. The petition in that case concluded with the most general prayer for relief, and under that prayer, the court remark, 'we think ourselves authorized to render such judgment as would be rendered in a new suit,' and to avoid a circuitry of actions, they accordingly set aside the entire sale as between the defendant and warrantor.

"In the case of *Carson, Administrator, v. Dwight et al.*, 5 Rob. 484, the plaintiff sued for the balance due on the price of a slave. It was set up in defence, that the slave was entitled to her freedom, for which a suit was then pending. The court remark, it is clear this question cannot be enquired into collaterally in this suit, and as the case stands, it cannot be used as a defence against the payment of the price, nor invoked as a ground of nullity against the sale; 'all that the defendants may perhaps require of the plaintiffs is, that he should give the security for the title transferred, and for the reimbursement of the amount paid in case of eviction. This (the court remark) does not appear to be sought at our hands; the answer contains no prayer to that effect; it does not even pray for general relief.' but we are disposed, however, for the furtherance of justice, to relieve the defendants against the danger of eviction, though they have not prayed for it. The court accordingly ordered the bond to be given.

"From these discussions, it seems clear that in a case like the present, when justice and equity so clearly demand it, that the court may under the prayer for general relief, require the defendants to give bond and security against eviction, before the delivery of the notes executed for the price of the land.

"It is, therefore, ordered, adjudged and decreed, that the demand of plaintiffs, so far as relates to their claim for a rescission of the sale, be rejected. It is, however, further ordered and decreed, that the land falling within the railroad reservation, to wit, lots 2, 3 and 4, S. E. quarter of N. W. quarter, S. W. quarter of

McDONALD
v.
VAUGHAN.

McDONALD
v.
VAUGHAN.

of N. E. quarter, W. half of S. E. quarter, and N. E. quarter of S. W. quarter S. 3, township 16, range 4 E., containing 314-95-100 acres, be appraised by two sworn appraisers, to be selected under the supervision of the parish Recorder, or in case of his absence or failure to act, then the Sheriff to act in his stead; the parties plaintiffs to select one of the appraisers, and the defendant to select the other; and in case of disagreement, the two to choose an umpire, whose decision for the object designed is to be final; and in case either party fails to select, then the officer is to make the selection, and that the defendant, *James Vaughan*, give bond in favor of the plaintiffs, for the amount of such appraisement, with one or more securities, possessing the qualifications required by Art. 3011 of the Civil Code, conditioned, so as to secure the said plaintiffs against any disturbance or eviction of the aforesaid land, as described within the railroad reservation; and that on the execution of such bond, the notes for the price of the land sequestered and enjoined in the hands of the Recorder, be given up to the defendant, *James Vaughan*. It is further ordered, that defendant pay costs."

VOORHIES, J. For the reasons given by the District Judge, and which we adopt as our own, it is, therefore, ordered and decreed, that the judgment of the District Court be affirmed, with costs.

STATE OF LOUISIANA v. ROBERT FULLER.

The Act of 1819, making it a crime to harbor and conceal a runaway slave, is not repealed by the repealing clause of the Act of 1855, relative to crimes and offences.

APPEAL from the District Court of the Parish of Union, *Richardson, J.*
F. P. Stubbs, District Attorney, for State. *McGuire & Ray*, for defendant and appellant.

VOORHIES, J. The appellants ask the reversal of the judgment of forfeiture of the bond signed by them, as sureties of *Robert Fuller*, on the ground that there is no offence charged in the indictment.

The prisoner is charged with the offence of "unlawfully and feloniously harboring and concealing a negro man slave, named *Nelson*, then and there being the property of *John B. Benford*, the said negro man slave then and there being a runaway slave, and he, the said *Robert Fuller*, then and there knowing the said negro man slave, *Nelson*, to be a runaway slave, as aforesaid, to the great damage of him, the said *John B. Benford*," &c.

The statute punishing the offence charged in the foregoing count of the indictment is not repealed by the Act of 1855, relative to crimes and offences. See *State v. Marion Fuller*, ante, p. 667; Acts 1819, p. 64.

Judgment affirmed.

ELIZABETH WILLIAMS v. A. W. BRIDGE et al.

Where the questions involved in a suit regard the relative situation of the lands of plaintiff and defendant, and the natural drainage of the soil, these being matters peculiarly within the cognizance of a jury of the vicinage, their verdict is entitled to great weight

Where the counsel in a cause have not argued points made in their bills of exception, they will be considered as waived.

A PPEAL from the District Court of the Parish of Morehouse, *Richardson, J. Todd & Brigham*, for plaintiff. *Morrison & Purvis*, for defendants and appellants.

BUCHANAN, J. Plaintiff sues the defendants for damages for cutting a ditch and making a levee, whereby water is diverted from its previous channel and thrown upon the land of plaintiff. The petitioner also prays that defendants be condemned to fill up the ditch and demolish the levee, and for general relief.

The questions presented are principally of fact, which were presented to a jury, who found a verdict in favor of plaintiff, that defendants destroy the works complained of.

This verdict appears to be conformable to the evidence and to the law. Art. 656 of the Civil Code says: "It is a servitude due by the estate situated below, to receive the waters which run naturally from the estate situated above; *provided, the industry of man has not been used to create that servitude.*"

"The proprietor above can do nothing, whereby the natural servitude due by the estate below may be rendered more burthensome."

The relative situation of the lands of plaintiff and defendants, and the natural drainage of the soil, are matters peculiarly within the cognizance of a jury of the vicinage; and their verdict upon a subject so generally interesting to the inhabitants of an alluvial region, is of the highest authority with us.

A point is made in the argument of defendants' counsel, that the ditch thus cut by defendants, was so cut upon land which did not belong to them, and, therefore, that they have no right to enter upon that land for the purpose of filling up the ditch.

This argument is not entitled to much weight. Their power to undo what they have done, would be presumed, in the absence of proof to the contrary. But we have, in the record, the evidence of *Conger*, the person on whose land this work was done, which shows that the work was originally intended to have been executed by himself and the defendants jointly, and that he desisted and attempted to persuade defendants to desist, upon remonstrances made by plaintiff.

It is evident, that no opposition will come from *Conger*, to the restitution of of the premises to their original condition, in execution of the verdict and judgment herein.

Defendants took three bills of exception to rulings of the court below upon admissibility of evidence; but as counsel have not argued the points made by these bills, we will consider them waived.

Judgment affirmed, with costs.

A. DYSON, Tutor, v. HENRY PHELPS.

The heir who purchases at the sale of the succession, has a right to withhold the price, until his share in such succession is ascertained by settlement and partition.

The purchaser of property in good faith from one who is not the owner, is only liable for the fruits from judicial demand.

On eviction, the buyer can only recover from the seller such increased value of the thing since the sale, as the parties had in contemplation at the time of the sale.

APPEAL from the District Court of the Parish of Morehouse, *Richardson, J. McGuire & Ray*, for plaintiff. *Todd & Brigham*, for defendant and appellant. *W. J. Z. Baker* and *C. H. Morrison*, for warrantors.

VOORHIES, J. The present contest relates to the title of the parties plaintiff and defendant, to the slave *Vina* and her children. The defendant's warrantors are also before court.

The slave *Vina* was sold at the succession sale of *Lucy Vanhook*, deceased, and adjudicated to *Elizabeth Griffin*, one of the heirs of the deceased, and the mother of the plaintiff. It is contended that this adjudication, although made in the name of *Elizabeth Griffin*, enured to the community existing between her and her husband, *W. W. Griffin*, since deceased, both parties having signed the notes *in solido*.

This does not affect the case: the wife had a right to purchase in her own name and with her own funds, any property during the existence of the community, and the title would vest in her absolutely. Having purchased at the sale of the succession, of which she was an heir, she had the right to withhold paying the price until a settlement and partition of the succession, ascertaining her portion. C. C. 1265 and 1266.

In the mean time, it appears that the administrator of the estate of *Lucy Vanhook*, instituted suit on the notes given for the price of adjudication, and that, during the pendency of this suit against the husband and wife, the following transaction took place:

On the 20th day of August, 1850, *J. A. R. Vanhook*, purporting to act on behalf of the heirs of *Lucy Vanhook*, deceased, conveyed to *R. L. Green* the slave *Vina* and her two children, for the sum of \$980; and as these parties were aware of the fact that such a transfer might in the future give rise to some difficulty, the vendor gave his bond, with *Thomas Nesom* as surety, for the purpose of holding the vendee harmless.

The latter, through his agents, *Frellsen & Co.* (for there is abundant proof of the agency of the firm, independently of the power of attorney excepted to by him,) transferred, on the 18th of February, 1852, the slave *Vina* and her four children, to the defendant, *Henry Phelps*, for the sum of \$1,150.

The title derived through these conveyances from *Vanhook*, is a nullity; for the property did not belong to the heirs of *Lucy Vanhook*, deceased, but to the plaintiff, as sole heir of her deceased mother, *Elizabeth Griffin*. C. C. Art. 2427. "The sale of a thing belonging to another person, is null; it may give rise to damages, when the buyer knew not that the thing belonged to another person." *Moore v. Lambeth*, 5 An. 66.

1. The defendant, being a purchaser in good faith, up to the time of the insti-

DYSON
v.
PHELPS.

tution of the present action, the judgment below was correct in awarding a restitution of the fruits from judicial demand.

2. The judgment allows the defendant to recover from his warrantor, *H. L. Green*, the sum of \$1,150, the price of the sale, with legal interest from the date of payment; and besides the sum of two hundred dollars for counsel fees. The former contends that he is entitled to the increased value of the property; but the authority relied upon does not give him that right.

In that case (*Weber v. Caussy*, 12 An. 536), the court remarked: "The Code of 1825 has omitted the provision of that of 1808, which entitled the purchaser to recover from his vendor, in case of eviction, the increased value of the thing sold, since the sale. See 9 La. 557. The only increase that can now be allowed, is such increase as the parties had in contemplation at the time of the sale."

In the case of *Bissell et al. v. Erwin's Heirs*, the rule laid down is, that "the vendor should not be made to pay the increase which results from unforeseen events, or from accidental or transient causes."

Now, the increase of the value of the slaves in the case at bar, cannot be said to have been contemplated by the parties originally; it is, on the contrary, the result of unforeseen events. *Remy et al. v. Municipality No. 2*, 12 An. 500.

The rights of the defendant have been properly determined under Art. 2482 of the Civil Code.

3. The heirs or legal representatives of *Thomas Nesom*, deceased, are also appellants, from the judgment rendered against them as warrantors, for the same amount awarded to *H. L. Green*, in favor of *Henry Phelps*. These appellants contend that the bond of two thousand dollars, signed by their ancestor in favor of *Green*, stipulates against an eviction at the hands of the heirs of *Lucy Vanhook*, deceased, and not of *Elizabeth Griffin*, deceased. So it is; but *Elizabeth Griffin* was an heir of *Lucy Vanhook*, deceased, and it is by right of representation, as sole heir of her deceased mother, that the plaintiff evicts the defendant.

As regards the restitution of the price, so far as *Green* and the heirs of *Nesom* are concerned, the judgment should have been for the amount paid by *Green* for the purchase from *Vanhook*. The restitution of the price, of which Art. 2482 C. C. speaks, has reference to the price actually paid by the vendee to his own vendor, and not to the price of any other subsequent sales or transfer of the same property.

It is worthy of notice, that the amount paid by *Green* to *Vanhook*, was applied to the extinguishment of the note given for the adjudication of the slave *Vina* to *Elizabeth Griffin*, deceased; so much then ensured to the benefit of the plaintiff. It would be highly inequitable, notwithstanding the irregularity of all the proceedings had in this instance, that the plaintiff should recover the property, and, at the same time, refuse to reimburse the price of the adjudication.

It is, therefore, ordered and decreed, that the judgment of the District Court be amended, by reducing the amount allowed in favor of *Green* against his warrantors, to the sum of nine hundred and eighty dollars; and further, by allowing the warrantors of *Green* judgment against the plaintiff for the sum of nine hundred and eighty dollars, with legal interest from judicial demand, the said amount to be paid into the hands of the Sheriff before execution of this judgment at the hands of the said plaintiff.

It is further ordered and decreed, that the judgment so amended, be affirmed; the appellee paying the costs of appeal.

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VICKSBURG, SHREVEPORT AND TEXAS RAILROAD COMPANY v. A. C. McKEEN.

The provision in the 16th section of the Act incorporating the Vicksburg, Shreveport and Texas Railroad Company, to the effect "*that no transfer of stock shall exempt the party transferring it from the obligation of paying installments afterwards called for, until fifty per cent. on each share shall have been paid,*" exempts from liability to the company only those who have transferred their share of stock after the payment of fifty per cent. on each share, *before* the installments have matured, and payment has been demanded.

APPEAL from the District Court of the Parish of Ouachita, *Mayo, J.*
Morrison & Purvis, and McGuire & Ray, for plaintiffs. *J. T. Ludeling*
for defendant and appellant.

LAND, J. The defendant subscribed to the capital stock of the Vicksburg, Shreveport and Texas Railroad Company, the sum of one thousand dollars, making forty shares, and paid thereon, at different times, five hundred and fifty dollars; and on a call made by the company for the balance due, refused payment and transferred his stock to *R. H. Watmore*, which transfer he plead in bar of this action, instituted for its recovery.

The sufficiency of this defence depends upon the interpretation of section sixteen of the Act of Incorporation, or charter of the company, which is in these words :

"Stock books shall be kept in the office of the company. Certificates of stock shall be issued to the share holders, to be signed by the President of the Board of Directors, for the time being; and no transfer of stock shall be binding on the company until made on its stock books. *No transfer of stock shall exempt the party transferring it from the obligation of paying installments afterwards called for, until fifty per cent. on each share shall have been paid.* Act of 1853, p. 186.

The exemption from liability for the balance of the installments, after the payment of fifty per cent. on each share, *by virtue of a transfer of stock*, creates the difficulty of the case. And a strict and literal construction of the language of this section of the Act would perhaps sustain the defence to the action; but it would lead to consequences not intended by the lawgiver, and thereby defeat his will.

In this case, a call was made on the defendant for the balance due on his subscription, on the 2d of March, 1858; and on the 25th of the same month, he transferred his stock to *Watmore*, and thereby defeated, (if his defence be valid in law,) the right of action of the company against him for the unpaid installments which were then due.

The provision in the sixteenth section of the Act relative to the transfer of stock was made upon the *presumption that each installment would be demanded and paid at maturity*, and that the exemption from liability to the company would only extend to the *unmatured installments*, after the payment of fifty per cent. on each share of stock.

It is, therefore, the opinion of the court, that *after the maturity of the installments, the right of exemption, by virtue of the transfer*, was extinguished, and that, notwithstanding the transfer on the stock books, the defendant was still liable to the company for the *unpaid balance then due*. The right of transfer, to

have the effect contended for, must be exercised in perfect good faith, and in pursuance of the true intent and meaning of the Act.

V., S. & T. R. R.
v.
McKENY.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

STATE OF LOUISIANA v. WADE HAMPTON, Collector, et als.

When the record shows that the defendant appeared and defended the suit, by filing a peremptory exception, and taking bills of exception to the introduction of evidence, he cannot claim a reversal of the judgment rendered against him, on the ground that the record does not show that issue was joined by a judgment by default.

In an action against a defaulting Tax Collector and the sureties on his bond, who are bound each for a specific sum, the case may be continued as to some of the defendants.

The principal and sureties on a Tax Collector's bond cannot set up, by way of defence to an action brought on the bond, the fact that it had not been approved, or received by the proper officer, and recorded, as provided by law.

A PPEAL from the District Court of the Parish of Franklin, *Mayo, J.*
M. A. Jones, for plaintiff. *McGuire & Ray, Morrison & Purvis and Harper & Bonner*, for defendants and appellants.

COLE, J. This is an action against *Wade Hampton*, who was Collector of the State and Internal Improvement taxes and licences due in the parish of Franklin, in 1854, and against his securities on his official bonds.

There was judgment for plaintiff, and defendants have appealed.

1. It is not an objection, that a default is not mentioned in the record to have been taken against some of the defendants; for the bills of exception and a peremptory exception filed by all the defendants, show that they defended the suit.

2. It is objected that the Collector is charged \$250 for insolvent and delinquent tax payers. Appellants are in error; the judgment deducts this amount.

3. There is a bill of exceptions to the ruling of the court, permitting the plaintiff to continue the cause as to certain of the defendants.

The court did not err, inasmuch as each of the securities was bound for a specific and separate amount, for which they were severally liable. Sess. Acts, 1855, p. 82, § 5; *State v. Wm. Hampton*, just decided.

4. The objections to the bond of *Wade Hampton*, on the grounds that it had not been approved or received by the proper officers, and attested and recorded as provided by law, are invalid. The securities signed the bond, and *Hampton* acted under it in the collection of taxes. Neither the principal or securities can plead successfully such objections.

Judgment affirmed, with costs.

STATE OF LOUISIANA v. ROBERT FULLER.

When the minutes of the court and the judgment show that the sureties on an appearance bond were regularly called to produce the body of their principal, previous to a judgment of forfeiture, it cannot be objected that there is no evidence of the fact.

The entry on the minutes is in the nature of a citation, and need not be offered in evidence.

APPEAL from the District Court of the Parish of Union, *Richardson, J.*
F. P. Stubbs, for the State. *McGuire & Ray*, for defendant and appellant.
VOORHIES, J. This case presents the same question as the one decided in the previous case of the *State of Louisiana v. Robert Fuller*, ante, p. 720.

There is, however, an additional ground relied upon by the appellants, to-wit: that there is no evidence in the record that the appellants were regularly called upon to produce the body of their principal, previous to judgment of forfeiture being entered on the bond.

Upon an inspection of the record, we find that the minutes of the court show the fact that the parties were regularly called upon their bond. This is in the nature of citation, and need not be offered in evidence. Besides, the judgment itself mentions the fact that the proceedings were regularly had, by calling the parties on the bond in the usual mode.

Judgment affirmed.

HEIRS OF SARAH ANN COONS v. ALEXANDER STRINGER, SR.

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The doctrine of the case of *Duen v. Morrison*, 13 An. 379, in relation to the money of the wife received by the husband during the marriage, which constitutes a charge against the community, is applicable to the share of the husband, who, in the partition of the community, is entitled to a credit for his separate funds applied to the use of the community.

APPEAL from the District Court of the Parish of Ouachita, *Richardson, J.*
McGuire & Ray, for plaintiff. *H. Gray*, for defendant and appellant.

BUCHANAN, J. It is agreed that this case (which was submitted at the close of the last term in Monroe) be decided in New Orleans.

We think the defendant and appellant entitled to the credit, claimed in the brief of his counsel, of eleven thousand dollars cash, of the separate estate of defendant, brought into the community.

The matrimonial partnership should be settled on a footing of perfect equality between the partners. One ought not to have a greater advantage in such settlement than the other. Upon this principle, the doctrine of the case of *Downs v. Morrison*, 13 An. 379, and of the cases therein cited, is applicable to the share of the husband in the partition of the community of acquets, as well as to that of the wife.

The receipt of the greater part of the amount of a judgment in the United States court, obtained by defendant against *John C. Williams*, for \$11,800 and interest, which judgment is admitted to have been separate property of defen-

dant, and the application of these funds, or a portion of them, to community purposes, are facts established by the evidence.

The court below allowed defendant as a credit, \$2,674 30, being a community debt paid *Williams, Phillips & Co.*, out of the judgment above mentioned.

It is, therefore, adjudged and decreed, that the judgment of the District Court be amended, by increasing the credit of defendant in account with the community of acquets between himself and his deceased wife, *Sarah Ann Coons*, by a sum of eight thousand three hundred and twenty-five dollars and seventy cents; that the judgment in all other respects be affirmed; and that plaintiffs and appellees pay costs of appeal.

COONS
v.
STRENGER.

A. M. ALFORD v. HUGHES & RANDOLPH.

A party may give in evidence the answers of his adversary to interrogatories on facts and articles, although such answers were made in a different suit between them from the one on trial

APPEAL from the District Court of the Parish of Bossier, *Egan, J.*
Richard U. Turner and Watkins & George, for plaintiff and appellant,
Landrum & Williamson, for defendants.

BUCHANAN, J. Plaintiff sues for restitution of the price of a slave woman named *Charlotte*, who is alleged to have been afflicted with a redhibitory disease at the time of her sale by defendants to plaintiff. The petition also alleges that the disease was well known to defendants, who concealed it from plaintiff.

The defendants pleaded the general issue; and the cause was tried by a jury, who found a verdict for defendants.

The fact essential to the maintaining of this action, of the existence of the disease in the slave at the time of the sale, is not made out by the proof. The earliest evidence on that subject refers to a period at least a month subsequent to the sale. The presumption of its existence when the sale took place, under the Act of 1834, does not, therefore, arise.

The physician who was called in by plaintiff is of opinion that the disease may have existed previous to the sale; but this is, at best, a speculative or conjectural opinion. See the cases of *Dupré v. Desmarest*, 5 An. 591, and *Roca v. Slawson*, 5 An. 708.

There is also much evidence on the other side, proving the sound condition of the slave previously to the sale.

On the whole, we cannot say that the jury arrived at an erroneous conclusion, from the evidence before them.

Plaintiff calls our attention to a bill of exception to the rejection by the District Judge of answers of one of the defendants to interrogatories on facts and articles, propounded in another suit between the same parties. It was rejected, on the ground that the plaintiff could not avail himself of said answers, without entitling the defendants to all the privileges incident to this particular case, and to make such explanations with reference to the particular case on trial, as might be pertinent.

This ruling appears inconsistent with that of the case of *Hood v. Chambliss*, 7 An. 106. In that case, Judge Slidell used the following language: "It is well

ALFORD
v.
HUGHES.

settled, that the admissions of a party may be given in evidence against him. Even mere oral admissions in conversation may be proved ; and *a fortiori*, what a person has declared in writing and under oath, should be admissible against him."

We think the evidence in question ought to have been received. But it will not be necessary to send back the cause for a new trial, on that account. Those answers to interrogatories only refer to the price which plaintiff gave defendants for the girl *Charlotte* ; a point which was only material in case the jury found in favor of plaintiff. The answers did not touch the allegations of the petition in reference to the redhibitory disease complained of.

Judgment affirmed, with costs.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

OPELOUSAS.

~~~~~  
**AUGUST, 1859.**  
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PRESENT:

HON. E. T. MERRICK, *Chief Justice.*

HON. A. M. BUCHANAN, HON. C. VOORHIES, HON. T. T. LAND,	}	<i>Associate Justices.</i>
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 HEIRS OF MARGURITE BABINEAU v. NARCISSE LEBLANC et al.

Where a nuncupative will under private signature is made, out of the presence of the witnesses, the testator must distinctly declare, in the presence and *hearing* of all the witnesses necessary in this form of testament, that it contains his last will.

**A**PPEAL from the District Court of the Parish of Lafayette, *Martel, J.*  
*C. H. & E. Mouton* and *P. D. Hardy*, for plaintiffs. *M. E. Girard* and  
*DeBlanc & Fusilier*, for defendants and appellants.

MERRICK, C. J. This suit is brought to annul a nuncupative will and codicil by private act.

There was judgment in favor of the heirs-at-law, (the plaintiffs,) and the defendants and legatees appeal.

The will and codicil to be valid, must have been executed in conformity to Article No. 1574 of the Civil Code. This Article admits of two forms of execution, viz, one where the will is *dictated* in the presence of the witnesses; the other, where the will was written by the testator, or by him or her caused to be written out of the presence of the witnesses.

It is not pretended that the will or codicil was executed in the first of these forms.

To be valid in the other form, the testatrix must have presented the will and codicil to the witnesses, and declared that that paper contained her last will. The testimony on this branch of the case is not satisfactory. The parish Re-

BANDREAU  
v.  
LEBLANC.

corder states, that two out of the five witnesses did not hear the testatrix utter one distinct word, and only saw her nod assent, when the witness who had prepared the will asked if it was her will. The witnesses might as well be absent, as to be present when the proceedings are conducted in such a manner as to be incomprehensible to them.

The testimony of *Mr. Girard* is satisfactory, but the law requires, in a case like this, the presence of more than one, two, or even three witnesses, who fully comprehend the proceedings.

Under the circumstances, we do not feel called upon to disturb the conclusions of the District Judge.

Judgment affirmed.

### SUCCESSION OF JEAN B. DAVID—Opposition of L. V. CHACHERÉ, Syndic, et al.

Where a Sheriff acts as syndic of an insolvent estate, he acts in his official capacity, and the parties in interest, who have been injured by his acts or omissions, when acting in such capacity, have the right to hold all his sureties on his official bond liable for injuries they may have received.

When the Sheriff's official bond has been recorded, it operates as a mortgage upon the property of the Sheriff from the date of its registry.

The law grants this mortgage for the protection of private individuals as well as the State, who may be injured by the acts of the Sheriff.

**A**PPEAL from the District Court of the Parish of St. Landry, *Voorhies, J. J. E. King*, for administrator. *Lewis & Porter* and *Dupré & Garland*, for opponents and appellants.

MERRICK, C. J. This case comes up on the following statement of facts:

"The only question presented by appellant being, whether *L. V. Chacheré*, Sheriff and syndic of the insolvent estate of *Myers & Alexander*, should be placed on the tableau of classification as an ordinary or mortgage creditor, the following statement is made by counsel, and the Clerk dispensed with the necessity of copying the voluminous documents offered in evidence.

"*Jean Baptiste David* died in November, 1855, while Sheriff of the parish of St. Landry. In the year 1854, on the 8th of August, then being the Sheriff, he was appointed syndic of the aforesaid insolvent estate, and continued to act as such to the period of his death. He received for said estate, as syndic, \$3,338 78, the amount charged against him in the judgment of the District Court. His estate is responsible to the insolvent estate he administered for this sum. *L. V. Chacheré*, the appellant, is and was, at the time of filing his opposition, syndic of said insolvent estate."

It appears to us, that the Sheriff acted officially when he acted as syndic. The appointment is conferred upon the Sheriff as such, and because he is Sheriff. The parties in interest, who have been injured by his acts or omissions as Sheriff, have the right to avail themselves of all the securities furnished by his official bond. Under the law, one of these is, (where the bond has been recorded,) a mortgage upon the property of the Sheriff from the date of the registry. This mortgage is for the protection of private individuals as well as the State.

Acts of 1848, p. 85-86, sec. 1 ; Phillips' Dig. p. 67 ; *Tucker v. Bobo, Sheriff*, 11 An. 611.

SUCCESSION OF  
DAVID.

The date of the registry of the Sheriff's bond does not appear. The appellant can only be allowed a mortgage from the date of *David's* appointment as syndic.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be amended, so as to award said *L. V. Chacheré*, Sheriff, a legal mortgage for said sum of \$3,338 78, upon the immovables and slaves of said deceased, and the proceeds thereof, to date from the 8th day of August, 1854, and that he be paid accordingly ; and that the judgment of the lower court, so amended, be affirmed ; the appellees paying the costs of the appeal.

### G. W. JOHNSTON v. JAMES PIKE.

When it is shown that the wife has disposed of property belonging to the community, for the purpose of procuring the necessaries of life for herself and children, which her husband failed to furnish them with, his authorization to her to sell will be presumed, under the provisions of Article 1779 of the Civil Code.

The right of the wife in this respect is extremely limited, since the husband's authorization is only implied in contracts entered into by her to procure the necessaries of life, and only when his neglect to supply them gives rise to that emergency.

**A** PPEAL from the District Court of the Parish of St. Martin, *Voorhies, J. DeBlanc & Fusilier*, for plaintiff and appellant. *E. Simon*, for defendant.

**VOORHIES, J.** This is contest for the ownership of a mare named *Jewel*, the defendant setting up title from the plaintiff himself, through a purchase from the latter's wife.

The question resolves itself into one of authorization from the husband to the wife, under the provisions of Art. 1779 of the Civil Code. It is there said : That " the authorization of the husband to the commercial contracts of the wife, is presumed by law, if he permits her to trade in her own name ; and to her contracts for necessaries for herself and family, when he does not himself provide them." The parties, however, disagree upon the interpretation of the Article above quoted.

The evidence shows the necessitous circumstances of *Mrs. Johnston* and of the children under her care ; that she sold the mare, *Jewel*, to the defendant for a valuable consideration, for the purpose of providing for their support, education and maintenance ; that the proceeds of the sale were accordingly applied. On the other hand, the plaintiff did not furnish them the necessaries of life, and they were left to shift for themselves. It is true that, at the time, there were several suits pending between the husband and wife, in one of which, the parties claimed mutually a separation. But this did not dispense the plaintiff from providing for the support of his wife and family, until the termination of the litigation. Had he shown, however, that he had, if not furnished, at least endeavored to furnish them the necessaries of life, he would be entitled to relief. This silence and inaction in this matter, must be taken as a tacit authorization to the contracts of his wife for necessaries.

The plaintiff admits that the wife has the right to purchase the necessaries,

JOHNSTON  
v.  
PIKE.

but not to dispose of property belonging to her husband or to the community, for the purpose of accomplishing this object. As the property sold belonged to the community existing between the plaintiff and his wife, our remarks will be limited to the disposal of community property by the wife.

The text speaks generally of *contracts for necessities*, and does not limit the wife to a mere purchase of necessities. It may very well happen that, in order to procure them, she may be compelled to pledge movable property; nay, the sale of such movables may be the only way by which she could procure wherewith to purchase the necessities of life.

It cannot be said that the wife and the children must starve and remain without the other necessities of life, or trust to the cold charities of the world, rather than dispose of some movables belonging to the community of which she is a partner. Conceding the necessity of a pledge or sale of property by the wife, in order to procure the necessities of life for herself and children, and the failure of the husband to furnish them to his family, his authorization would be presumed.

Nor does this view of the case put the whole property of the community to the mercy of the wife, as contended for by the appellant's counsel; the right of the wife is extremely limited in this respect, since the husband's authorization would be implied only to contracts to procure the necessities of life, and not beyond that emergency. *Thorn v. Egan et al*, 3 Rob. 329; *Desliz v. Jone*, 6 Rob. 293.

Judgment affirmed.

MERRICK, C. J. I do not think the plaintiff equitably entitled to recover, without tendering to the defendant the amount which he has paid for his benefit. On this ground, I concur, with some hesitation, in the decree.

LAND, J., was not present at the decision of this case.

#### EDWARD C. GARDINER v. JEAN B. THIBODEAU.

In an action for trespass, the defendant cannot put the plaintiff upon proof of title; possession alone is sufficient to support the action.

The law does not justify any one in killing a slave, while in the act of committing a theft on his premises; and any person so killing a slave will be bound to the owner for his value.

**A**PPEAL from the District Court of the Parish of St. Landry, *Martel, J.* *P. D. Hardee*, for plaintiff and appellant. *C. H. & E. Mouton*, for defendant.

MERRICK, C. J. This suit is brought to recover the value of a slave alleged to have been killed by the defendant.

There was a verdict of the jury and judgment of the court in favor of the defendant, and plaintiff appeals.

There are some bills of exception taken to the charge of the Judge to the jury. As we shall dispose of this case upon the testimony, we do not feel called upon to express an opinion upon the bills of exception.

The proof is clear, that the defendant killed the slave *Charles*, as alleged in the petition. Defendant denies that he is liable, 1st, because the plaintiff has not shown that he was the exclusive owner of the slave; and 2dly, because the de-

defendant was a freeholder, and having ordered the slave to stop, he was justified in shooting him for neglecting so to do.

I. The plaintiff was in possession of the slave as owner. The defendant (if his act were without justification) is a trespasser. He cannot, therefore, put the plaintiff upon proof of title. 2 An. 224; 6 L. R. 559.

II. The slave was shot within the inclosures around defendant's dwelling-house. His reasons are given by the witnesses as follows, viz :

*B. Simms*, (who was present while the body of the negro was lying outside defendant's premises,) asked defendant who had killed the negro? He says "Defendant stated that he had." When asked "what it was for," he answered "that he had found the negro on his premises, stealing chickens; that he would kill any negro or any white man."

Defendant told the witness, *Gardiner*, "that he had hallooed to the boy to stop; that the boy continued to run, and then it was that he shot."

*Léon Thibodeau*, defendant's witness, says that defendant told him "that the boy was in his yard, under the gallery of an out-house, and the boy upon perceiving him had run; that he had stopped once, and the negro still running, he had shot him. Starting from the corner of the yard fence, the negro fell 16 yards from the fence. There were chicken feathers from the yard to the place where the negro was lying."

This view which the defendant has taken is doubtless the most favorable which can be put upon his actions. Does it amount to a justification, he being a freeholder?

The law on this subject, as it now stands, is as follows :

"It shall be lawful to fire upon runaway negroes, who may be armed, when pursued, if they refuse to surrender." Acts 1857, p. 233, sec. 41.

It is proved that a knife was found in the pocket of his coat after the body of the negro was removed to the residence of the plaintiff. The coat was lying at the feet of the boy, and the knife was a butcher knife, six or seven inches long. This does not bring the case within the statute. The defendant did not pretend (as we have seen), that he killed the slave because he was a runaway and armed, but because he was stealing his chickens, and run, and did not stop when commanded. If it be assumed, that the negro had his coat on when he was stealing the chickens, and the knife was in the pocket, the defence still fails, because it is not shown that the slave was a runaway. So far from being a runaway, the proof makes it sufficiently certain that he was out for no other purpose than that of stealing chickens; two of which were found by his house. The proof shows, that he was addicted to theft; but there is none tending to show that he was a runaway. Our law does not justify the killing of any one for a theft, and the defendant is left without sufficient justification. *McCutcheon v. Angelo*, ante, p. 34, 3 An. 132.

There is much difference in the estimates of the value of the slave. Plaintiff's witnesses place his value at \$1800; defendant's at \$500. We will assume the medium, viz, \$1150.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed; and we do now order, adjudge and decree, that the plaintiff do recover and have judgment against the defendant, for the sum of eleven hundred and fifty dollars, and costs of both courts.

## ALPHEUS L. TUCKER v. THEODULE CARLIN &amp; WIFE.

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The fees of counsel employed by the wife to prosecute a suit for a divorce and a partition of the community property, must be paid by her out of her separate estate; the community cannot be held liable for them.

**A** PPEAL from the District Court of the Parish of St. Mary, *Voorhies, J.*  
*R. N. McMillan*, for plaintiff. *J. G. Olivier* and *H. Gibbon*, for defendant and appellant.

**MERRICK, C. J.** This is a suit instituted by the plaintiff to recover the sum of one thousand dollars for counsel fees and professional services rendered by the plaintiff to the defendant, *Henrietta Troubridge*, wife of defendant, *Carlin*, in the prosecution of a suit against her husband for divorce, the custody of the children, and a partition of the effects of the community, and services in the defence of a suit for a divorce brought by *Carlin* against his wife. See case of *Troubridge v. Carlin*, 12 An. 882.

There was judgment in the District Court against the defendants *jointly*.  
*Carlin* alone appeals.

The value of the services are not questioned. The appellant, however, contends, that as these services were rendered the wife alone, they ought to be paid out of her separate estate, and not out of the community.

On the other hand, it is contended that the debt was contracted during the existence of the community, and is, therefore, a debt of the community. His counsel cites Art. 2372 of the Civil Code, which declares that "the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife anterior to the marriage must be acquitted out of their own personal and individual effects." This Article, taken literally, and without reference to other provisions of law, is certainly sufficiently broad to maintain plaintiff's demand; but, after a careful consideration of the subject, we are induced to think that the defendant cannot be held responsible for this debt.

The husband is the head and master of the community, and is bound for the debts of the community, not only to the extent of its effects, but to the extent of his separate estate and entire fortune. Being the head and master of the community, and rigorously bound as above, the law has given him absolute control over the debts and contracts of the community, and no man can pretend to a debt against the community, or even against the separate estate of the wife, in virtue of a contract, without his consent. *Crow et al. v. Stocomb*, 11 Rob. 506. It is not pretended, that any such assent has been given in this instance, and if the plaintiff is entitled to recover, it is *not* in virtue of an express contract. If, therefore, plaintiff can recover of the community, it is by reason of a *quasi* contract, and the benefit which the community has derived from his services. C. C. 2272 and 2273.

*Mrs. Carlin*, it must be observed, does not appeal. Then let us consider whether plaintiff can recover under a *quasi* contract. If so, he has managed the business of the community as a *negotiorum gestor*, or done something which has been of advantage to it. It was not the first, for he was acting expressly in

TUCKER  
v.  
CARLIN.

another capacity, that of attorney and counsellor at law, and directly against the wishes of the head of the community. When he brought the suit for a partition of the community and a divorce, he was not benefitting the community, but on the contrary, he was endeavoring to injure it, by putting an end to the same. How, therefore, can it be said, that he has benefited the community, and is, therefore, entitled to compensation out of it?

There are many debts which the wife is obliged to pay out of her separate estate, although made after the existence of the community. Such are cases where improvements are made upon the separate property administered by her, or where she has committed a tort, for which she is liable. 8 An. 34. The *spirit*, therefore, of Article 2372 governs, and separate debts contracted after the marriage, are paid in the same manner as those contracted before the marriage.

Again: the fees of the attorneys may be assimilated to the costs in this class of cases, which, where the wife failed in her action, are generally decreed against her and not against the community. 11 Rob. 445; 1 An. 315; 5 An. 33; 6 An. 262; *ibid*, 403; 9 An. 283; 6 Rob. 38; 6 Rob. 135, &c.

If she can be made responsible for the costs, in like manner, she may be responsible for the services of her attorneys, rendered without contract. For the one is a debt contracted during the existence of the community, as well as the other.

Again: no man ought to be held responsible for the acts of another done to his prejudice and against his will. Thus it is held in regard to the *negotiorum gestor*, that the latter must have intended to act in the interest of and to manage the affairs of another and not his own, and the management must have been useful at the time. Mackeldey, p. 238, No. 499, Brussels ed. 1846.

Now, as the wife may repudiate the community at its dissolution, and thus leave its debts and its burdens to be borne and discharged by the husband and his heirs, she ought not to have it in her power to increase the liabilities of the same.

¶ It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed as to said defendant, *P. C. Carlin*, and that there be judgment in his favor, and that he recover his costs in both courts.

### JEREMIAH COLLINS v. J. W. McDONALD.

A judgment by default taken in a suit on a note, by a party claiming the ownership of it by the blank endorsement of the payee, does not relieve the plaintiff from the necessity of proving the endorsement.

**A** PPEAL from the District Court of the Parish of St. Landry, *Martel, J. Swayze & Moore*, for plaintiff. *John E. King*, for defendant and appellant.

MERRICK, C. J. This suit was brought upon a promissory note, payable to the order of *John F. Campbell*, through whose endorsement plaintiff claims ownership of the note.

COLLINS  
v.  
McDONALD.

Judgment was taken by default, and on making the same final, plaintiff offered the note in evidence, but failed to prove the signature of the endorser.

Defendant appeals, and demands a reversal of the judgment, for want of proof of title to the note.

The objection is well taken. The judgment by default does not relieve the plaintiff from proof of his demand. C. P. 312. He has not proven his demand in this case until he has shown that he has acquired title to the note, which has not been done. *Johnson v. Duncan*, 5 M. 361. This case differs from that, where the defendant has answered, and is presumed to be present at the trial. In the latter case, if he does not object to the admission of the note in evidence, on the ground that the signatures of the endorsers have not been proved, he is presumed to waive such objection, and the signatures are considered as admitted.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that this case be remanded for a new trial; the plaintiff paying the costs of the appeal.

### STATE v. C. DEROSIER et al.

When a judgment of forfeiture has been rendered on a bail bond, in which there is no mention of any offence for which the principal was answerable, and it does not appear from the record that there was any indictment against him, the judgment will be reversed.

**A**PPEAL from the District Court of the Parish of St. Landry, *Martel, J.*  
*P. D. Hardy*, for the State. *J. E. King*, for defendants and appellants.

VOORHIES, J. This is an appeal from a judgment of forfeiture of a bail bond. The error assigned by the appellant is, "that the judgment was rendered without evidence, there being no statement of facts, no indictment, and no offence mentioned."

On a perusal of the bond, we find that there is no mention made of any offence for which the defendant was answerable; and, although the Clerk certifies that the record contains all the documents and evidence in the case, yet there appears to be no indictment against the appellant. *State v. Cooper*, 3 An. 225.

It is, therefore, ordered and decreed, that the judgment of forfeiture be avoided and reversed, as in case of nonsuit.

## WILLIAMS et als. v. CLOSE et als.

When a survey is ordered, the costs of making it must be taxed with those of the suit, and paid by the party cast in the action.

On the dissolution of an injunction, the Judge may allow damages to the amount of twenty per cent. on the judgment enjoined, without proof.

But when counsel fees are proven and allowed, exceeding twenty per cent., the Judge cannot, in addition to such allowance, award twenty per cent. as damages.

**A**PPEAL from the District Court of the Parish of St. Landry, *Martel, J. Swayze & Moore*, for plaintiffs. *T. H. Lewis & Porter*, for intervenors. *B. F. Linton*, for defendant and appellant.

MERRICK, C. J. A judgment of the District Court in this case was affirmed by this court in 1857. See 12 An. 573, 578. On the return of the mandate to the lower court, an execution issued for the costs. The present proceeding is an injunction against the Sheriff and plaintiffs, to enjoin so much of the execution as was issued for the costs of the survey, amounting to \$449 08, and the fees of one of the witnesses.

The injunction was dissolved, with twenty per cent. damages, eight per cent. interest, and fifty dollars special damages for attorney's fees.

The plaintiff in injunction appeals.

If the District Judge were of the opinion that there was not sufficient time to make up the transcript, he could make the appeal returnable to the next following term of the Supreme Court.

We do not understand counsel for appellant to complain of so much of the judgment as allows the plaintiffs the costs of his witness.

As to the survey, it was ordered by the District Court, notwithstanding the opposition of the defendant. The costs, therefore, of the survey, were properly taxed against the defendant under the very letter of the statute of March 15, 1855. See p. 467, sec. 5. It is enacted, "That the fees chargeable by surveyors shall be paid by the parties desiring their services; and when the services shall be rendered in obedience to an order of a court, in a suit therein depending, the surveyor shall make and state an account of his fees for such services written in words at full length on the back of one of the plats returned by him to the court, and the same shall be allowed in the bill of costs to be against the losing party, as other costs; but when it shall appear that the survey, or any part thereof, was made at the instance of the party cast in the suit, so much of said fees as accrue on the work done by the surveyor for such party shall not be taxed." See also Bullard & Curry's Dig., p. 796.

The survey in this case was made at the instance of the plaintiff in a cause then pending, and judgment having been rendered against the defendant, the costs of the same were properly taxed to be paid by the losing party. The District Judge having determined that the survey was necessary in the original suit, by ordering the same, we must presume that it was useful and necessary notwithstanding the ancient plats on file.

It is contended by the appellant, that the judgment is erroneous in condemning him to pay fifty dollars special damages, and twenty per cent. general damages on the amount enjoined, viz, 449 08.

WILLIAMS  
v.  
CLOSE.

We do not perceive that any other damages have been proven besides the attorney's fees. The Act of 1831, reenacted in 1855, gives the court power to render judgment "*for not more than twenty per cent. damages, unless damages to a greater amount be proved.*" Acts 1855, p. 325, sec. 7.

Interest is the only damages allowed by law for delay in the payment of money. C. C. 1929. The court cannot, therefore, in general, where interest is allowed, presume that the party has sustained damages to a greater amount. The exception to this general rule is in the case of injunction, where the court may, under the statute, award, without any proof whatever, damages to the amount of twenty per cent. on the amount enjoined. But more than this cannot be allowed without proof.

In this case, the attorney's fee, proven, amounts to more than twenty per cent. damages. It was, therefore, properly allowed. But the court has given the plaintiff twenty per cent. damages in addition. This, under the exposition of the statute made by this court, as well as by the language of the law itself, seems to be erroneous. See *Brown v. Lambeth*, 2 An. 823; *Farrar v. New Orleans Gas Light Company*, ib. 874.

The court did not err in awarding eight per cent. interest upon the amount enjoined. This part of the original judgment did not bear interest, and the District Court properly, on the dissolution of the injunction, awarded the highest rate of conventional interest. Acts 1855, p. 325, sec. 7.

The affidavit for an injunction was sufficient.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be amended, by striking therefrom the allowance of twenty per cent. damages on the amount enjoined, and that said judgment so amended be affirmed, the appellees paying the costs of the appeal.

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1123 584

### JEAN JACQUES NEVEU v. H. F. VOORHIES, Sheriff, et al.

Counsel fees will not be allowed as special damages where an injunction is maintained against a seizure of property, and the case is not a proper one for the allowance of vindictive damages.

**A**PPEAL from the District Court of the Parish of Lafayette, *Martel, J.*  
*C. H. & E. Mouton*, for plaintiff and appellee. *M. E. Girard* and *A. De Blanc*, for defendants and appellants.

**BUCHANAN, J.** The Sheriff of the Parish of Lafayette seized and advertised for sale, under executions in several suits against *Neveu & Guidry*, "all the right, title and interest of *C. Neveu* in the store at the corner of Main and Lafayette streets, carried on under the name of *J. J. Neveu.*"

*Jean Jacques Neveu* has enjoined the sale, and claims by his petition one thousand dollars damages from the Sheriff and the seizing creditors, for the seizure. He avers that his son, *Christophe Neveu*, on the 13th of April, 1858, instituted suit against him, alleging himself to be part owner of the property in question, and a partner with petitioner in the goods, merchandise, notes and accounts belonging to the store mentioned in the notice of seizure; and claiming an undivided half of said property; that on the same day of the institution of that suit,

the petitioner was served with the notice of seizure as above. Petitioner avers that he is sole owner of the aforesaid store, and of all the goods, merchandise, notes and accounts appertaining thereto, and that the said *Christophe Neveu* has no right, title, nor interest in said property. He alleges as a reason for bringing this suit, that his silence, after having received the notice of seizure, might be construed as a tacit admission on his part, that *Christophe Neveu* has an interest in the aforesaid property.

The answer of the defendants pleads that *Christophe Neveu*, their debtor, as being a partner in the late firm of *Neveu & Guidry*, is really and truly interested as half owner and partner in the store mentioned in the petition, and in the merchandise and business contained and carried on in said store. That the said property has been put and held in the sole name of plaintiff, *Jean Jacques Neveu*, for the purpose of defrauding the creditors of his son and partner, *Christophe*. Wherefore they pray for the dissolution of the injunction herein, with damages.

The evidence shows that the house and lot in which the store is contained were adjudicated at Sheriff's sale in August, 1854, to *Jean Jacques Neveu*, who gave his twelve months bond for the price, which was paid by him at maturity. It is also shown that in 1853, the plaintiff, who previously had a separate store in the village, (Vermillionville,) moved his stock of goods into this store, then occupied by *Neveu & Guidry*, who about the same time retired from business, and the business has been carried on in the sole name of plaintiff ever since. Many witnesses have been examined on both sides, as to the sayings and doings of the parties; and various bills of exception have been reserved by plaintiff and defendants to the admission and rejection of testimony as to particular facts; which bills we do not deem it necessary to pass upon. It appears that *Christophe Neveu* has been, with some intermissions, actively employed in the store; and that he has declared, out of the presence of his father, the plaintiff, that he had an interest in the store. But it is not proved that the plaintiff has ever, either directly or by implication, admitted the existence of such an interest. It is moreover shown, that plaintiff exercised the control of a master and owner in the establishment, to the point of even turning *Christophe* out of the store on one or more occasions.

The defendants seem to have been afforded every facility of establishing a partnership between the plaintiff and his son, and of establishing an interest on the part of the latter in the immovable and movable estate comprised in the notice of seizure; and they have failed to do so. The burden of proof was upon them; for the presumption arising from possession was on the side of plaintiff. And as to the house and lot, it must be observed, that there is something more than a mere failure of proof on the part of defendants; for there is direct proof, on the part of plaintiff, of the purchase in his name at Sheriff's sale, and of his payment of the price. The bid was made, it is true, by the son; but the circumstances establish, with sufficient distinctness, that he acted in the matter as agent of his father.

Upon this state of facts, we conclude that the injunction was properly maintained. But we disagree in the allowance of three hundred dollars, as damages against the defendants, being for counsel fees. Under the Acts of 1831 and 1833 the practice is well established to allow attorneys fees as special damages, in case of dissolution of injunction. But no precedent has been brought to our notice, of such an allowance, in case of the injunction being perpetuated. It may be, that cases could be found, where attorneys fees have been an element of damages for wrongful seizures of property of a party for the debt of another party. But this

NEVES  
v.  
VOORHIES

is not a case of that kind. The plaintiff's store has not been seized, but merely the right, title and interest of another person in that store; and if that seizure had proceeded to a sale, the purchaser would have acquired nothing more than a right of action against plaintiff, to establish the extent of such right, title and interest. And this is not a case for the allowance of vindictive damages; for the defendants' proceedings in the premises, which gave rise to this action, are clearly not malicious, and were based upon probable cause.

It is, therefore, adjudged and decreed, that the judgment of the District Court, so far as it has perpetuated the injunction herein issued, be affirmed; that so far as it allows damages to plaintiff, it be reversed; and the claim of plaintiff for damages is rejected. It is decreed, lastly, that defendants pay costs of the court below; and that plaintiff and appellee pay costs of appeal.

VOORHIES, J., recused himself in this case, on account of relationship to one of the parties.

14 740  
47 804

14 740  
125 818

#### WIDOW AND HEIRS OF GEORGE KING v. P. G. WARTELLE.

The action of one partner, or his representative, against the other partner, for an account, is prescribed in ten years after the dissolution of the partnership. The amendment of a petition for an account by praying for a partition of property held in common between the partners, is allowable.

The meaning of Article 2361 of the Civil Code is, that the rules of partition among heirs, apply to partitions among partners; not that the rules governing the action of partition among heirs, apply to all actions which may be exercised by one partner against another.

When the action is one for partition of property, and the liquidation of partnership affairs, the settlement of the accounts being an incident to the partition, the prescription of thirty years only is applicable to the case.

An opposition to the report of auditors, must specially mention the items of credit objected to.

**A**PPEAL from the District Court of the Parish of St. Landry, *Martel, J.*  
*T. H. Lewis & Porter*, for plaintiffs and appellants. *J. G. Olivier & C. H. Mouton*, for defendant.

BUCHANAN, J. The late *George King* and the defendant, on the 13th of May, 1829, entered into a partnership, "in the business of cultivating cane and making sugar."

The contract of partnership was in the form of an authentic act, and stipulated:

1st. That certain lands particularly described, belonging to the parties either jointly or individually, should be "employed in cultivation for the use of the said copartnership, so long as it shall continue to exist."

2d. That the parties should "each furnish an equal force of slaves for the purpose of cultivating and carrying on said business, the said slaves to be at the risk of their respective owners."

3d. That expenses for buildings, &c., should be equally borne, and the buildings, &c., so bought and constructed, should be common property.

4th. Advances in cash, made by either partner, to be reimbursed out of the proceeds of the next crop; or if not then reimbursed, for want of means, to have an interest of ten per cent.

5th. "At the end of every year, or when the crop shall have been disposed of, and the expenses paid, the net proceeds shall be divided, equally, between the said partners."

KING  
v.  
WARTLELL.

The last crop made for the account of the partnership upon the land described in the first Article of this contract of partnership, was so made in the year 1839.

In the month of February, 1840, *George King*, having purchased a tract of land in the Bellevue prairie, of one *Gray*, removed all the slaves belonging to him, from the plantation cultivated in partnership by himself and defendant, to the tract of land thus purchased, and put an end to the partnership.

*George King* died in November, 1850; and in Oct., 1851, his heirs bring this suit against the defendant, for "a full and complete account of his administration of the affairs of the said partnership," and pray "that he be condemned to pay to plaintiffs such sum as he may be found to owe, on a fair settlement of the partnership accounts."

The defendant pleads the prescription of ten years to this action; and the plea, in our opinion, is well taken. The partnership was dissolved more than ten years previous to the institution of this suit; and the action of one of the partners, or his representatives, against the other partner, for an account, and for the balance resulting from such an account, is a personal action, which is prescribed in ten years.

All the parties are residents of the parish of St. Landry. C. C. 3508.

After the plea of prescription was filed in the cause, the plaintiffs filed an amended petition, with leave of court, praying for a partition of the undivided tracts of land, and other undivided property held in common by the parties, under their contract of partnership.

The defendant excepted to this amendment as altering the nature of the demand. The District Court overruled the exception; and the defendant, under reservation of his exception, answered the amended petition, assenting to the partition of two tracts of land, which he averred to be the only property of the parties still remaining undivided.

While we concur with our brother of the District Court in allowing the amendment offered by the plaintiffs, for the reason, that there is nothing in it inconsistent with the original petition, we cannot give it the effect which the learned counsel of plaintiffs claim for it, of absorbing, as it were, the original action, and giving to *that*, a vitality beyond the limit assigned to it, by the Article of the Code above quoted.

The Article 2861, upon which the plaintiffs rely, does not say, that the action for the settlement of partnership accounts, is governed by the same rules, as the action of partition of inheritances among heirs.

That Article, which is the last in the title of "partnership" in the Code, reads as follows:

"The rules concerning the partition of inheritances, the manner of making such partition, and the obligations which result from the same between heirs, apply to partners."

The meaning of the legislator is, obviously, that the rules of partitions among heirs, apply to partitions among partners; not that the rules governing the action of partition among heirs, apply to all actions which may be exercised by one partner against another.

The judgment of the District Court rejects the action of plaintiffs for a settlement of partnership accounts; and sustains that for a partition of the property remaining undivided between the partners.

KING  
v.  
WARTTLE.

For the reasons above given, the judgment appealed from is affirmed. And it is further decreed, that plaintiffs and appellants pay the costs of appeal.

SAME CASE—ON A RE-HEARING.

MERRICK, C. J. On a reconsideration of this case, we are still of the opinion that the amendment of plaintiffs' petition was properly allowed. Indeed, the defendant's counsel admits that there was no inconsistency between the two demands. In the settlement of partnership accounts, it may frequently happen that each partner is indebted to the partnership for the sums withdrawn; each may have in his possession funds received, and there may be assets on hand.

In such case, if one partner call upon the other for an account, it is evident that judgment ought not to be rendered in favor of such plaintiff, for one-half of what such defendant may owe the *partnership*, but only for such balance as may be due on the partition after the plaintiff has, himself, accounted for what he has received and what he owes. Thus we said, in the case of *Pratt v. McHatton*, 11 An. 265, that a several judgment against one in favor of other individual partners, should not be rendered, where there are available partnership assets, by which the amounts received by the partners can be readily equalized. The amendment, then, was properly allowed, as it tended to a complete liquidation of the partnership. When the amendment was once allowed, it formed a part of the pleadings, and plaintiffs' demand was precisely what it would have been, had plaintiffs' original and amended petition been filed at the same time. See 3 Mart. 40, 41.

The action is then one for partition and the liquidation of partnership affairs. The prescription of this action is thirty years. C. C. 2861, 1227, 1228, 1229.

The settlement of the account of the partners is but an incident to the partition, precisely as the recovery of the rents and revenues is an incident to the action of revendication of real estate. The defendant may be an usurper and a possessor in bad faith, yet the prescription of one year will not bar the action for the rents and revenues, as an incident, to the petitory action. 3 Toul. 72; 6 Saugrey, 248-251, Berlin ed.

So, here, the settlement of the accounts is an incident to the partition, and without the same, there can be no equality in the partition. C. C. 1279, 1280, 1281. Mackeldy says :

"Lorsqu'une succession, ou un objet particulier, fait l'objet de la communauté, chaque co-héritier ou co-propriétaire a le droit d'intenter contre l'autre une action en partage ; le co-héritier ou le co-propriétaire qui jusque-là a administré la succession ou la chose commune est tenu de rendre compte de sa gestion et de partager proportionnellement avec les autres tout ce qu'il a acquis." Brussels ed. 1846, p. 239, sec. 503, No. 2, Partie Spéciale; see also Dig., lib. 10, t. 2, lex. 19; Dig. 10, t. 3, lex. 20.

The point was also decided by this court in the case of *Aiken v. Ogilvie*, 12 An. 354, wherein it was held, that the plea of prescription of ten years did not apply.

This brings us to the consideration of the case on the merits, and it is presented as follows :

"On the 5th of June, 1852, upon motion of the plaintiffs, and without objection from defendant, the settlement of the accounts between the parties, was referred to

KING  
v  
WARTLELL

auditors, who qualified according to law, and on the 25th of October of the same year, notified the plaintiffs and defendant that they would, on the 29th inst., following, enter upon their investigation.

"On the 14th of August of the next year, (1853,) the auditors made their report, establishing from the exhibits before them, a balance in favor of the plaintiffs, up to the 1st of August, 1841, of \$4,996 60.

"This report did not include the value of the movables and immovables held jointly and left in indivision, or the account since pleaded by the plaintiffs.

"On the 13th of December, 1854, the plaintiffs filed their motion to amend the report of the auditors, praying to be allowed as credits the amount of an account for advances made the partnership in 1828, of \$2,095 50, with interest thereon, as stipulated in the articles of co-partnership, and that all the sums claimed by the plaintiffs in this suit, and not credited by the auditors, be allowed. With these amendments, they pray the homologation of the report, and that the defendant be cited to show cause why it should not be homologated accordingly.

"On the 16th of May, 1856, the defendant answered the rule by denying all the allegations alleged in the motion for the amendment of the report; and for cause why it should not be homologated, plead :

"First. That the auditors have adopted the first day of April of each year as the period from which to compute the interest, when, by the terms of the contract, the settlement was to be made at the end of each year, or after the sale of the crop; and that the interpretation thus given to the act by the auditors is in direct violation of the construction put upon it by the parties themselves.

"Secondly. That said auditors have allowed interest to the defendant on the balance due him annually from the first day of April of each year; when under the articles of co-partnership, as understood by the parties themselves, interest was due him from the date of the advances.

"Thirdly. The auditors have allowed interest to the plaintiffs on the partnership funds, or proceeds of the sale of the crops, from the first of April of each year, when by the terms of the contract no interest was due or would be allowed on these funds; but interest was due, and only could be allowed by one partner to the other out of his individual funds, and that in point of fact no funds remained in the coffers of the partnership at the end of any one year.

"Fourthly. That there is error in striking out of the account of the defendant the price of slave *Charles*, purchased at the succession sale of *Washington Butler*, which, with another slave, *Simon*, purchased on the 18th of May, 1835, were bought on account of the partnership, though the titles to them were taken in the individual name of defendant. That immediately after the dissolution of the partnership, a division of the property susceptible of a partition in kind having been effected, the late *Judge King* took the boy *Simon*, and defendant the slave *Charles*. That *King* subsequently sold *Simon* to *Wikoff*, and concluded with a prayer for the rejection of the plaintiffs' demand; that the report of the auditors be set aside; that the errors here complained of be corrected by the court, or that the report be resubmitted to the auditors for correction; and again reiterates his plea of prescription."

It is thus seen that the whole controversy is confined to the objections of the parties to the auditors' report.

I. Plaintiffs claim that the report of the auditors should be amended, by allowing the plaintiffs credit for \$2,095 50, and ten per cent. interest thereon from 1829 until the present time. There is much uncertainty in the testimony on this

KING  
v.  
WARTHELL.

branch of the case, and we are not disposed to disturb the auditors' report in this particular.

II. The second objection of plaintiffs' counsel to the auditors' account, is too general. If any items of credit have not been allowed, they should be specially mentioned in the motion to amend, or in the opposition to the report; otherwise, the report of auditors would be of little or no assistance to the court in the investigation of a case.

III. The defendant objects, that the auditors have assumed the first of April, instead of the first of January, as the period at which the accounts were to be settled and the interest calculated. The difference in the result would be so inconsiderable as to make the change a matter of but little importance. Probably it would not benefit the defendant at all, and would require a new reference to auditors to make the calculations. The first of January is not absolutely fixed by the contract as the period for such calculations, but it is in the alternative, and the period when the crops are sold and the expenses paid is also mentioned in the contract. The auditors assumed the first day of April as that period, and we cannot say that the contract did not authorize them so to do.

IV. The defendant complains that he has been allowed advances only from the first day of April of each year, instead of the date at which they were made. It appears by the fourth clause of the contract, that it was when the advances exceeded the crop, that they were to bear interest, otherwise, the partner advancing, received, annually, his disbursement, at the same time that he withdrew his share of the net proceeds of the crop. Thus, it seems, that the partner advancing, was to wait until this period, before he could require the interest to be stated.

V. It is objected, that the plaintiff ought not to have been allowed interest from the first of April of each year, on his portion of the proceeds of the crop such year; and that in point fact, no funds remained in the coffers of the partnership at the end of any one year. The defendant has claimed interest at the rate of ten per cent. per annum, for his advances and for sums individually furnished the deceased, *George King*. While availing himself of the stipulations of the act of partnership, he has no reason to complain of the application of the same rule to himself.

This construction of the contract appears reasonable and should bind him. He controlled the funds of the partnership and received the same. Whilst he is entering up charges against his co-partner, for principal and ten per cent. interest, he must allow, as a credit under the contract, the funds which his partner is entitled to withdraw, and which he chooses to manage for the benefit of the partnership affairs. They may well be considered advances when so detained.

VI. The auditors do not appear to have erred in refusing the defendant credit for the price of the slave *Charles*. *Judge King*, himself, appears to have paid a part of the price. The proof is too uncertain, and we will allow it to stand as an offset to plaintiffs' claims for horses, mules, &c., furnished in 1828 or 1829.

We do not think *Judge King's* letter to defendant, requesting a loan of \$550, a waiver of his demands against the defendant as a partner. Among many persons, the loan of cash for a short period, is looked upon as a kind of debt of honor and to be returned without reference to the state of accounts between the parties. Perhaps a creditor would apply more willingly to his debtor, for such favor, than to another person.

By the act of partnership, the heirs are entitled to recover ten per cent. interest from April 1st, 1841, until paid.

KING  
v.  
WARTELLE.

The appellant did not complain of the mode adopted to settle the accounts between the partners, as it seemed to favor his argument on the plea of prescription. But it leaves the one partner personally indebted to the other, on the statement of the accounts, whilst the residue of the partnership property must be equally divided between the partners, and we shall so decree.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment heretofore pronounced by us, be set aside, and that the judgment of the lower court be avoided and reversed; and that the plaintiffs, as administrator and heirs of *George King*, deceased, do recover and have judgment against the defendant, *Pierre G. Wartelle*, for the sum of four thousand nine hundred and ninety-six dollars and sixty cents, with ten per cent. interest thereon, from April 1st, 1841, until paid, and the costs of both courts to this date. And it is further ordered, that the case be remanded for an inventory and partition between the plaintiffs and defendant, of the property remaining in kind; the decree being without prejudice to the rights of *Mrs. Louisa King*, wife of said *Wartelle*, to claim her interest in said debt and real estate in the hands of said administrator, when he shall have received and administered the same.

## J. DESHOTELS et als. v. J. B. SOILEAU, fils.

The policy of the State since the Act of the Legislature of the 6th of March, 1857, prohibiting the emancipation of slaves, is that the slaves within her borders shall remain slaves, and there is nothing unconstitutional in such legislation.

Where the testator, by will, directed his residuary legatees, in case his slaves could not be emancipated with permission to remain in the State, to remove them from the State, *after having had them emancipated*, and the Legislature, before the consummation of the emancipation of the slaves according to the forms prescribed by law, passed an Act prohibiting the emancipation of slaves—*Held*: That the slaves had no vested right to freedom under the will, until the formalities required by the laws previously existing, for consummating the emancipation, had been complied with. *Held, also*: That the legacy to the slaves of their freedom, lapsed by the Legislature having passed a law rendering it impossible for them to be emancipated, and they became the property of the heirs-at-law of the testator.

**A** PPEAL from the District Court of the Parish of St. Landry, *Martel, J.*  
*Swayze & Moore*, and *Dupre & Garland*, for plaintiffs, argued:

The judgment of the District Court is so vague, that we are left to the inference, and the inference only, that the legacy to the slaves having lapsed, it inures to the benefit of the universal legatees instead of the heirs.

First. Because they have forfeited any claim under the will, (if declared valid) having failed to comply with the conditions attached to the legacy to them. So far from doing so, *André H. Deshotels*, on his examination on his *voire dire*, says: "He desired the will should be broken, because he thought it unjust. He never took any steps to have the slaves emancipated."

Secondly. Because, if the legacy to the slaves of their freedom has lapsed, and they are to be returned to the estate, the heirs are entitled to them. The only portion of the will under which the intervenors could assert any claim to the possession of the slaves, is in these words: "I will, in the event of my said slaves refusing to leave the State, should the laws of the State require this as a consideration of their emancipation, then I will them to my said nephew and niece, and discharge them from the conditions above, and only require them to have them emancipated whenever the laws of the State will permit them to remain in the State."

DESHOTELS  
v.  
SOULEAC.

This, it will be said, is a positive and direct disposition in favor of the intervenor, manifestly showing the intention not to give them to the heirs. Not so. The intention in this clause is still to *emancipate the slaves* "when the laws of the State will allow them to remain in the State." They were only to be placed in their possession for *that purpose* until the period when the emancipation could be effected. There was then still a condition imposed, and on that condition only were they willed to the intervenors. That condition having become impossible, the legacy based upon that condition, which was the motive of the bequest, must fall also.

Upon a careful examination and reading of the will, it seems evident to us that the motive for making it, the important consideration with the testator, his only aim and object, gathered also from his repeated declarations at other times, was the emancipation of his slaves. He did not desire that they should become the property of either the heirs or universal legatees. If this is so, they must be returned to the estate and belong to somebody. In that event, the heirs are entitled to them, even had the testator stipulated expressly the contrary: for the law gives them inheritance whenever the disposition made of the property in favor of other persons, fail or cannot be carried out. The court must not forget that all testaments are interferences with natural and legal order of descents; they are exceptions to the general law; must be construed as such strictly, and in questions of doubt, the general law should prevail. 12 An. 417.

The last question is that involved in the conclusion of the judgment decreeing the return of the slaves to the estate, the statute of March, 1857, having prohibited the emancipation of slaves; and it is the important issue, if the will is declared valid by your honors. It will be strenuously contended by the learned counsel of the defendant, that the slaves, by the will, became *statu liberi*; that they acquired a vested right to their freedom, of which they cannot be deprived by any subsequent legislation, and, therefore, as to them, the Act of 1857, is retroactive and as such unconstitutional.

We will not examine the question of vested rights, nor the power of the Legislature (or of the government) to pass laws affecting these rights, or impairing the obligations of contracts. We will leave the court to examine this matter in Story and Kent, where the subject is treated of at length, and content ourselves with the endeavor to show that this inquiry can not be made in this case, because there is no vested rights destroyed or interfered with by the statute of 1857. Rights are either natural, created by law, or arise out of contracts.

Leaving to the casuist and to the pseudo-philanthropist, the question of the natural right of the slave to his freedom, we will deal with him here, as we find him in the condition of slavery and considered as property. "A slave is one who is in the power of a master to whom he belongs. The master may sell him, dispose of his person, his industry and his labor. He can do nothing, possess nothing, nor acquire anything but what belongs to his master." C. C. Art. 35.

Slaves, therefore, as such, have no rights but those given them by express statute. In other respects they are like any other property. The right allowed to the master to liberate his slaves upon complying with certain formalities, confers no right upon the slave; it is a law affecting the right of the master, or rather permitting him to make a *particular disposition* of this peculiar property, under certain circumstances. It is in the nature of a grant to the master to change the character of this property, to alter its condition from slavery to freedom, after a compliance with the formalities which are established in view of the public welfare. Until the formalities are complied with, the master cannot avail himself of this "permission" of the law, nor does the slave acquire any right which is perfect and so absolute as to be beyond legislative interference. It is an inchoate right. 11 An. 425.

It is the attribute of every government to establish and regulate such modifications of the rights of property in things within its jurisdiction, as the public interest requires. 2 An. 381.

"The right of the Legislature to regulate the condition of this class of persons is unquestionable." See 2 An. 180.

"There can be no question as to the legislative power to regulate the condition of this class of persons within its jurisdiction, and to prescribe in what form and by what facts such condition shall be changed." 5 An. 697.

And, finally, in 12 An. 419, repeating the language in 11 An., your honorable court expresses the opinion, that "the policy of the State has annexed condi-

DESHOTELS  
v.  
SOLLAU.

tions to the enfranchisement of slaves, which the court cannot permit to be disregarded. This language holds good of a prohibition to enfranchise altogether.

It has been repeatedly decided that until the formalities which preceded emancipation (under the laws heretofore existing) had been complied with, whatever might be the right of the party to his freedom, the court could only render a judgment ordering the emancipation after compliance with established regulations on that subject. See 3 An. 557; 5 Rob. 300; 1 Rob. 359.

But it is said these slaves were "*statu liberi*" at the death of *Deshotels*, the period when his will began to be operative if valid; and as such they had certain rights, that they were capable of receiving by testament or donation; that they could transmit an estate; that they possessed a certain "*état civil*"; grant this for argument sake, does that prevent the legislative authority, *which has the power to prescribe in what form and by what fact such condition shall be changed* to arrest there the change of condition begun, and to say, "thou shalt have no other right"? Unquestionably not. This is not the case of a right arising from a contract under existing laws, giving to the contracting parties certain positive and absolute obligations. This Act of 1857 is the withdrawal of the permission given to the master to dispose, in a certain way, and under particular circumstances, of this property.

We say further, that there can be no such mixed condition or status as a *statu liber* since the Act of 1857, because a "*statu liber*" is "one who has acquired the right of being free at a *future time*, or on a condition which is not fulfilled, or in a certain event, which has not happened, but who in the mean time remains in a state of slavery." Now, at what *future time*, in what event, &c., can the condition of this class of persons be changed? In no event, in no time.

That matter is irrevocably fixed by the law prohibiting emancipation. The policy of the State, the public necessities, our safety, nay our very social and political existence, forbid any such anomalous mixed state as persons entitled to a freedom which they can never obtain. Before this consideration all questions of private or personal rights must disappear. It may perhaps be urged also, that as the intention of the deceased was to emancipate his slaves, the court is authorized to carry out his wishes by allowing the universal legatee or the executor to remove them beyond the State to some country where slavery is not recognized. To this position, which we cannot consider serious, we would only say, that our courts have no authority but such as is conferred by our laws, and that they can not cause to be done out of the State, that which they have no power to order to be executed here. They cannot indirectly contravene a prohibitory statute.

Since preparing the above, we find the following emancipation case decided in the State of Georgia, which is reported in the National Intelligencer of the 24th of July, 1858:

"*Decision of an Emancipation Case in Georgia.*—The Macon Telegraph of Tuesday says: 'On yesterday morning, Judge Lumpkin delivered an opinion involving an emancipation clause in a will, in a case of this kind: A, the testator, had made a will, in which he bequeathed certain negroes for life to B. After the death of B, the negroes were to be free, and carried to a free State or to Liberia. The court decided that this clause in the will was void under our emancipation acts; that the negroes were free *eo instanti* the termination of the life estate in Georgia, and, as a matter of course, contrary to the spirit and policy of our laws in relation to emancipating slaves.'"

J. H. Overton, for defendant, argued:

The leading questions involved in the present suit have already been before this court, but in another form of action, and under different issues from those here presented. That case was a suit instituted in June, 1856, by the present defendant, as dative executor of the last will and codicil of *André Deshotels*, who died in this parish in April, 1855, leaving no issue or other forced heirs, against the District Attorney. It was brought under the 77th, 78th and 79th sections of the Revised Acts of 1855, for the emancipation of the slaves of the deceased, liberated by his last will and codicil.

Two of the present plaintiffs were intervenors in the case, and additional to the defence set up by the law officer of the State, pleaded various grounds of nullity in both the will and codicil, which are specifically set forth in the record of the suit, and make part of the evidence of this cause.

It was tried in the month of June following, by a jury of the parish, who, after a full and elaborate investigation of its entire merits, sustained by their verdict

DESHOTELS  
v.  
SOULEAU.

the validity of the will and codicil, and the integrity of its devices, and adjudged that the slaves of the testator, to whom their freedom was bequeathed, be emancipated without permission to remain in the State.

An appeal was taken by the intervenors from the judgment affirming that verdict returnable to the August term (1856) of this court, where it was argued and held over under advisement until the last term, when, by a decision of your Honors, it was reversed, by a dismissal of the proceedings taken by this defendant for their emancipation, solely upon the ground of the unconstitutionality of the only existing law providing for such cases, then regarded as the only valid and binding expression of legislative will.

A careful investigation of that case, upon the evidence of which this cause is to be decided here, will, we think, conclusively establish the validity of both the will and codicil of the deceased, under which his said slaves claim to be free, and their clear, legal and indefeasible title *consequently*, to all the rights and immunities which attach to that condition, then secured and guaranteed to them by existing laws.

The case at bar is in its character one of revendication, instituted by the plaintiffs, as heirs at law of the testator, claiming to recover, as owners by inheritance, the entire succession as inventoried, including the slaves liberated by the will, and charging the defendant with detaining and withholding the said property from them without color of right, and appropriating it individually to his own use and profit, and pray to be decreed owners, with a further judgment of five thousand dollars, their estimate of the hire.

The defence set up denies the allegations of the plaintiffs, and pleads that the defendant is the dative executor of the will and codicil of the deceased, *André Deshotels*; that they have been probated in due form of law, and ordered to be executed; that he has charge and possession of the successional property of the deceased, yet undisposed of according to law, in virtue of that trust and in due process of carrying into effect the testamentary injunctions of the testator; that the said *Deshotels* died without issue or other forced heirs in April, 1855, when his said will took effect and was duly probated and ordered for execution in June following; that the said will is valid in law both as to form and the dispositions it contains; that at the death of the testator, the slaves liberated by him became absolutely vested with an indefeasible right and title to their freedom, of which no posterior legislation can constitutionally divest them; and concludes with the prayer that the demands of the plaintiffs be rejected; that the dispositions and provisions of the will be held legal and valid; that the said succession, or those who claim the said slaves as heirs, may be decreed to be divested of all ownership and property whatever in them, and under the bequest to them of their freedom, the said slaves may be adjudged to be *statu liberi*, and as such entitled irrevocably to all the rights and privileges which by law attach to that condition.

Such were the original parties, and such the only issues involved in this litigation, when *André Hildevert Deshotels* and *Marie Fidelle Souleau*, his wife, intervened, and in singular contrast with their antecedent acts, joined the defendant in sustaining the will and codicil of the deceased, but only however to the selfish extent, as shown by their pleadings, of securing their own rich legacy. They were the nephew and niece of the testator, to whom a valuable bequest of some thousand dollars had been made upon the condition *expressed*, that they were immediately after his death to take the necessary measures for the emancipation of the slaves named in the will, with permission to them, if possible, to remain in the State. If by the existing laws their emancipation could not be effected here, which has since, by the Act of 1857, become impracticable, they were required to remove them where it could be accomplished, and to furnish to each one of the said slaves in aid of their removal, one hundred and fifty dollars, and to provide for them, from the date of the testator's death until their enfranchisement could be effected, all the necessary food and clothing, and to treat them with kindness and humanity. These were the positive and clearly expressed obligations imposed on the intervenors by the testator, and in the language of the will, "upon their failure to comply with the above conditions, this legacy is to become null and void, so far as they, the said *André Hildevert Deshotels* and *Marie Fidelle Souleau*, are concerned."

Can any rational mind, upon reading the fourth clause of the will, and the first and second clauses of the codicil, made more than two years afterwards to the same effect, come to any other conclusion, but that they promised the testator

DESHOTELS  
v.  
SOILEAU.

faithfully to carry out, after his death, these his last wishes and desires? And how have they discharged the trust so solemnly confided to them, and for the accomplishment of which they were made by his will the beneficiaries of his munificent bounty? Let the nephew himself answer the enquiry.

On the trial of the late proceedings instituted by this defendant, as dative executor, for the emancipation of the slaves, he appeared as an opposing witness, and in his *voire dire* examination upon a challenge to his competency, testified under oath, "that he desired that the will should be set aside, because he thought it was unjust, even if he was to have less as heir than as legatee. He thought it unjust, because it was not such as the deceased always told him he had made it. He was called upon to act as executor in the place of the one named in the will, and he refused to do so. He has never taken any steps to have these slaves emancipated; on the contrary, he has desired that these slaves should be retained in slavery. Deceased told witness that he had made his will, and given all his property to witness and wife."

The further judgment in the case, as appealed from by the defendant, rejects the demands of the plaintiffs, so far as they affect the validity of the will and codicil, which are held to be legal and valid; decrees that the slaves, to whom their freedom is therein bequeathed, be adjudged, notwithstanding, to be the property of the succession of the deceased, and that they be "returned thereto to be disposed of according to law, the statute of the 6th of March, 1857, having prohibited the emancipation of slaves in this State, and that the costs of the suit be paid by the estate of *Deshotels*."

Having thus shown, as we think, conclusively, that the acts in question were executed in strict conformity with the requirements of the law; that the testator was sufficiently versed in the English language to have dictated them in that language, and when thus written, to have understood their contents when read to him and the witnesses; and that they are entitled to be regarded as the truthful depositories of his last wishes. We proceed, in the next place, to examine the legality of the bequests which they contain, of freedom to certain of his slaves, and what rights those testamentary dispositions confer upon them.

The plain and obvious provisions of our law upon that subject had so long been understood and acquiesced in, as a measure of beneficent and humane policy towards that class of our population, that it had become lastingly incorporated with our system of domestic rule and polity. It formed an integral part of that wise law of rewards and punishment, which lies at the foundation of all well-ordered governments, human or divine, and has received, on account of its inflexible adaptation, the deserved sanction of every age and relation in life. It has come down to us from the earliest history of Louisiana, nearly a century ago, when her agriculture was in its infancy, and the concomitant relations of master and slave had but just begun.

The law, as it *then* existed, provided that when a testator had emancipated his slave by a last will, the latter might enforce his enfranchisement against any one who opposed or otherwise resisted it. Again, when a slave, after acquiring money from sources independent of his master, gave it to any person to keep, who promised to buy him of his master and emancipate him,—if such person, after having received the money, refused to buy said slave according to promise, or having bought him refused to liberate him, the slave could appear in court and enforce a specific performance of the obligation. Or, if any one had stipulated with a slave to buy him of his master, under a promise to enfranchise him, whenever he reimbursed him the purchase money, and should, after he had bought him, refuse either to receive the money and set him free, or having received it, should likewise refuse to liberate him, the slave could also appear in court and compel the performance of the contract. Partida 3, tit. 2, *salv.* 8. Such were some of the beneficent provisions of the Spanish law in force in this country for nearly a half century, and until after its cession to the United States, when it underwent, in 1807, by an Act of the Legislative Council, some modifications, leaving however the right to emancipate intact, when once legally acquired.

This Act, for the most part, directory of the forms to be pursued in cases of emancipation, was, in its provisions, restrictive only as to the age of the slave and his good character previously, and even these conditions were dispensed with, in cases where the slave to be emancipated had saved the life of the master, his wife or any of his children.

In the following year, the Code of 1808 was adopted, recognitive of the same

DESHOTELS  
v.  
SOILEAU.

right, that "a master may manumit his slave in this Territory, either by an act *inter vivos* or by a disposition made in prospect of death, provided that such manumission be made with the forms and under the conditions prescribed by the special law enacted thereupon by the Legislature." O. C., Art. 25, p. 40.

Experience had fully demonstrated the efficacy and wisdom of such laws, when those relations of master and slave came in for their appropriate share in the more comprehensive textual legislation of the Code of 1824. By its provisions, the powers and rights of each were more fully and clearly defined, and *this* strong incentive to the slave, as a guerdon for his obedience, fidelity and devotion to his master, was amply maintained. The subsequent Acts of the Legislature for the years 1827, 1830, 1831, 1842, 1852 and 1855, were only amendatory of the forms to be pursued in effecting emancipations, with additional guards and checks against its abuse; but in nowise did they affect existing cardinal legislation upon the subject.

Additional to the laws already in force touching that relation, the Code of 1824 expressly authorizes the slave (an exception to his general incapacity) to contract on his own account for his emancipation, Art. 1783; and further establishes the status of one who had acquired the right of being free at a future time, his capacity to receive by donation or testament, and his right to the protection of the laws against all attempts to dis seize him of his vested freedom. Arts. 193, 194.

The cursory review we have taken of this branch of the law from the earliest settlement of the Territory down to our own times, has been entirely with the purpose of illustrating the settled views so long entertained here, and so uniformly embodied in the legislation of the country. From such an exposé of what was obviously, for so long a time, the uniform and invariable policy of the State in matters of emancipation, we expect to maintain before this court, that no interpretation should be given to the Act of 1857, beyond the prohibition to emancipate *from and after its passage*.

Such a statute repealing all remedy for perfecting title to rights which may continue to be vested, under laws yet in force and intact, would, we have no doubt, in the enlightened age of the English Judiciary, when Coke, Hobart and Holt were the learned and intrepid expounders of its jurisprudence, have been pronounced void as against common right and reason. The same sense of justice and freedom of opinion which distinguished those ornaments of the English Bench in their resistance to destructive innovations and encroachments by Acts of Parliament, upon those great and fundamental principles which underlie and support all government and property, would, if adopted by our own courts, go far towards the protection of individual rights against the follies and inconsistencies of our own legislation. It is only by the free and fearless exercise of either *this* power, or that resorted to in its stead, that when a statute is "contrary to natural equity and reason, or repugnant or impossible to be performed," the courts, upon the presumption that no such absurd or unjust consequence was within the contemplation of the law, ought, out of duty and respect to the law-giver, to intervene and give it a *reasonable* interpretation.

Such an interpretation would be, in our judgment, to confine the prohibition enacted by the statute to the emancipation of the slave *within the State*, which is distinct and different from acquiring a right and title to freedom, and is but the perfection of the latter by a compliance with the formalities prescribed for its accomplishment. The condition and status of a slave who has acquired that right is, while in obedience, restricted in his legal capacity, and subject to service until his enfranchisement; when it is to take effect at some future time. When emancipated, he becomes a free agent, no longer liable to service, and exempt from the civil disabilities which attach to his condition as a *statu liber*. C. C. Art. 143; *Angelina v. Whitehead*, 3 An. 556.

But constructively carried to the extent contended for and evidently assumed by the plaintiffs, as the grounds of recovery in this case, would be to fasten another shackle to the many which already, under the positive restrictions of our laws, clog that free and unrestricted disposition of one's own property, in a case too where the will of the owner could be carried out or executed by removal or colonization, and without violation of the law.

If, therefore, the right of acquiring and disposing of property gratuitously, by last will, remains in force as it was previous to the passage of the Act of 1857, and unaffected by its prohibitory provisions;—if, as affirmed by this court in one

DREHOTELS  
v.  
SOULEAU.

of their late decisions, the testament be a law, devolving upon courts as their first duty, in that as in other laws, to ascertain the intention of the law-maker, and when satisfactorily ascertained, to execute it, it follows, of necessity, that the dispositions whether in the manumission of a slave, which is but the donation to him of his value, or a universal legacy, must alike stand or fall as the intention of the testator can or cannot be carried into effect consistently with the rules of law.

But there yet remains in this connexion another consideration which ought to enter into the views of the court, and have its proper weight in the application and effect to be given to this statute. It is without any preamble exposing its object, and we are, therefore, left to ascertain its intent and meaning by other means. But it is no less clear, that the evident purpose of the Legislature was effectually to prevent any addition to the free-colored population of the State, by emancipation within its limits, in virtue either of testamentary dispositions, or in any of the other modes authorized by our laws.

Adopting the policy of a majority, if not the entire slave-holding States of the Union, regarding this class of their population, as far back as 1842, this State enacted that "all *statu liberi* in the State, when they become free, shall be transported out of the State at the expense of their last owner, by proceeding before the District Court, at the suit of any citizen, and each *statu liberi*, when transported out of the State, shall, on returning into the State, be liable to all the penalties provided by law against free negroes or persons of color coming into the State." And in 1852, ten years afterwards, another Act was passed, providing in its first section that, thereafter, no slave should be emancipated in the State, except upon express condition that, when once emancipated, they shall be sent out of the United States, within twelve months after their emancipation,—and further prescribed, that the Police Juries of the several parishes, and the Common Council of New Orleans, before granting an emancipation, shall require of the owner or other person applying therefor, to deposit in the Parish Treasury of the parish in which the Act is made, or with the Mayor of the City of New Orleans, the sum of one hundred and fifty dollars for each slave to be emancipated, to be applied in payment of voyage to Africa and support after arrival. And further, by the second section of the Act it was declared, that claims for emancipation not yet perfected by the proper authorities shall not be granted, except upon the conditions just recited; and upon a failure to comply with those conditions, the slaves shall be hired out until the sum of one hundred and fifty dollars shall have been made, and so deposited, after which the emancipation may be perfected and the slaves sent to Liberia within one year. And in case every slave so emancipated should not be sent to Liberia within one year after his emancipation, or should return again after being sent, he shall forfeit his freedom and become the slave of his former owner, or revert to his legal representatives.

Next in order follows the Act of 1855, which was declared by this court to be in conflict with Article 118 of the State Constitution, and therefore unconstitutional. Now, what in effect is the law of the 6th of March, 1857, which declares that from and after its passage, no slave shall be emancipated in this State, but a repeal of the conditions of the first section of the Act of 1852, by a compliance with which emancipations of slaves could then be perfected. It is evident that the passage of the former law grew out of the inexecution of the latter, and was alone and exclusively designed by the Legislature to subserve the same end: to close the door for all time to come against the right of a *statu liberi* to perfect his emancipation in this State, and thus to remain and enjoy his freedom here.

The policy of both statutes was the same, and the object the same, progressively varying only in the rigor of the measures adopted the more effectually to suppress any further addition or accession to the free-colored population of the State. They, together with the entire antecedent legislation upon that subject, are strictly acts in *pari materia*, and according to the authorities, must be taken together and compared, in giving a construction to the Act under consideration. The object of the rule is to ascertain and carry into effect the intention of the Legislature, and it is laid down as a legal inference, that a code of "statutes relating to one subject was to be governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions."

Applying these principles, elaborated here perhaps at too great length, to the questions involved in the present case, the following propositions, we think, may be safely and conservatively established by the court, without trenching upon the

DESROCHES  
v.  
SOULEAU.

general power and dominion of the owner over his property, viz : That the authority of the master to manumit his slave is distinct from the emancipation of that slave, as shown by the obvious difference between the *status* and *capacity* of each : while one is subject to civil disabilities and held to service, the other is free from those disabilities and left to the untrammelled enjoyment of his liberty. That the power to manumit does exist independently of any right to emancipate *here*. And finally, that the Act of the 6th of March, 1857, prohibitory of the exercise of the latter *within this State*, was never intended, nor can it be construed, consistently with the established rules of interpretation, to interdict the emancipation of a slave *beyond* her territorial limits, which could work no possible injury to her, and would in no wise be violative, either in letter or spirit, of existing laws.

Will this court then, give such an interpretation to the Act of 1857, as to take away or impair a remedy or the exercise of a right which had previously accrued and become vested ?

Such a construction would give a retrospective effect to that statute, a principle now universally reprobated.

A distinguished American Judge, in the leading case upon that subject, of *Dash v. Vankleecke*, 6th Johnson's Rep. 477, says :

" It is not pretended that we have any express constitutional provision on the subject ; nor have we for numerous other rights dear alike to freedom and to justice. An *expost facto* law, in the strict technical sense of the term, is usually understood to apply to criminal cases, and this is its meaning when used in the Constitution of the United States ; yet laws impairing previously acquired *civil* rights, are equally within the reason of that prohibition, and equally to be condemned. There is no distinction in principle, nor any recognized in practice, between a law punishing a person criminally, for a past innocent Act, or punishing him civilly by divesting him of a lawfully acquired right. The distinction consists only in the degree of oppression, and history teaches us that the government which can deliberately violate the one right, soon ceases to regard the other."

In the commentaries of the same learned jurist, he lays down this limitation to the general condemnation pronounced upon giving a retrospective effect to laws. That it may apply to remedial statutes, *provided* it does not impair or disturb absolute vested rights, and go to confirm rights already existing and in furtherance of the remedy, by curing defects and adding to the means of enforcing existing obligations. Kent's Com., vol. 1, p. —.

Would not the refusal of this court to decree the removal of these slaves by the present defendant, as ordered by the testator, disturb them in their vested rights ? Would such a refusal confirm them in these rights, and be in furtherance of their remedy ? And lastly, would such judicial action cure defects in the execution of those devises, or add to the means of enforcing obligations growing out of the right of the testator to make those testamentary dispositions ?

Leaving these questions with the court, we now proceed, in the close of this argument, to notice the decisions of your Honors upon the effect to be given to the Act of 1857.

The case at bar presents no issue in its pleading, involving the right of the slaves to be emancipated *in this State*. The defendant, acting as dative executor, and charged in virtue of his office and duties with the execution of its devises, claims in defence, to have the *status* of these slaves defined and adjudged, and to be decreed by the court to remove them, with their consent, beyond the limits of this State, where their emancipation can be perfected, and where they will be protected by law in the quiet enjoyment of their liberty.

Two cases decided : *Delphine, f. w. c., v. Guillet et al.*, unreported, and *Turner, Curator, v. Smuth et al.*, reported in 12 An. 417, both brought to enforce emancipation within the State of Louisiana, and consequently decreed against as prohibited by the Act of 1857.

These cases, neither in their cause of action, or in the remedies sought, bear any affinity in point of fact or law to the case at bar, and, therefore, can offer no precedent to control the court in the decision of this cause.

T. H. Lewis & Porter and A. Dejean, for intervenors, argued :

*Adré Deshotels* died in April, 1855, without issue or forced heirs, leaving a last will and codicil, wherein, after making certain specific legacies, he bequeathed " the residue of his estate both personal and real, of every

DESHOTELS  
v.  
SOILEAU.

description whatsoever, including slaves, lands, cattle, horses, hogs, sheep and movable property, to his nephew, *André Hildevert Deshotels* and *Marie Fidèle Soileau*, his wife, in equal portions, with the following condition, that they, the said *André Hildevert Deshotels* and his wife, *Marie Fidèle Soileau*, immediately after the death of testator, take such steps, as shall be necessary, under the then existing laws of the State of Louisiana, to emancipate and set free the following slaves, to-wit," &c.

Testator further nominated and constituted *Eloi Vidrine*, of the above parish, his testamentary executor. Said will and codicil were admitted to probate and ordered to be executed, and the said *Eloi Nidrine* refusing to accept the testamentary executorship, *J. B. Soileau, fils*, one of the particular legatees, was appointed and duly qualified as dative testamentary executor.

On the 13th October, 1857, *Joseph Deshotels* and others, representing themselves as the legal heirs of the said *André Deshotels*, deceased, brought an action against the said *J. B. Soileau, fils*, individually, and not in his said capacity of dative testamentary executor, setting forth: "That the said *Soileau*, without any color of right or title to the said property, has taken possession of the estate aforesaid, and withholds it from the petitioners, who are legally entitled to the same, by virtue of their heirship aforesaid."

The petition concludes with a prayer, that petitioners be decreed to be the owners and proprietors of the estate of the said *André Deshotels*, consisting of lands, slaves, &c.; that the said *Soileau* be ordered to deliver the same to your petitioners, and condemned to pay to them five thousand dollars for the use and hire of said lands and slaves, &c., &c.

Defendant, for answer, denied generally the allegations in petition contained, and specially the heirship of plaintiffs.

For further answer, he represented that the said *André Deshotels*, deceased, had left a last will and codicil, which are valid and in due form of law; that said will and codicil were probated and ordered to be executed, and that respondent was appointed and duly qualified as dative testamentary executor thereof.

*André Hildevert Deshotels* and *Marie Fidèle Soileau*, his wife, as instituted heirs and legatees of the testator, intervened in the above suit, and set forth: "That *J. B. Soileau, fils*, the defendant, is the dative testamentary executor of the last will and testament of *André Deshotels*, deceased, and in such capacity he holds possession of the property claimed by plaintiffs. They also alleged the validity and legality of the will and codicil, and that it was the duty of said *Soileau*, as testamentary executor thereof, to see them faithfully executed."

They conclude with a prayer to be permitted to unite with the defendant in defending the validity of said will and codicil, and that they be declared universal legatees under said will and codicil, &c.

Upon these issues, parties went to trial, and the following judgment was rendered, in substance:

"That the claims of *Joseph Deshotels* and others, so far as said claims relate to the nullity of the testament, be rejected.

That *André Hildevert Deshotels* and *Marie Fidèle Soileau*, his wife, are universal legatees, under said will and codicil.

That the will and codicil be recognized as legal and valid.

That all the slaves to whom the deceased had bequeathed their liberty in said will, with the right to claim the same from the said legatees, be and are hereby decreed to be a part of the succession of said deceased, *André Deshotels*, and to be returned thereto, to be disposed of according to law, the statute of the 6th of March, 1857, having prohibited the emancipation of slaves in this State. The costs of suit to be paid by the estate of *Deshotels*."

From this judgment, *J. B. Soileau, fils*, the defendant, appealed.

The questions, we think, presented in this case for the decision of the court, are these:

1st. Is said will good and valid as a nuncupative will under private signature? If so,

2d. Have not the slaves therein emancipated an indefeasible and constitutional right to their liberty, notwithstanding the statute of the 6th of March, 1857, which was enacted subsequently to the probating of said will?

3d. Should the court be of opinion that the will is good and valid in form, but that said slaves cannot be emancipated, are not the intervenors, who are instituted heirs under the will, and to whom the residue of the estate is bequeathed,

DEBOUTILLE  
v.  
SOULEAU

also universal legatees, and as such, are not said slaves to revert to them, and not to the legal heirs?

Having conclusively shown, as we believe, that said will and codicil are good and valid in form, and that testator understood perfectly the dispositions thereof, we will briefly allude to the second proposition in order, to-wit: Have not the slaves therein emancipated an indefeasible right to their freedom, notwithstanding the statute of the 6th of March, 1857, which was enacted subsequently to the probating of said will?

Article 105 of the Constitution of the State of Louisiana, says: "No ex post facto law, nor any law impairing the obligation of contracts, shall be passed, nor vested rights be divested, unless for purposes of public utility, and for adequate compensation previously made."

As the will bequeathing to these slaves their liberty, was not only made, but was also probated and ordered to be executed previous to the passage of the aforesaid statute, had they not, therefore, a vested right to their freedom, which no subsequent legislation could constitutionally divest them of?

But should your honors be of the opinion, that said slaves are not entitled to their freedom or cannot be emancipated, are not intervenors, who are instituted heirs under the will, and to whom the residue of the estate is bequeathed, also universal legatees, and, as such are they not benefited by the lapsed legacies; that is, are not said slaves to revert to them and not to the heirs-at-law?

That they are universal legatees, we think there is little doubt. According to French commentators, whose interpretation of the civil law is considered high authority, they undoubtedly are universal legatees.

What says Toullier on this point? Book 3, tit. 2, art. 513, p. 487—"Si le testateur faisait d'abord un legs particulier et donnait ensuite le surplus ou le restant de ses biens à un autre légataire; par exemple, je lègue à Secundus le fonds Cornélien, et le surplus ou le restant de mes biens à Primus." *Ce dernier legs serait universel*, parce qu'il est sensé que je n'ai voulu restreindre le legs de tous mes biens que j'ai fait à Primus qu'en faveur de Secundus, et dans le cas seulement ou celui-ci recueillerait son legs particulier."

This position is sustained in 3 An. 705, to-wit: "One to whom a testator bequeaths the residue of his estate after the payment of a particular legacy, is entitled, as universal legatee, to the possession of the estate of the deceased, when there are no heirs to whom any portion of the testator's property is reserved by law."

Now, if these intervenors are universal legatees, are they not benefited by the lapsed legacies, and do not these slaves revert to them and not to the heirs-at-law?

The doctrine of lapsed legacies or lapses, and the rights of universal legatees thereto, is very fully treated by the French commentators. Rogron, book 3, t. 2, p. 210, says: "Ce qui forme le caractère essentiel du legs universel c'est le droit éventuel qu'a le légataire à tout ce qui compose ou composera la succession; il a, de plus, le privilège de continuer la personne du défunt et de le représenter comme ferait un héritier légitime."

Paillet, book 3, t. 2, p. 362, says: "Il est de principe que dans le cas de nullité ou de caducité des dispositions particulières, le legs universel profite de la nullité ou de la caducité."

Toullier, l. 3, t. 2, p. 484, says: That even when there is a forced heir, the universal legatee inherits by right of accretion, to the exclusion of said heir, the lapsed or repudiated legacies.

We could multiply quotations from the above authorities, in support of this point, but wish to be brief, and therefore forbear.

But passing over the question of lapses, of universal legatees and their rights, &c., &c., let us see what disposition the will has made of these slaves, should they not be emancipated. The testator, it seems, provided for this contingency. Let us read from the will, p. 21, 2d line: "I will, however, in the event my said slaves refusing to leave the State, should the laws of the State require this as a consideration of their emancipation, then I will them to my said nephew and niece, and discharge them from the conditions above, and only require them to have said slaves emancipated, whenever the laws of the State will permit them to remain in the State."

The above clause indicates clearly the intentions of the testator, as to the disposition to be made of these slaves should they not be emancipated. And we

contend that any other disposition of them would be a palpable violation of the expressed will of the testator.

Therefore, by the terms of said will, be they universal legatees or not, they are entitled to said slaves should they not be emancipated.

DESHOTELS &  
v.  
SOILEAU.

BUCHANAN, J. Upon the questions of fact relating to the formalities required by law for the confection of a nuncupative testament under private signature, having been observed in the present instance, we concur in the conclusions of the District Judge, from the voluminous, and to some extent, contradictory testimony before him.

The will of *André Deshotels* is valid in form, and has been duly probated.

Several questions of law are presented to us, upon the following clause of that will :

"Fourth. I will and bequeathed unto my nephew, *André Hildevert Deshotels*, and to his wife, *Marie Fidèle Soileau*, in equal portions, all the residue of my estate, both personal and real, of every description whatever, including slaves, lands, cattle, horses, hogs, sheep, and movables. This bequest is given and made with the following conditions, that is to say : that they, the said *André Hildevert Deshotels*, and his wife, *Marie Fidèle Soileau*, immediately after my death, take such steps as shall be necessary, under the then existing laws of the State of Louisiana, to emancipate and set free the following slaves, to-wit, *Harriet, Louise, Hyacinthe, Lucy, Jean Pierre, Eliza, Pauline, Coralie, Louison, Aimie, Jean Baptiste, Valmont* and *Louisa*, upon such terms as will permit them to remain in the State of Louisiana ; and should this not be permitted by the laws, then they shall have them emancipated, and furnish each one of the said slaves with one hundred and fifty dollars, to remove them from the State of Louisiana. And upon the further condition, that the said legatees shall, during the time from the date of my death and the emancipation of my slaves, furnish them all necessary food and clothing, and treat them with kindness and humanity : and on their failure to comply with the above conditions, this legacy is to become null and void, so far as the said *André H. Deshotels* and *Marie Fidèle Soileau* are concerned. And in order fully to carry out this provision of my will, I give and bequeath unto my said slaves their liberty, with the right to claim the same from my said legatees, immediately after my death. I will, however, in the event my said slaves refusing to leave the State, should the laws of the State require this as a consideration of their emancipation, then I will them to my said nephew and neice, and discharge them from the conditions above, and only require them to have said slaves emancipated, whenever the law of the State will permit them to remain in the State."

And in a codicil, there is a similar testamentary disposition in relation to a slave named *Marie*.

The heirs-at-law of *André Deshotels* contend, that the legacy of freedom to the several slaves named in these clauses of his will and codicil, has lapsed, from the incapacity of the legatees to receive, (C. C. 1696,) the emancipation of those slaves being now a legal impossibility, under the provisions of the statute of the 6th of March, 1857. Session Acts, p. 55.

On the part of the executor, it is contended that the right of the slaves to their freedom, became vested and indefeasible, upon the death of the testator, which took place on the 6th of April, 1855, about two years previous to the passage of the Act of the Legislature in question : and that it would be contrary to the 105th Article of the State Constitution, to give to that statute the effect of defeating a right thus vested.

DESBOTELS  
F.  
SOULEAU.

The operation of the Act of 6th of March, 1857, has been considered by us in various cases, commencing with that of *Delphine v. Guillet*. The constitutional view of the subject now presented, was lately considered by us in several cases decided during the last spring in New Orleans—the cases of the *Succession of Baker Woodruff*, and that of *Johnson v. Johnson*. The same point was raised in the case of slave *Minnie and others v. John Ray, Executor*, lately decided at Monroe. We then held, and we adhere to the doctrine, that the right of a slave to freedom under the will of his master, was not vested, until the formalities required by law for consummating the emancipation had been complied with.

The right of the owner of a slave to give the slave his freedom, was always a qualified right in Louisiana, subject to the action of the constituted authorities, and by the Act of the 6th of March, 1857, the right, qualified as it was before, has been annihilated. Dating from the passage of that Act, we understand the policy of this State to be, that the slaves within her borders shall remain slaves. In this, there is nothing unconstitutional.

The Legislature has not pretended to say, that those who were formerly slaves, and who, having been solemnly emancipated with all the forms of law, have become free, shall return to slavery. It has merely rendered it impracticable for the future, to consummate the emancipation of a slave, by withholding that sanction which was always necessary to the consummation of emancipation.

And the last will now under consideration, affords internal evidence that the testator was aware of his inability to give complete and perfect freedom to his slaves, and desired to provide against every legal contingency that might occur, to prevent the accomplishment of the object which he had in view. For,

First. He devises these slaves, with other property, to certain persons, on condition that the devisees shall take the necessary legal steps to have the slaves emancipated, with permission to remain in the State.

Secondly. On condition, (in case the law will not permit the slaves, when enfranchised, to remain in the State,) that the devisees shall have them emancipated, with the obligation to remove from the State, and shall furnish the slaves with necessaries funds to operate such removal.

Thirdly. For fear the devisees should disregard the preceding conditions of the devise, the testator gives to these slaves the right to sue the devisees for their freedom, immediately after the death of testator; and,

Fourthly. Should it ever happen that the slaves themselves would refuse to accept the boon of liberty, coupled with the obligation to remove from the State, the testator makes a special devise of the slaves to certain persons, *upon trust*, that the devisees will have the slaves emancipated, whenever the law shall be so changed, as to permit them to remain in the State after enfranchisement.

The whole of this complicated machinery has been constructed with reference to the peculiar legislation on this subject, as it existed when the will was made, and the modifications which that legislation might undergo thereafter. One contingency alone was omitted; that the Legislature should think proper to take away the power of emancipation altogether. This contingency has happened; and the will has made no provision for such a case. The special devise of the slaves to the nephew and niece of the testator, has no application nor effect to this state of the case, because it is only made in event, that the negroes should refuse to leave the State as a legal condition of their emancipation.

It is argued by the able counsel for the testamentary executor, that the will has conferred upon his client, the power which the testator might unquestionably

have exercised in his lifetime, of taking the slaves in question out of the State. But we do not so understand the clause referred to, and which we have copied above.

DESHOTELS  
v.  
SOILEAU.

The *residuary legatees* are directed, in a certain contingency, to remove the slaves from the State, *after having had them emancipated*. This is a very different thing from authorizing the *executor* to remove the slaves *without being emancipated*.

The only question which remains to be considered, is one raised by the intervenors, the residuary legatees, namely : that the legacies of freedom to the slaves named in the will, having lapsed, to whom do the said slaves belong—to the residuary legatees, or to the heirs-at-law ? This question is settled in favor of the heirs-at-law, by the decision in *Turner v. Smith*, 12 An., which affirmed the doctrine of the case of *Compton v. Prescott*, 12 Rob ; also, case of *Josephine Lewis v. Heirs of Williams*, lately decided at Alexandria.

It is, therefore, adjudged and decreed, that the judgment of the District Court be amended ; that the will and codicil of *André Deshotels*, admitted to probate and execution by decree of the District Court of St. Landry, be recognized as valid in form ; that the defendant, *Jean Baptiste Soileau*, as testamentary executor of said last will and codicil, do account to plaintiffs, as heirs-at-law, and to intervenors, as residuary legatees of said *André Deshotels* ; that the legacy of their freedom, to the several slaves named in the last will and codicil, be declared to have failed ; and the said slaves to be the property of plaintiffs, in the proportions in which they are severally heirs-at-law of the testator. It is lastly decreed, that the costs of this suit, in both courts, be borne by the succession of *André Deshotels*.

### C. G. WILLIAMS et al. v. DONAT LEBLANC.

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A judgment in a petitory action will be received as proof against those who were parties to the suit as warrantors.

Relief by amendment of the judgment of the court below cannot be extended to one appellee against another appellee.

The warrantor is not liable for counsel fees paid by the party calling him in warranty.

**A**PPEAL from the District Court of the Parish of St. Landry, *Martel, J. T. H. Lewis & Porter and Swayze & Moore*, for plaintiffs. *J. E. King*, for defendant. *Dupré & Garland and B. F. Linton*, for warrantor and appellant.

BUCHANAN, J. This is a petitory action for a tract of land measuring six arpents front on the Courtableau Bayou, by forty arpents in depth, being the same for which (with other lands) suit was brought by the same plaintiffs against *John Close*, and judgment rendered by this court at the August term in Opelousas, 1857. See 12 An., p. 873.

After judgment rendered in that case, it appears that plaintiffs discovered that the land embraced in the present suit had been in the possession of the present defendant *Donat Leblanc*, from a date antecedent to the institution of their previous suit above mentioned. They have, therefore, instituted the present suit against *Donat Leblanc*, the actual possessor of the land.

*Donat Leblanc* has called in warranty his vendors, *Honoré Déjean* and *Casimir*

WILLIAMS  
v.  
LEBLANC.

*Leblanc*, who appeared and called in warranty their vendor, *John Close*. The suit of *Williams v. Close*, decided in 12th An., was offered in evidence by plaintiffs, and was received as proof against the warrantors, who were parties to that suit. This ruling was correct. The warrantors were the real defendants in this action, and, as to them, the suit in 12th An. was not *res inter alios acta*. That suit, like the present, was a petitory action, *rei vindictio*; and although the action should properly have been instituted against a party in possession, yet, as the warrantors, though not in possession, choose to defend the action as if they had been in possession, the judgment rendered therein was binding upon them, as *ficti possesores qui liti se obtulerunt*. Mackeldey, *Manuel du Droit Romain*, section 302, paragraph 2.

There was judgment in favor of plaintiffs against the defendant; in favor of defendant against *Honoré Déjean* and *Casimir Leblanc*, his vendors; and in favor of the said *Déjean* and *Leblanc* against *John Close*.

*Close* alone has appealed; and it is the judgment against *him* alone which is open to our revision.

The plaintiffs have answered the appeal, by praying an amendment of the judgment as between themselves and the defendant, which allowed a remuneration to defendant for the enhanced value of the land and improvements; but this relief cannot be extended to one appellee against another appellee. The allowance in question, in the judgment of the District Court, was personal to the defendant, who is not before us as appellant.

The judgment appealed from is as follows:

"It is further decreed, that the warrantors, *Déjean & wife*, have judgment against their warrantor, *John Close*, in his individual capacity, and as administrator of his deceased wife, *Euphrosine Barré*, for the restitution of the price paid to him for the land, for three hundred dollars counsel fees, and for one thousand four hundred and ninety dollars and 83 cents, being the amount recovered by the defendant from the said *Déjean & wife*. It is further decreed, that the warrantor, *Casimir Leblanc*, have judgment against *John Close* in his individual capacity, and as administrator of the succession of his deceased wife, *Euphrosine Barré*, for the sum of one hundred dollars, fees of counsel, for four hundred and seventy-five dollars, being the price paid by said *Casimir* for his land, and for the sum of two hundred and ninety-eight dollars and sixteen cents, the latter sum being the amount received by the defendant from the said *Casimir Leblanc*.

This double judgment does not appear to us to be sustained by the evidence.

I. On the 25th of April, 1849, *John Close* and *Euphrosine Barré*, his wife, appeared before a Notary Public in the parish of St. Landry, and made a sale of a tract of land of five arpents front to the Bayou Courtableau, left bank, by forty arpents in depth, to their daughter, *Euphrosine Close*, wife of *Honoré Déjean*, authorized and assisted by her said husband. The consideration of this sale was a nominal price of one thousand dollars, or five dollars an arpent, "laquelle somme de mille piastres est ou sera à déduire de la part ou portion qui reviendra à la dite dame *Déjean* dans la succession du premier décédé de ses père et mère, les présens vendeurs, qui alors sera acquittancée sans qu'il soit besoin d'en prendre aucune inscription hypothécaire."

This recital of the deed shows plainly, that no money whatever was paid by *Mrs. Déjean*. There was a conveyance to her of a tract of land by her father and mother, in advance of her share in their inheritance, with a stipulation to collate, in the partition of said inheritance with her co-heirs, a sum of one thousand dol-

WILLIAMS  
v.  
LEBLANC.

lars as the value of the advance thus received by her. *Mrs. Close* has died, but there is no proof of any partition of her estate, in which a collation has been made by *Mrs. Déjean*; and if there had been, *Mrs. Déjean's* recourse for restitution would have been against her co-heirs, under the warranty implied in partitions. *Close*, therefore, owes nothing to *Déjean* for the price of the land of which defendant has been evicted; for no price was paid by *Déjean* or his wife, to *Close* for said land.

Neither does *Close* owe anything to *Déjean* for lawyers fees in defending this suit. This point has been repeatedly settled in this court. See *Hale v. New Orleans*, 13 An., and the cases there cited.

The other items which make up the sum for which judgment is rendered in favor of *Déjean* against *Close*, are composed of damages assessed by the judgment in favor of defendant against *Déjean*; and which, even if proper charges against the latter, (which is not a matter before us,) he has no right to recover of appellant.

II. *Casimir Leblanc* bought at a public sale, made by order of court, of the effects belonging to the community of acquets between *Euphrosine Barré*, deceased wife of *John Close*, and her surviving husband, on the 4th of April, 1853, a tract of wood land measuring eight arpents front, by forty in depth, on the Bayou Courtableau.

On the 18th February, 1854, *Casimir Leblanc* sold to *Donat Leblanc* a tract of one and a-half arpents front, by forty arpents in depth, on the Bayou Courtableau, which the vendor describes in the deed as belonging to him, "having acquired the same at the public sale of the succession property of the late widow of *Charles Close*." This title does not correspond with that upon which the appellant is called in warranty. The answer of *Close* to the call in warranty seems, however, to admit the identity of the land conveyed by the two titles; and the argument of his counsel upon the appeal does not call its identity in question. We may, therefore, suppose the description of *Casimir's* title in his deed to *Donat* to be a clerical error. We consider *Close* bound to warrant the title of the land sold at probate sale as community property. The price at which it was sold at that sale, was eleven dollars eighty-seven and a-half cents an acre; which for forty acres, the quantity which is covered by the claim of plaintiffs, amounts to four hundred and seventy-five dollars. For this amount the appellant is liable to *Casimir Leblanc*, his vendee.

There are some other items of damages allowed in favor of *Casimir Leblanc* by the judgment appealed from, which we reject for the reasons given in relation to the claim of *Déjean*.

A plea of prescription is filed by defendant, which, if it were an open question, we would think entitled to great attention; for the court in *Hers of O'Conner v. Barré*, in 3d Martin, expressly decided that *Barré*, the author of the title of *Close*, was a possessor in good faith, and with a good title.

But the decision in 12 An., p. 873, of *Williams v. Close*, has barred this defence as to the appellant; and as to the defendant and his warrantors, who acquired their title less than ten years previous to the institution of the present action, prescription has not run in their favor, independent of the possession of *Close*, their author.

It is, therefore, adjudged and decreed, that the judgment of the District Court upon the call in warranty of the appellant, *John Close*, by *Honoré Déjean*, appellee, be reversed; and that the said call in warranty be rejected; and it is further

WILLIAMS  
v.  
LEBLANC.

decreed, that the judgment of the District Court upon the call in warranty of the appellant, *Close*, by *Casimir Leblanc*, appellee, be amended, and that said *Casimir Leblanc* do recover of said *John Close*, upon his said warranty, the sum of four hundred and seventy-five dollars, with costs of his said call in warranty in the District Court. And it is decreed, lastly, that the appellee, *Honoré Déjean*, pay costs of his call in warranty in the District Court; and that the appellees, *Déjean* and *Casimir Leblanc*, pay costs of appeal.

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PAYNE & HARRISON v. EDWIN B. SCOTT, Tutor.

Where a suit is brought by a merchant on an account rendered against minors for supplies furnished, advances, &c., and a privilege claimed upon their crop, and it appears that he had dealt with the tutor in his *individual capacity*, and the account was made in his name, and no contract is shown to have been made with him as tutor on behalf of the minors—*Held*: That he can only recover so much as is shown to have enured to the benefit of the minors, and then only to the extent of their revenues.

Article 343 of the Civil Code, which provides that the expenses incurred in the support and education of minors, shall not exceed the amount of their revenues, without the authority of the court, on the advice of a family meeting, applies also to expenses incurred in the management and preservation of their estates.

**A**PPEAL from the District Court of the Parish of St. Landry, *Martel, J.*  
*Swayze & Moore*, for plaintiffs and appellants. *John E. King*, for intervenor and appellee.

MERRICK, C. J. This suit is brought to recover the sum of \$1498 20, and legal interest thereon from January 20th, 1856, with a privilege upon the crop in the ground, for goods, merchandize, necessary plantation and household supplies, and money alleged to have been furnished for the use and benefit of a plantation and slaves belonging to the minors, *Pannell, Henrietta* and *Fanny Scott*. These minors, are the issue of the first marriage of their tutor, *Edwin B. Scott*. *Scott* has a like number of children by his second marriage. He resides with his second wife and mother upon the plantation belonging to the children of the first marriage. These children have six negroes, which appear to be employed upon the plantation; and *Scott* also employs upon the same three others belonging to his mother. In 1855, he made thirty-five hogsheads of sugar, having given an equal quantity to get the thirty-five ground.

In 1856, (the period when this account was made,) the crop consisted of fifty acres of corn, and the like number of acres in cotton. The cotton, owing to neglect of cultivation, only produced 700 pounds in the seed, or about half a bale of ginned cotton; equal in value to twenty dollars.

The account sued on was made in the *individual name of Edwin B. Scott*. The first item therein bears the date of 21st of March, 1856, and is for a bill of \$518 77, and the last is under the date of April 7th, 1856, and is for an acceptance of a draft for \$335 92, including commissions, stated to be for carts and wagons. There is also another charge of \$100 for a plantation wagon.

The items of the bill of 21st of March, (with the exception of 5 barrels of pork at \$80, 5 sacks of salt at \$5 75, and \$217 21 for bagging, rope, twine and tar.) were for family supplies, such as coffee, rice, claret, &c. Other items of the account are for dry goods, clothing, furniture, and cash advanced.

PAYNE  
v.  
SCOTT.

The under-tutor intervened in this case in the District Court, for the protection of the minors, and judgment was rendered in favor of the plaintiff against *Scott* individually, but against the plaintiffs on their demand against the minors.

The plaintiffs appeal.

It has been shown that the credit was given to *Scott* individually, and not as tutor. The plaintiff cannot, therefore, recover in virtue of any contract; for none has been shown to have been made on behalf of the minors. *Messrs. Payne & Harrison* did not, at the time they gave the credit, give it on account of the revenues of the minors; for those gentlemen were not then probably aware of the minors existence.

If the plaintiffs can recover at all, it is in the form of the action known in the civil law as *de in rem verso*, that is, for so much as has actually turned to the advantage of the minors, and then (their being no permanent addition to their estate) only to the extent of the revenues. C. C. 1960, 2278, 343.

Only fifty acres of cotton were planted in 1856, and *Scott* could not reasonably have expected to make over fifty bales of cotton, and (as just said) actually made but half a bale, worth twenty dollars. But the minors are sought to be charged with rope and bagging sufficient for over one hundred bales, and at a cost of more than ten times the value of their whole crop, viz, \$213 11. This bagging, 720 yards, and the rope, 1021 pounds, were evidently used in some other manner. So of the wagons; the minors are charged with \$435 92 for carts and wagons, and the proof is, that the following year there were no wagons on the place, and only one pair of wheels.

The plaintiff has not only failed to show that the foregoing items enured to the benefit of the minors, but his allegation is rebutted by the evidence.

The plaintiff has also failed in his proof in regard to the pork, salt and tar, which may have been disposed of by *Scott*, the purchaser, in the same manner as the wagons, carts, bagging and rope. At all events, the plaintiffs, in this sort of action, (where the goods were charged to one person, and the price is sought to be recovered of another,) cannot recover against the minors where the tutor himself would not be permitted to do so. The proof is insufficient in this case.

The plaintiffs deny that Article 343 of the Civil Code, which provides that the expenses for the support and education of the minor shall not exceed his revenues, applies to those which are necessary to preserve and render productive their property; and it is supposed that it is sufficient to show that the supplies furnished were such as the defendants might reasonably be supposed to need for their plantation.

It appears to us, that the spirit of Article 343 covers the expenses of the minor's estate, as well as his personal expenses. See *Moore v. Nichols*, 5 L. R. 488.

In *Barbarin v. Barbarin*, 3 An. 264, this court, in speaking of expenses incurred in the management of the estate and payment of debts, &c., said: "The advances made by the under-tutor, not having been authorized by a decree of court, rendered on the advice of a family meeting, he has no claim for them against the minors, beyond the revenues; and he cannot be permitted to enforce his claim against the defendant personally, until that of the minors is ascertained and paid."

In the case of *Hubbell v. Hubbell*, the tutrix expended more for the support and education of the minors than the revenues. The court remarks generally, that "our Code expressly provides that the expenses of a minor shall never exceed his

PAYNE  
v.  
SCOTT.

revenues, without the authority of the court, upon the advice of a family meeting." 5 An., p. 525.

In the case of *Urquhart v. E. B. Scott, Tutor*, 12 An. 674, the suit was for "a balance of account due plaintiffs for alleged advances made and supplies furnished to said Scott, in his capacity aforesaid, for the use and benefit of a plantation belonging to said minors," and it was alleged "that said advances and supplies were absolutely necessary for the proper administration of the property and the maintenance and education of said minors."

In reference to an action of this sort, we said :

"It is not shown that the estate was embarrassed with debts at the commencement of the tutor's administration, nor does it appear that the revenues of the minors were inadequate to their support. The tutor is prohibited, under the stringent but wise provisions of our law, from borrowing money on behalf of the minors. If their support, or the preservation of their property require an expenditure beyond these revenues, it is the duty of the tutor to cause to be convened a meeting of the family or friends of the minor to deliberate upon the propriety of making a loan. In the absence of such authority, the tutor can make no contract, binding as such, which creates an indebtedness on the part of his wards. Those who deal with tutors acting on behalf of minors, must do so at their peril."

It was after making these sweeping remarks, that the court used the language relied upon by plaintiffs' counsel. An examination of the case will show, that the court was reasoning in reference to the proceeds of the crop in the hands of *Messrs. W. & D. Urquhart*, and so far from countenancing the doctrine that a tutor can by his own acts diminish the capital of the minor, the court, by its decree, rejected the plaintiffs' demand. 12 An. 674.

The case of *Miltenberger v. Elam*, 11 An. 667, sustains the same view of the capacity of the tutor and rights of the minors.

It is true, that Article No. 339 of the Civil Code allows the property of the minor to be alienated without the advice of a family meeting when a judgment is to be executed against him. But this Article presupposes that the judgment was obtained upon a just cause and in conformity to law. See examples, 7 L. R. 316, 8 L. R. 321.

There is the greater necessity for a careful examination of the demand against the minor, on account of the effect of the execution of the judgment against him.

We are, therefore, of the opinion, that the judgment of the lower court ought to be affirmed, and it is so decreed.

#### SUCCESSION OF BENJAMIN MCCLELLAND.

14 762  
80 974

The community cannot be allowed more than the actual cost of improvements made on the separate estate of one of the spouses, during the existence of the marriage, although the property had increased in value during its existence.

One partner in the community will not be permitted to question the title of the other partner to property possessed by such partner prior to the existence of the community.

**A** PPEAL from the District Court of the Parish of St. Landry, *Martel, J. T. H. Lewis & Porter*, for administrator. *J. E. King* and *C. A. Moulton*, for opponent and appellant.

MERRICK, C. J. The object of this suit, (which is prosecuted by way of an opposition to the administrator's account), is to settle the value of the community property which existed between the intestate and the opponent, his widow.

SUCCESSION OF  
MCCLELLAND.

The amount to be deducted for the debts of the community is reserved for future adjustment.

Both parties, administrator and opponent, appeal.

I. The first question presented is, whether the District Judge has allowed enough to the community for the increase of the herds or stock of cattle and horses in the parishes of St. Landry and Calcasieu?

Both parties complain : one maintains that the Judge has allowed too much ; the other, that the estimate is too low.

There is much discrepancy in the testimony, and after a careful consideration of the same, we are unable to say that the District Judge erred on this branch of the case. The testimony leaves it very doubtful whether there had been much increase in the herds of cattle during the existence of the community. We could not interfere with the conclusions of the District Judge on this subject with any certainty that our appreciation of the testimony would be more exact. We do not perceive that the proceeds of the gentle cattle are credited to the separate estate.

II. Was the plantation of the deceased (being his separate estate) increased in value by the erection of buildings thereon by the community? The District Judge allowed \$450 for such improvements. He must have assumed, (which was correct), that the community could not be allowed for more than the cost of such improvements, although the property had increased in value since the existence of the community. The question is not the same when the improvements do not enhance the value of the soil to the amount of the cost of the same. 2 An. 43.

III. The District Judge allowed the separate estate of the husband \$6,475 for separate property sold during the existence of the community, but not shown by direct proof to have enured to its benefit. We cannot say, under the peculiar circumstances of this case, that he erred. He charged the separate estate (upon the mere presumption of law) with the sum of \$19,733 84, debts of the husband, paid during the existence of the marriage. It might well be inferred, considering the thrifty habits of the deceased, that the \$6,475 were used in part payment of his separate debts, no other separate debts having been shown to exist. If the community is credited with the one, it should be debited with the other.

IV. Certain slaves were in the possession of the husband as owner, before his marriage with the opponent. There is no other proof of ownership, and no production of written titles. Is the presumption arising from Art. 2374 C. C., that all the effects which the husband and wife reciprocally possess at the dissolution of the marriage, rebutted by the proof of such prior possession? The deceased was, at the time of his marriage, the owner of a large estate of lands, slaves, vacheries, &c.; much of which is conceded to be separate property. It is to be presumed, that he possessed the slaves he held prior to and at the time of the marriage, as owner also. Indeed, we so understand the testimony. If the widow in community pretends that these slaves belonged to the community, she must show that the title to them was acquired during the community. One partner in the community cannot be permitted, under the mere presumption of Art. 2374, to set up defects and question the title of the other to property possessed by the other prior to the community.

V. The claim against the administrator for the supposed loss arising from a

SUCCESSION OF  
McCLELLAND.

neglect to sell certain slaves, cannot be considered under the pleadings and argument of counsel.

We perceive no other questions which require particular notice, and are satisfied that substantial justice has been done between these parties.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be affirmed, the administrator and opponent each paying one-half of the costs of the appeal.

### BAZILIE FUSELIER AND HUSBAND V. J. D. BABINEAU.

14 764  
51 1643

14 764  
109 365

A judgment against the tutor upon the account of tutorship does not conclude the tutor's surety, although *prima facie* evidence against him.

When a solidary co-debtor pays in discharge of the whole debt less than the whole amount of the debt, he cannot claim from his co-debtor reimbursement of his portion of the whole debt, but only of the amount paid.

Any convention to the contrary between the creditor and the co-debtor making the payment, produces no effect upon the rights of the co-debtor, who was not a party to such convention.

The surety on a tutor's bond is not liable for what came into the tutor's hands before signing the bond.

The tutor is bound to pay interest on all sums of money of the minor, which come into his hands.

**A** PPEAL from the District Court of the Parish of St. Martin, *Martel, J. E. Simon and C. H. Mouton*, for plaintiff and appellant. *Martin Voorhies*, for intervenors. *A. DeBlanc and J. G. Olivier*, for defendant.

BUCHANAN, J. *Mrs. Fuselier*, the plaintiff, sues defendant, who is one of two co-sureties of her late tutrix, for a balance of account of tutorship, due by the latter, as settled by a judgment obtained by plaintiff against her said tutrix.

The bond, subscribed by defendant, on which this action is based, reads as follows :

" *State of Louisiana—Parish of St. Martin.*

" Know all men by these presents, that we, *Julie Picard*, widow of *Simon David*, and now the wife of *Ursin Ozenne*, and by him duly authorized, of the parish of St. Martin, and *Antonio Bauvais* and *Joseph D. Babineau*, of the same parish of St. Martin, are held and firmly bound unto *Alphonse Robin*, Judge of the parish of Pointe Coupée, and to his successors in office, in the sum of thirty thousand dollars, for the payment whereof, well and truly to be made, we bind ourselves, our heirs, &c., firmly by these presents, dated at the parish of St. Martin, this third day of January, one thousand eight hundred and thirty-eight. The condition of the above obligation is such, that whereas the above bound *Julie Picard* has been appointed by the Judge aforesaid, tutrix of *Basilie Fuselier* and *Ludger Fuselier*, her grand-children : Now, therefore, if the said *Julie Picard* shall well and truly fulfill the duties incumbent on her as tutrix aforesaid, and shall account for and pay over to the said *Basilie Fuselier* and *Ludger Fuselier*, or to their legal representatives, or to such person or persons as shall be entitled to the same, when thereto legally required, all such sum or sums of money as shall come into her hands as tutrix aforesaid, then the above obligation to be void, otherwise to remain in full force and effect.

(Signed)

J. P. OZENNE,  
UR. OZENNE,  
ANTOINE BAUVAIS,  
JOSEPH D. BABINEAU."

FUSELIER  
v.  
BABINEAU.

The petition in this case was filed the 3d of March, 1853. The defendant filed his answer the 3d of October, 1853. The parties went to trial, and judgment was rendered by the District Court on the 5th day of October, 1854, decreeing that plaintiff recover of defendant the full amount of the judgment against the tutrix, subject to certain credits.

An appeal was taken by defendant, which was decided by this court in May, 1856, remanding the cause for a new trial. 11 An. 393.

The case being thus reopened in the court below, a new party made her appearance in that court, to-wit, *Julie Désirée Bauvais*, wife of *Hilaire Gradnigo*, and daughter and sole heir of *Antoine Bauvais*, deceased, the co-surety of defendant in the bond of tutorship, who, on the 3d of March, 1857, filed a petition of intervention, alleging that, having been bound to plaintiff as heir of her father, and having been sued by plaintiff upon her said liability, she had, (by a notarial act, annexed and made part of the petition of intervention,) shortly after the rendition of the judgment of the District Court against defendant, settled in full with plaintiff for the claims of the latter, reckoning said claims at the amount fixed by said judgment, to-wit, \$22 382 75; and had taken a subrogation from plaintiff, by the same act of the rights of the latter against defendant, under the bond of tutorship.

The petition of intervention goes on to aver, that by the judgment of the Supreme Court, subsequently rendered, an item of \$2,584 50, allowed by the judgment of the District Court, as a just claim of plaintiff against her tutrix and the sureties, had been rejected and disallowed; by means whereof, the intervenor was entitled to claim back from plaintiff the said amount, with accruing interest, as so much paid in error.

The petition of intervention concludes with a prayer for judgment against plaintiff for the sum paid in error; and for judgment against defendant, for whatever amount the court may fix as due by said *Babineau* on his bond of suretyship.

The act of compromise annexed to the petition of intervention shows, that, on the 24th of October, 1854, the plaintiff and the intervenor appeared before a Notary Public, and, after declaring that the intervenor was bound, *in solido*, with the defendant, for the balance due by plaintiffs' late tutrix; and also, that such balance amounted, at the date of the act, under the judgment of the District Court, lately rendered against defendant in this suit, to a sum of \$22,382 75—the act proceeds to recite that intervenor pays to plaintiff eighteen thousand dollars, in cash and notes of hand; of which sum, the parties agreed, that \$11,191 37½, was paid for the half of intervenor's co-surety, *Babineau*, and 6,808 62½, for the half of the intervenor herself, in the joint and several obligation of the said sureties under their bond, and the judgment of the District Court.

As this contract is made the foundation of a pretention to render one of two co-sureties, liable to reimburse to the other about two-thirds of what has been paid by the latter to the common creditor, in discharge of the joint and several obligation of both, it is proper to repeat textually the form of words by which it is supposed that such an effect has been produced. The contract says:

"Quoique la dame *Julie Désirée Bauvais* et le sieur *Joseph D. Babineau* soient tous les deux responsables solidairement envers la dite dame *Basile Fuselier*, de la somme de vingt-deux mille trois cent quatrevingt-deux piastres soixante-quinze cents, il est néanmoins convenu ici que chacun individuellement vis-à-vis l'un de l'autre, n'est débiteur que de la moitié de cette somme. La dame *Basile Fuselier*,

FUSLIER  
v.  
BABINEAU.

en pleine et entière satisfaction de la moitié du dit jugement qui est due par la dame *Julie D. Bauvais*, consent à accepter d'elle la somme de six mille huit cents huit piastres, soixante-deux cents et demi ; et pour l'autre moitié, qui est due par *Joseph D. Babineau*, dont la dite dame *Julie Désirée Bauvais* se trouve responsable en raison de la solidarité, la dite dame *Bazilie Fuselier*, en pleine et entière satisfaction de la dite moitié, consent à accepter la somme de onze mille cent quatrevingt-onze piastres, trente-sept cents et demi, ces deux sommes réunies formant celle de dix-huit mille piastres, montant auquel ont été fixées les conditions du présent arrangement, ce qui a été payé ainsi qu'il est ci-après mentionné, dont quittance. Par considération du paiement de la dite somme de onze mille cent quatrevingt-onze piastres et trente cents et demi, portion due par *Joseph D. Babineau*, la dite dame *Bazilie Fuselier* subroge la dite dame *Julie Désirée Bauvais* dans tous les droits, titres et prétensions qu'elle a et peut avoir contre le dit *Joseph D. Babineau* en vertu du jugement dont il est parlé plus haut."

It is very clear, that from and after the date of this contract, or *arrangement*, as the act styles it, the plaintiff was without interest in this suit. She was paid and satisfied in full. And she so declares in her answer filed to the petition of intervention ; claiming that the notarial act of the 24th of October, 1854, was a *compromise* or *transaction*, having the force of the thing adjudged between herself and the intervenor, " who was subrogated both by the operation of law and an express stipulation to that effect, to all the rights, claims and demands of this respondent, against the said *Joseph D. Babineau*, the co-surety of *Bauvais*."

We concur in this view of the position of those two parties (the plaintiff and the intervenor) in relation to each other ; and view the suit, from the moment of the appearance of the intervenor in court, as being prosecuted exclusively for her account and benefit.

The defendant answered the petition of intervention, by alleging fraud and collusion in the judgment rendered in favor of plaintiff against *Mr. and Mrs. Ozanne*, in the parish of Pointe Coupée, and pleaded various other defences.

Upon these issues the parties went to trial, and the judgment of the District Court was, that plaintiff take nothing by her action against defendant ; and that all the rights and claims of the intervenor, *Julie Désirée Bauvais*, be reserved for future adjudication. The plaintiff and the intervenor both appealed.

The plaintiff has no cause to complain of this judgment. She has, by her own avowal, nothing to claim from the defendant. The only issue in this record which concerns her, is the claim made by the intervenor against her for restitution of the sum by which the first judgment of the District Court was reduced by our decision on the previous appeal ; and also for restitution of such other sums as should be deducted in favor of defendant, upon the final decision of the cause. This issue, indeed, is disposed of by the construction which we have put upon the notarial act of the 24th of October, 1854, (C. C. Art. 3045,) and whatever difference of opinion there may be as to the nature and effect of the said act, there can be none in relation to another act subsequently passed between the same parties (the plaintiff and the intervenor) : by which act, the intervenor consents to receive, in full satisfaction of all claims made by her against the plaintiff, the sum of twelve hundred and fifty dollars, which sum the plaintiff paid the intervenor in an endorsed note ; and the intervenor thereupon declares that she has no claim of any nature whatever, against the plaintiff. And the intervenor, *Mrs. Gradnigo*, by the same act, discontinues her demand in intervention as against the plaintiff, *Mrs. Fuselier*, and all demands of deductions from the balance of

FUSELIER  
v.  
BARINNEAU.

the account of the tutorship of the plaintiff established by the judgment of the District Court of Pointe Coupée, and the arrangement or settlement by notarial act of the 24th of October, 1854 : *Mrs. Gradnigo* consenting to withdraw her intervention from court, or to permit judgment to be entered up against her upon the same, at the option of *Mrs. Fuselier*. And it was further agreed between the parties to said act, that *Mrs. Gradnigo* might, if she thought proper, prosecute the present action against the defendant, in order to render available her recourse against defendant under the bond of tutorship ; that *Mrs. Fuselier* will only remain in said suit for the purpose of asserting the rights which she may have to the costs and expenses of the suit, and for no other purpose : it being well understood that if *Mrs. Gradnigo* concludes to prosecute further the present action, in the name of *Mrs. Fuselier*, that the latter shall not be held or bound either towards *Mrs. Gradnigo*, or towards any third person, for any sum, or for any fact resulting from the issue and decision of the suit ; that is to say, that *Mrs. Gradnigo* will take the suit in the situation and condition in which it is at present, between the primitive parties, and will prosecute it in the same manner, to the same ends, with the same consequences and the same responsibilities, as if she had instituted it herself, and as if *Mrs. Fuselier* had never had any part therein ; saving and excepting that *Mrs. Gradnigo* will not be bound for any costs incurred to the date of the act, (12th of March, 1858,) other than those of her intervention, whatever may be the issue of the suit. The intention of the parties being to save *Mrs. Gradnigo* the delays of the new action which she would have to institute, in order to assert her recourse against defendant, did she not prosecute the present action.

The appellant, *Mrs. Fuselier*, being thus out of court, and the appellant, *Mrs. Gradnigo*, prosecuting her co-surety under her legal and conventional subrogation to the rights of plaintiff, as well as in virtue of the assignment and transfer of this action to her made, it remains to inquire what are the matters in controversy between the defendant and the intervenor.

This appellant argues that there are but three points left open by the former judgment of this court, to-wit :

1st. The amount received by *Gabriel Fuselier*, husband of plaintiff, by transfer of claims belonging to his wife.

2d. The confusion of the qualities of debtor and creditor in the intervenor.

2d. The plea of *res judicata* as to *Mrs. Ozenne's* interest in the succession of *Ludger Fuselier*, deceased.

We do not concur in this view of the present position of the cause. The decree is the only indication of what was decided by the court ; and that decree simply remands the cause for a new trial, with leave to defendant to amend his pleadings.

There was no judgment for any particular items of the account of tutorship, or decree disallowing any particular item of said account. The whole of said account, or at least so much of it as the parties have commented upon, is before us for adjudication.

We have enounced, in our previous decision, the doctrine, that the judgment against the tutor, upon the account of tutorship, does not conclude the tutor's sureties, although *prima facie* evidence against them. To this doctrine we adhere ; and the party, who has, since the cause was remanded, stepped into the shoes of plaintiff, is bound by it.

I. In examining the account, we commence by observing, that no matter what

FUSELIER  
v.  
BARINLEAU.

may have been the correct amount due by the tutrix and by her sureties to her ward, the plaintiff, yet the intervenor, who now occupies the place of plaintiff, can never recover more from her co-surety, the defendant, than the half of the amount, which she paid the plaintiff in satisfaction of her rights under the bond. Any deduction made by plaintiff from the amount justly due her, enures to the benefit of all the sureties *pro rata*. One of several solidary debtors, who discharges the common debt, cannot be allowed to speculate at the expense of his co-debtors. Article 2100 of the Code declares, that a solidary co-debtor who pays the whole debt, can claim from each of his co-debtors only the part and portion of each. But if the debtor was paid in discharge of the whole debt, less than the whole amount of such debt, we are not to infer from this Article, that he can claim from his co-debtors reimbursement of the portion of each in the whole debt, but only of their portions in the amount paid. And any convention to the contrary between the creditor and the co-debtor who has paid the creditor, such as we have seen stipulated between plaintiff and intervenor, on the 24th of October, 1854, can have no effect upon the right of the co-debtor, who was not a party to such convention.

*Mrs. Gradnigo*, when she discharged the debt for which she and defendant were jointly and severally responsible, acquired, of right, (C. C. 2157,) a subrogation to the rights of the common creditor. But those rights were fixed by the creditor at the amount which she thought fit to accept from *Mrs. Gradnigo*, in satisfaction of the whole debt; and the legal consequences of the payment, as between the solidary co-debtors, were beyond the power of the creditor to modify or control. A stronger case than this, in favor of the pretensions of the intervenor, was presented in *Roman v. Forstall*, 11 An. 717, where it was held, that the co-debtor, the transferee of a third person who had paid the debt, and taken a conventional subrogation, was only entitled to recover his co-debtor's proportion of the amount which had been actually paid.

II. The surety is not liable, under this bond, for anything that came into the tutrix's hands, before the signing of the bond.

III. The defendant is not liable, for reasons giving in our previous decision, for the item of \$2,584 50, collected by *Mr. Janin* and applied to the payment of a debt of *Mrs. Ozenne* to *Gabriel Fuselier*.

IV. The grandmother of plaintiff was not her presumptive heir, at the time she was appointed her tutrix.

V. Neither was she an heir of her deceased grandson, *Ludger Adolphe Fuselier*; and the allotment to her of a portion of his estate as heir, was an error which did not constitute *res judicata* against plaintiff, and might be, as it was, rectified by a subsequent judgment.

VI. The counsel of appellee argues, that interest was improperly charged the tutrix upon the various sums of money received by her.

This argument is based upon a variation between the expressions used in Art. 71, p. 70 of the Code of 1808, and Art. 341 of the Code of 1825. The former provides, that the tutor is bound to pay to his ward, interest at the rate of five per cent. on all sums which he shall have received on his account, from the time he shall have received such sums respectively, without being admitted to free himself from such interest, under pretence of his not having been able to lay the money out.

The Article 341 of the new Code, directs the tutor to invest in the name of his minor, the revenues which exceed the expenses of his ward, whenever they

amount to the sum of five hundred dollars. And in default of making such investment, the tutor is bound to pay (by the Act of 1825, p. 198, § 1) legal interest.

FUSILLIER  
v.  
BARINEAU.

The obligation of the tutor to pay interest on moneys of the minor which come into his hands, can scarcely be considered an open question, at this day; after the many decisions recognizing such an obligation, since the Code of 1825 is in force.

We will content ourselves, therefore, with observing that the word *revenues* in the first paragraph of the Article 341, is to be taken as synonymous with the word *funds* in the second paragraph of the same Article; and as meaning all moneys belonging to the minor, that come into the hands of the tutor in the course of administration.

We state the account of the liabilities of defendant, under the bond of tutorship subscribed by him as surety of *Julie Picard Ozenne*, as follows:

Items of judgment against the tutrix allowed—

| Item No. | 2, | Capital, \$ | 179 03. | Interest, \$ | 129 77. | Commissions, \$ | 12 97 |
|----------|----|-------------|---------|--------------|---------|-----------------|-------|
| 3,       | "  | 1,003 18    | "       | 720 00       | "       | 72 00           |       |
| 4,       | "  | 237 89      | "       | 160 27       | "       | 16 02           |       |
| 5,       | "  | 6,986 75    | "       | 4,794 20     | "       | 479 42          |       |
| 6,       | "  | 5,964 30    | "       | 3,799 70     | "       | 379 97          |       |
| 7,       | "  | 5,964 30    | "       | 3,496 00     | "       | 349 60          |       |
| 9,       | "  | 1,007 48    | "       | 484 75       | "       | 48 47           |       |
| 10,      | "  | 627 30      | "       | 288 92       | "       | 28 89           |       |
| 11,      | "  | 971 70      | "       | 456 11       | "       | 45 61           |       |
|          |    | <hr/>       |         | <hr/>        |         | <hr/>           |       |
|          |    | \$22,941 93 |         | \$14,329 72  |         | \$1,432 97      |       |

Amount of capital.....\$22,941 93

Amount of interest.....14,329 72

Total.....\$37,271 65

Deduct commissions of tutrix.....\$1,432 97

Deduct for minor's education and support.....2,598 00

4,030 97

Balance (reliquat de tutelle).....\$33,240 68

Interest on said balance, at 5 per cent. from 20th December, 1852, to

2d April, 1853, date of Sheriff's sale.....461 75

Total.....\$33,702 43

Deduct proceeds of Sheriff's sale.....18,984 09

Balance due 2d of April, 1853.....\$14,718 31

Interest on said balance from April 2d, 1853, to Oct. 24, 1854.....1,125 34

Total.....\$15,843 68

Due on account of tutorship, capital and interest, on the 24th of October, 1854, the day that the intervenor settled in full with plaintiff, and took a subro-

|                             |                                                                                                                                                                                                               |                      |
|-----------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------|
| FUSELIER<br>v.<br>BABINEAU. | gation of her rights against her co-surety, the defendant, (from the preceding page,) .....                                                                                                                   | \$15,843 68          |
| <hr/>                       |                                                                                                                                                                                                               |                      |
|                             | Of which half was due by defendant to intervenor, in consequence of such payment, say .....                                                                                                                   | \$7,921 84           |
|                             | Of which was interest as above .....                                                                                                                                                                          | 562 67               |
|                             | And capital .....                                                                                                                                                                                             | \$7,359 17           |
| <hr/>                       |                                                                                                                                                                                                               |                      |
|                             | The defendant is entitled to be credited on the above interest of by the half of the proceeds of slave <i>Kitty</i> and some land sold under execution in January, 1855, and March, 1856, for \$479 79, say.. | \$562 67<br>\$239 89 |
| <hr/>                       |                                                                                                                                                                                                               |                      |
|                             | Balance of interest due by defendant .....                                                                                                                                                                    | 322 78               |
|                             | Balance of capital bearing interest .....                                                                                                                                                                     | 7,359 17             |
| <hr/>                       |                                                                                                                                                                                                               |                      |
|                             | Total .....                                                                                                                                                                                                   | \$7,681 95           |
| <hr/>                       |                                                                                                                                                                                                               |                      |

It is, therefore adjudged and decreed, that the judgment of the District Court as regards the plaintiff and appellant, *Bazile Fuselier*, be affirmed; that as regards the appellant, *Julie Gradnigo*, intervenor, it be reversed; and that said *Julie Desirée Bauvais*, wife of *Hilaire Gradnigo*, recover of *Joseph D. Babineau*, the defendant and appellee, the sum of seven thousand six hundred and eighty-one dollars and ninety-five cents, with interest at the rate of five per cent. per annum on seven thousand three hundred and fifty-nine dollars and seventeen cents of said sum, from the 24th of October, 1854, until paid, and costs of the District Court since (and including) the intervention filed herein, by the said *Julie Gradnigo*. And it is further decreed, that the plaintiff, *Basilie Fuselier*, pay costs of the District Court previous to the filing of *Mrs. Gradnigo's* intervention; and that the costs of appeal be borne, one-half by plaintiff and one-half by defendant.

VOORHIES, J., recused himself on account of relationship to one of the parties in this cause.

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### JAMES COLE et als. v. ANDREW LANGLEY, Administrator.

A marriage which was celebrated in this State while under the dominion of Spain, may be established by reputation.

APPEAL from the District Court of the Parish of Calcasieu, *Martel, J.*  
*T. H. Lewis & Porter*, for plaintiffs. *J. H. & T. Overton*, for defendants and appellants.

VOORHIES, J. The only question presented for adjudication under the pleadings and evidence in this case, is the legitimacy of the plaintiffs.

The deceased, *Mary Ann Olivier*, whose estate is under administration, had three children by her connexion with *Nicolas Frugé*, and some others subsequently, after the death of *Frugé*, with *John Langley*. With regard to the lat

COLE  
v.  
LANGLEY.

ter, it is admitted that they are heirs of the estate of their deceased mother and grand-mother. But it is contended by one of them, who besides being an heir, is a tutor of some of the minors and administrator of the estate, that the three children of *Nicolas Frugé* are natural children, if not bastards, their father and mother never having been married, but, as alleged, having lived in concubinage.

The testimony of the witnesses is conflicting in several particulars, as to the fact of these parties living as married persons or in concubinage; but the weight of the evidence goes to show that they were considered as man and wife. Indeed the children took their father's name; their mother was called *Mrs. Frugé*; the issue were baptised as legitimate children at different intervals, in 1794, in 1796 and in 1798; and by these certificates of baptism it appears, not only who were the paternal and maternal grand-father and grand-mothers of these children, but that some of them officiated as God-fathers and God-mothers.

If there was still left a serious doubt as to the existence of a marriage contract between the deceased, *Nicolas Frugé* and *Mary Ann Olivier*, the testimony of *Marcantel*, one of the defendants' witnesses, would remove the doubt, although he says, that *Mary Ann Olivier* told him that she had never been married to *Frugé*. This witness states:

"He inquired of *Mary Ann Olivier* how it was that some of her children were called *Frugé* and others *Langley*; she replied, that the *Frugés* were the children of her first husband. Witness then asked her, if she had been twice married; she replied, no, she had been to the priest to be married, that he wanted her to confess, which she refused, *et qu'alors ils s'étaient pris sous le voile espagnol*. This conversation took place about thirteen or fourteen years ago; can't say the time exactly."

Other witnesses state the same fact about her being married to *Frugé sous le voile espagnol*; and it is shown that this means, "a ceremony wherein four persons hold up a white veil or covering over the parties in front of the priest, who performs the ceremony, whilst celebrating the marriage; and it is also necessary that the priest should officiate in such marriages."

*Alexander Hébert*, who is one of the witnesses testifying to this fact, says further: that "he has heard old people say, that it was usual to pursue this course under the Spanish government." His declaration is entitled to a great deal of weight in this particular, from the fact that he once acted as groomsman at a marriage of this kind.

Now, if *Mrs. Langley* stated to *Marcantel*, that she was married to *Frugé sous le voile espagnol* (as she has stated to other persons,) it is inconsistent with the declaration that the priest would not officiate at her marriage, because she would not confess.

The mode in which the deceased's answers were elicited by this witness, and this palpable inconsistency in the answers which he says were made by her to his queries, justified the District Judge in giving no weight at all to that portion of the testimony of this witness, evidently given to disprove the marriage of *Frugé*.

From a careful examination of the evidence on record, we are of opinion that the plaintiffs have proven their legitimate filiation, not only by the certificates of baptism, of which mention is above made, but by reputation.

In the case of *Isaac Alloway v. Marguerite Babineau et als.*, this court said: "We agree with the District Judge, that the heirship has been established by legal evidence, it having been established by reputation, that the marriage of the plaintiff's father and mother took place whilst Louisiana was under the govern-

COLE  
v.  
LANGLEY.

ment of Spain. Proof of marriage by reputation was sufficient under the laws of that country." See also the cases of *Patton et als. v. Cities of Philadelphia and New Orleans*, 1 An. 98; of *Hobby v. Jones*, 2 An. 944; of *Succession of Provost*, 4 An. 374; and of *Holmes v. Holmes*, 6 La. 468. See also 4 Partida, tit. 2d, law 5, p. 456; C. C. Arts. 212, 213, 214.

Judgment affirmed.

### CHARLES LEBLANC v. MARIE LUDRIQUE, Widow.

The title of a party to land purchased from the Government, and for which he has obtained a patent, cannot be defeated by any other claimant, unless he show an equitable or legal title in himself which existed prior to the issuance of the patent, and which could not be defeated by the subsequent action of the Land Department.

In a contest of title between such parties, the application to enter, with the accompanying proof of occupancy and cultivation, are admissible in evidence as the muniments of title which form the basis of an equitable right, prior to the issuance of the patent.

An endorsement of the Register of the Land Office on the application to enter, to the effect that the applicant, through a duly authorized agent, had tendered payment, and was refused in consequence of the land claimed having been erroneously sold to another, is only proof of the fact that a tender of payment had been made; the Receiver had no authority to certify as to the agency, nor could he make a binding entry as to the invalidity of the previous sale.

**A**PPEAL from the District Court of the Parish of St. Martin, *Voorhies, J. Deblanc & Fuselier*, for plaintiff. *Simon & Gary*, for defendant and appellant.

VOORHIES, J. The plaintiff and the defendant set up adverse titles to a tract of land, the ownership of which forms the subject-matter of the present controversy.

On the 27th day of September, 1841, *Charles Leblanc, fils*, filed in the Land Office at Opelousas, his application for a right of preëmption. Subsequently, (on the 10th day of May, 1855,) he purchased the land from the Government and obtained a patent certificate of his purchase. It appears that since the year 1836, he has occupied and cultivated a portion of the land in controversy.

On the other hand, the defendant claims, as surviving widow of her deceased husband, *Daniel Zeringue*, in her own right and as natural tutrix of her children. *Daniel Zeringue's* titles consist in the formal application to the Commissioners of the Land Office, for the right of preëmption, by virtue of the Act of Congress of the 29th of May, 1830. He occupied the premises for several years, abandoned the same, sold his buildings, and again came back; but then he did not occupy the land after returning, except by occasionally cultivating a portion of it. He died, however, without having paid the *minimum* price stipulated by the Act of Congress; nor does it appear that he ever attempted to do so, notwithstanding the allegations in the defendant's answer. The record does not inform us as to the time when the township map was returned to the Land Office at Opelousas; but the testimony of *Dupuis* shows that, at the time of the purchase made by the plaintiff, it had been returned. Several months after the entry made by the latter, (how long after the return of the township map, we know not,) the defendant offered to pay the amount due for *Daniel Zeringue's* preëmption right; whereupon, the Receiver refused to accept the sum tendered, on the ground of the plain-

LEBLANC  
v.  
LUDRIGUE.

tiff's previous entry, which he, however, considered to have been erroneously made. The intention of *Daniel Zeringue*, not to avail himself of the benefit of his preëmption, is also evidenced by his own declaration. *Adolphe Dupuis*, one of the witnesses, states, "When *Daniel Zeringue* moved his fence, he told me he did so because he did not wish to have anything more to do with it; that it was the business of *Mme. Adelard Deronnelle*, who claimed by virtue of a double concession. That conversation took place before the plaintiff obtained his title, but since he had settled on the land as preëmptor. *Zeringue* told me so when I was at his sugar-house, working at his mill; it was in a conversation on this subject."

The plaintiff having purchased the land in question from the Government, is entitled to a judgment, unless the defendant have an equitable or legal title which could not be defeated by the action of the Land Department. But before examining this point, it is necessary to dispose of two bills of exception taken by both parties to different rulings of the inferior court.

It is set up as a grievance by the counsel for the plaintiff, that the District Judge erred in admitting in evidence the application of *Daniel Zeringue*, with the accompanying proof of his occupancy and cultivation, made for the purpose of taking the benefit of the Act of Congress of 1830, granting preëmption rights to actual settlers. The objection goes to the effect and not to the admissibility of these documents; these are the muniments of title which form the basis of the defendant's equitable rights, if any she have.

The other bill of exception is to the ruling of the court rejecting an endorsement of the Register of the Land Office on the application made by *Daniel Zeringue* on the 9th of October, 1830. The endorsement is in the following words: "On this day, the 8th of September, 1855, *Baptiste Calais*, duly authorized, tendered payment for the land claimed in the within proof, and was refused in consequence of the said land having been erroneously sold to *Charles Leblanc, fils.*" The Receiver had no right to certify as to the agency of *Baptiste Calais*; nor could he make a binding entry as to the invalidity of the plaintiff's purchase. The endorsement, then, could at most go to prove the fact, not otherwise denied, that the defendant had, through her agent, tendered the purchase money for the preëmption right of *Daniel Zeringue*, deceased.

If the defendant has an equitable title to defeat the plaintiff's, it behooves her to make a showing to that effect. But, on the contrary, the abandonment of *Daniel Zeringue* of his preëmption right, as above stated, is fatal to her pretensions. The title afterwards acquired by the plaintiff cannot be prejudiced by the steps taken by the defendant subsequently to her husband's death.

The plaintiff's counsel asks for an amendment of the judgment; but this application should have been made in the pleadings.

Judgment affirmed.

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## JOSEPH MAST v. JOHN C. HAMILTON et al.

The Acts of 1852 and 1855 confer upon the Register of the State Land Office jurisdiction in cases only where conflicting claims arise between parties as to their rights to preëmption; but where one of the parties claims a preëmption right, and the other sets up title to the land by virtue of a patent issued by the State, the District Court has original jurisdiction.

A party who has acquired a preëmption right to swamp land donated to the State by the General Government, may maintain a real action against one to whom a patent has been issued by the State, to annul such patent, when the party bringing the action shows that he has not been able to perfect his title by making payment, because the land had not been conveyed by the General Government to the State, after which time payment could alone be required of him.

When the preëmptor in such a case had complied with the provisions of the Act of 1855, by making application and proof of settlement within six months after the promulgation of the Act; and before the lands selected, upon which he had settled, had been approved and returned to the Land Office of this State, a patent had been issued to another person, over the protest of the preëmptor—*Held*: That the patent issued was null and of no effect.

**A**PPEAL from the District Court of the Parish of St. Martin, *Voorhies, J. E. Simon, Sr., and E. Simon, Jr.,* for plaintiff. *Deblanc & Fuselier,* for defendants and appellants.

**BUCHANAN, J.** The plaintiff alleges that he has a right of preëmption, as an actual settler, under the laws of the State, to a fractional quarter section comprised in the swamp or overflowed lands granted to the State of Louisiana by Acts of Congress approved March 2d, 1849, and September 25th, 1850; and that he has taken the steps required by law to secure his right of preëmption, by making declaration under oath, and filing his application in the Land Office at Baton Rouge.

The petition further states, that defendant, in violation of plaintiff's rights, was permitted to purchase the same quarter section of land under certificate No. 1677; that said purchase is null and void for the reasons,—

1st. That it was in violation of the laws of the State granting a right of preëmption and preference to actual settlers on the overflowed lands, donated to the State by Congress.

2d. That plaintiff was an actual settler on said land, and had made the proof and application required by the State laws, prior to the sale to defendant.

3d. That the Register of the State Land Office at Baton Rouge did not notify plaintiff either by letter, or by the notice and advertisement in public papers to preëmptors, required by law, before selling the land.

4th. That the defendant, *Hamilton*, was a minor at the date of the sale to him of the land in question, and consequently, incapable of acquiring the same without the advice of a family meeting.

Defendant excepted to the action, 1st, for want of jurisdiction; 2dly, that the petition discloses no legal cause of action.

It is argued upon the first of these exceptions, that the 3d section of the statute No. 248, of the Session Acts of 1852, and the first section of statute No. 37 of the Acts of 1853, confer upon the Register of the State Land Office the jurisdiction and decision of conflicting claims to preference rights in lands granted by Congress to the State; the latter statute with right of appeal to the District Court; and that these statutes exclude original jurisdiction of the present action, in the District Court, in which it has been instituted.

The conflicting claims spoken of in the statutes referred to are claims to a right of preëmption of the public lands, set up by several individuals who pretend to have settled upon and cultivated the same land. But this is not a controversy of that kind. Only one of these parties asserts a right of preëmption. See case of ———, decided at Monroe this year.

On the second exception it is argued, that this action is not possessory, because it does not assert a disturbance of plaintiff's possession within a year; and that it is not petitory, because it does not allege a title as owner in the plaintiff, to the *locus in quo*.

The prayer of the petition is, that the purchase of the land from the State Land Office, by defendant, under warrant No. 1677, may be declared null and void, and that plaintiff's right of preëmption be recognized, as superior to defendant's said purchase.

Granting that the form of this action does not bring it precisely within either of the real actions mentioned in the Code of Practice, we think that it is maintainable under the Acts of the Legislature giving a right of preëmption to actual settlers on public lands. The plaintiff, it is true, does not ask to be declared the owner of the land in question; but the reason is, that he has not made payment to the State, which alone would give him a perfect title; and he has not made payment, because the land has not yet been conveyed by the General Government to the State; after which conveyance alone, payment is required of him by law.

The answer of defendants sets up title in themselves to the land.

The evidence shows, that defendant, *Hamilton*, on the 30th of April, 1855, purchased from the State, under warrant No. 1677, N. S., swamp lands, "subject to the approval of the Secretary of the Interior," the North half of the South-East fractional quarter of section 14 in township 8, South of range 6 East, in the South-Western Land District of Louisiana. A portion of this land had already been occupied, since the year 1852, by the plaintiff, whose application and proof of settlement have date the 2d of June, 1855, but were actually filed in the Land Office only on the 24th of September, 1857, although deposited among the papers of the office previous to the 1st of April of the year preceding. Plaintiff annexed to his application a protest against the issuance of a patent in favor of the purchaser, *J. C. Hamilton, Jr.*

The Register of the State Land Office testifies that the list of selections, including the land in controversy, has never, as yet, been approved or patented to the State, and that no notices could or did issue to the plaintiff, requiring him to make payment for his right of preëmption.

The Act of 15th of March, 1855, provides that settlers on the public lands "shall be entitled to make application therefor, and proof of settlement, at any time within six months of the promulgation of this Act, and to make payment therefor at any time within ninety days after the publication and notice herein-after provided for, or within six months after the lands shall have been surveyed and returned to the State Land Office."

The plaintiff complied with this Act, by making application and proof of settlement within six months of its promulgation; and he cannot yet be called upon to make payment, as the selection of this land has not yet been approved and returned to the Land Office; neither have the publications and notices mentioned in the Act been made.

The defendant's title shows upon its face, that the land sold was not approved

MAST  
v.  
HAMILTON.

or patented to the State; for it is there said that the "above purchase and sale are made subject to the approval of the Secretary of the Interior." Consequently, this land was covered by the Act of 15th of March, 1855, which was promulgated more than a month before the date of the purchase made by *Hamilton*; and therefore, was binding upon him in this instance.

Judgment affirmed, with costs.

P. D. HARDY, District Attorney, v. H. F. VOORHIES, Sheriff.

The District Courts out of the parish of Orleans have neither appellate nor original jurisdiction in the trial of slaves accused of crimes or offences, nor can they interfere for the purpose of carrying into effect the sentence of the tribunal established by law for their trial.

**A** PPEAL from the District Court of the Parish of Lafayette. *Martel, J.*  
P. D. Hardy, in pro. per. *Deblanc & Fuselier* and *E. Mouton*, for defendant and appellant.

VOORHIES, J. The slave, *Modeste*, the property of *Mrs. E. Messonier*, was tried for the murder of her mistress, found guilty by a special tribunal organized under the statute of the 19th of March, 1857, and ordered to be executed, by the following sentence, to-wit :

"Whereas the slaves, *Modeste* and *Joseph*, have been duly arrested, on the charge of having feloniously killed and murdered their mistress, *Elise Messonier*, in the town of Vermillionville, parish of Lafayette, on the 30th day of May, 1858, and whereas they have been brought before us, the undersigned, Justices of the Peace in and for the parish aforesaid, to answer to said charge, and after an impartial trial have, by us the undersigned Justices of the Peace, and a jury of ten slave-holders, duly summoned from the body of the parish aforesaid, been unanimously found and adjudged guilty of the felony and murder aforesaid : now, therefore, it is considered by the said court here, that the said slave, *Joseph*, be taken to the common Jail of said parish by the Sheriff thereof, and on Tuesday, the 15th day of the present month of June, 1858, in front of said jail, be hanged by the neck until dead ; and that the slave, *Modeste*, be also hanged by the neck until she be dead, at the same place, fifteen days after she has brought forth her child, she being now pregnant."

The death warrant placed in the hands of the Sheriff states that :

"Whereas the slave, *Modeste*, has this day received sentence of death for the crime of murder, whereof she was found guilty according to the statute, made and provided in such cases : these are, therefore, in the name of the State of Louisiana, to command that, in pursuance of said sentence, you take the slave into custody, and her safely keep and confine in the common Jail of the Parish of St. Landry, until fifteen days after she has brought forth her child, she being now pregnant ; when, you are further ordered, between the hours of nine and four o'clock of that day, to do execution on said slave, *Modeste*, in front of the Jail of the parish of Lafayette, by hanging her by the neck until she be dead."

Over a year having elapsed since this sentence was passed and the warrant placed in the hands of the Sheriff, the District Attorney called upon the latter to proceed to execute the culprit. This request not being complied with, the former

HARDY  
P.  
VOJRRHES.

instituted proceedings before the District Court, with the view of carrying the sentence into execution. Counsel were appointed to represent the slave, *Modeste*, in these proceedings, and the Sheriff made a party. After an investigation of the case, the District Judge decreed that the Sheriff should proceed to fix a day for the execution of the slave, *Modeste*, and proceed to execute the warrant in every other particular.

The refusal of the Sheriff to comply with the request of the District Attorney, and the objection raised by the counsel of the slave, to the right of the State to proceed with the execution, are based upon the fact that the sentence provides for the hanging of the convict only fifteen days after she will have given birth to a child, she being pregnant at the date of the trial; whilst on the other hand, it is contended on behalf of the prisoner, that this condition has never been fulfilled.

It is not necessary, however, to pass on the merits of this controversy, as discussed in the briefs furnished by counsel. The District Court was, in our opinion, without jurisdiction in this matter. The remedy of the State possibly might be, to apply either to the Governor, or to the Justices who had presided in the case, for the purpose of having a day fixed for the execution. *State v. Jonas*, 6 An. 695; *J. R. McDowell v. John W. Couch*, *ibid*, p. 365; *State v. Jerry*, 3 An. 576; *State v. Oscar*, 297.

The District Courts have no jurisdiction, either original or appellate, for the trial of slaves accused of crimes and offences, except in the parish of Orleans by special Act. In the State at large, the only tribunals vested with jurisdiction in such cases, are those created by the Act of the 19th of March, 1857. An appeal lies directly from these tribunals to the Supreme Court, in the same manner and in the same instances as in appeals from the District Courts. An appeal from the Magistrates' Court to the District Court would not lie in criminal proceedings against slaves; the interference of the latter, even for the purpose of carrying into effect the sentence of the former tribunal, is, consequently, unwarranted in law.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed; and that the motion for a *mandamus* be discharged.

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#### ALEXANDRINE A. LOUAILLIER v. MARIE T. CASTILLE, Administratrix.

A judgment creditor of an estate cannot sustain a petitory action against one who possesses property alleged to belong to the succession, when there is no administrator to whom delivery of possession of the property can be made.

The insufficiency or want of avertisement in a Sheriff's sale is an informality within the purview of the Act of 1834 (reenacted in 1855), and under that Act is prescribed against after the lapse of five years from the date of the sale.

**A**PPEAL from the District Court of the Parish of St. Landry, *Martel, J. Swayze & Moore*, for plaintiff and appellant. *J. H. & T. Overton* and *J. F. Morrogh*, for defendant.

LAND, J. This suit is in the nature of a petitory action, by a judgment creditor of *Jacques Lastropes*, deceased, to recover on behalf of his succession, and to

LOUAILLER  
v.  
CABILLÉ.

subject to the payment of plaintiff's judgment a certain lot of ground, together with the buildings and improvements thereon, situate in the town of Opelousas.

This property was sold, several years before the death of *Lastropes*, by the Sheriff, under an execution against him, and the plaintiff sues to recover it for his succession, on the ground that his title was not divested by the Sheriff's sale, for the reason that the sale was made without advertising the property, and without observing other formalities required by law.

The plaintiff alleges, that the administrator of the succession of *Lastropes* had been discharged from his office, before the institution of this suit.

The defendant excepted to plaintiff's right or capacity to maintain the action, and also pleaded the prescription of five years against informalities in Sheriff's sales, under the Act of the 10th of March, 1834, p. 123.

The exceptions were sustained, and the plaintiff has appealed.

The general rule of law is, that a petitory action can only be maintained by the party in whom the legal title is vested, or by his legal representative. Article 44 of the Code of Practice declares, that the plaintiff in an action of revendication, must make out his title, otherwise the possessor, whoever he be, shall be discharged from the demand.

The plaintiff's petition alleges title not in herself, but in another who is no party to this suit, either directly or indirectly.

But conceding that a judgment creditor of an *insolvent succession* forms an exception to this general rule of law, under the authority of the decision in the case of *Heda v. Fontenot*, 2 An. 782, and can compel the delivery of property of the succession, in the hands of a third party, to the administrator, for the purpose of administration and the payment of debts, his right, nevertheless, must be exercised in due course of administration of the estate; for, after the final discharge of the administrator, or other representative of the insolvent succession, there would be no one in office authorized to receive and administer the property which he might recover by judgment. In this case, for instance, how could a judgment in favor of plaintiff be executed? To whom would the writ of possession command the Sheriff to make delivery of the property? Who has authority to receive the property, to administer it, and distribute the proceeds of sale, as the law directs in matters of insolvency?

The administrator of the succession was a necessary party to the suit, and for this reason alone, the plaintiff's action would fail. But the most fatal objection to plaintiff's demand, is the plea of prescription of five years under the Act of 1834, referred to above.

The plaintiff claims to exercise a right of action which vested in the deceased, *Lastropes*, and which survived to his administrator, that is to say, to set aside the Sheriff's sale of his property, on the ground of the insufficiency of the advertisement; but this right of action was subject to the prescription of five years, which had been long accomplished before the institution of this suit, and which could not, therefore, have been successfully prosecuted by either of them, as late as the 24th of August, 1858, the day on which the petition in this cause was filed,—the Sheriff's sale having been made on the 11th day of January, 1849.

As the plaintiff is exercising a right of action which vested in the deceased, her demand is subject to all matters of defence which could have been opposed to a suit instituted by *Lastropes* himself, or his administrator, and is, therefore, subject to the plea of prescription of five years, under the Act of 1834.

The only ground of nullity specially alleged in the petition, and which can be

passed upon by us, *under the pleadings*, is, that there was *no advertisement* of the property previous to the sale by the Sheriff. The insufficiency, or want of advertisement, is an informality, within the purview of the Act of 1834, (reënacted in 1855), and is prescribed against after the lapse of five years from the date of the sale. See Phillips' Digest, p. 22, sec. 4.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

VOORHIES, J., recused himself in this case.

LOUAILLIER  
v.  
CASTILLE.

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### LOBIT & CHARPENTIER v. JOSEPHINE CASTILLE, Administratrix.

Where an administrator persists in refusing to file his account, after the expiration of the time fixed by law, and fails to tender a good reason for the delay, the Judge shall order him to be arrested and imprisoned until he renders the account. C. P. 1011.

The subsequent Article enables interested parties to compel him to render an account, by imprisonment, or distraining his property and income.

Upon the neglect of the administrator to pay the amount for which judgment has been rendered, and his failure to prove that he has no funds in his hands belonging to the succession, the creditor may take out an execution against such administrator's individual property; but to do so, it is necessary that the judgment should be notified to him, and a rule taken on him in his official capacity.

Where the remedy is resorted to, of having the administrator dismissed from office, and sentenced to pay interest and damages, he settles with his successor in office, and not with the creditor who has provoked the dismissal.

The regular mode by which an ordinary creditor is to obtain payment of his judgment against an estate, is concurrently with the other creditors. C. P. 987, 1054; C. C. 1168. This implies that an account and tableau of distribution should be filed, wherein each creditor may be classed, in order that he may receive his portion of the funds in the hands of the administrator.

Where a creditor declines to pursue the ordinary remedy, and pursues the administrator personally, by a report to the penal provisions of the law, he must bring himself within them before he can demand the penalty.

"The classification and order of payments" referred to in C. P. 993, is that mentioned in a preceding Article (988), and the case is contemplated, where the administrator has funds, and is ordered to pay the same to the creditors, according to their rights, and not a case where funds are not in the hands of the administrator at the time of such classification.

**A**PPPEAL from the District Court of the Parish of St. Landry, *Martel, J.*  
*Dupré & Garland*, for plaintiffs. *B. F. Linton*, for defendant and appellant.

VOORHIES, J. The plaintiffs, having been classed as ordinary creditors of the estate of *Onézime A. Boudreau*, deceased, for the sum of \$3,380 28, besides interest, brought suit four months afterwards, (31st October, 1856,) for the purpose of compelling the administratrix to render an account of the funds in her hands, subject to their claim, and to pay over the same within ten days after being notified. They further ask that, in case the defendant fails, within the time to be fixed by the court, to render this account, then she be made personally liable for the whole amount of their debt, that writs of execution do issue accordingly, and that she be dismissed from office, with ten per cent. damages.

The administratrix filed a general denial on the 24th of November, 1856; and on the 29th day of the same month, the District Judge ordered her to file, within sixty days, "a brief statement of her condition, as administratrix of the estate of *Onézime A. Boudreau*, showing the funds in her hands belonging to said estate." This order was served upon the defendant personally, on the 12th day of Decem-

LOBIT  
v.  
CASTILLE.

ber, 1856. No account was filed by her in obedience to this mandate of the District Court.

In the month of June, 1859, over two years having intervened, the suit was tried, and resulted in a judgment which awarded to the plaintiffs an execution against the property of the defendant personally. The latter then appealed.

In the meantime, writs of seizure and sale had been placed by the plaintiffs into the hands of the Sheriff, who had proceeded thereupon to seize and sell the hereditary rights of the defendant in the succession of her deceased father, *Alexandre Castille*. These rights, appraised at \$9000 on a cash valuation, were adjudicated for \$1000 to the plaintiffs and *Mrs. Frances Ritter*, another judgment creditor. These proceedings are noticed in the opinions given by this court in the cases of *Josephine Castille v. L. V. Chacheré, Sheriff, et al.*, 13 An. 561, and *Lobit & Charpentier v. Alexandre Castille*, *ibid*, p. 563.

The question to be disposed of is, whether the plaintiffs have properly pursued their remedy.

The 1011th Article of the Code of Practice provides that, if after the expiration of the time given to the executor or administrator to file an account, he refuses or neglects to obey, the Judge shall issue a mandate, directing him to comply with the provision of the law; and, if within the time allowed to obey this mandate, the administrator persists in refusing to render an account, without tendering a good reason for the delay, the Judge shall order him to be arrested and imprisoned until he renders the account. The following Article enables interested parties to compel the administrator to render the account, either by having him imprisoned until he does comply, or by having his property and income distrained, or by using any other means which the law may afford. By the Article 1057 it is provided that, upon the neglect of the administrator to pay the amount for which judgment has been rendered, in one of the modes pointed out in the preceding Articles; or upon failure to prove that he has no funds in his hands, belonging to the succession, the creditor may take out an execution against the administrator's own individual property. But in order to do so, it is, in the first place, necessary to notify the judgment to the administrator; and, in the second place, take a rule upon him, in his official capacity, for the purpose of obtaining payment of the judgment. *James H. Stevens et als. v. Sarah A. H. Stephens, Administratrix*, 13 An. 416; *Collins v. Hollier*, 13 An. 586; C. P. 1053, 1054, 1055, 1056, 1057.

In the case under consideration, the plaintiffs applied for an execution, without making any allegation that their judgment had been notified to the administratrix. The order given by the District Judge to her, to file, within sixty days, a brief statement of her condition as administratrix, does not appear to have been predicated upon any information given by her to the Sheriff, that she had not sufficient funds to satisfy the plaintiffs' demand; nor do we find in the record any motion by the latter to compel the former to prove the truth of her declaration in this respect.

The plaintiffs have, therefore, failed to pursue the remedy provided in the 2d section of chapter the 1st of title III of the Code of Practice, and were not entitled to an order of seizure and sale against the property of the administratrix.

The different remedies given by law to the creditors of an estate, to enable them to coerce the payment of their claims, when evidenced by a judgment, have been blended together by the plaintiffs in this instance. Either of them, if carried out properly, would, however, afford ample relief to the party. Should an

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administrator, when called upon with an order of court to file an account, refuse or neglect to comply, he might be imprisoned, and writs of *distringas* issued until a compliance. And if, on the other hand, resort is had to the remedy of an execution against the property of the administrator, the judgment should be notified to him in the first place. In case of non-success, a rule is then taken, under C. P. Art. 1056, and enforced by the issuance of execution, in the contingency provided for by the next Article. The other remedy is to have the administrator dismissed from office, and sentenced to pay interest and damages; but, in the last instance, the administrator, upon being dismissed, settles with his successor in office, and not with the creditor who has provoked the dismissal.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed; and that the plaintiffs' demand be rejected as in case of nonsuit, with costs in both courts.

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SAME CASE—ON A RE-HEARING.

MERRICK, C. J. A petition for a re-hearing has been filed in this case.

The counsel for the appellees inform us that they rely upon Article 993 of the Code of Practice, as authority for the judgment rendered by the District Court in this case.

The regular mode by which an ordinary creditor is to obtain payment of his judgment against an estate, is concurrently with the other creditors of the succession. C. P. 987, 1054; C. C. 1168. This implies that an account and tableau of distribution should be filed, wherein each creditor may be classed, in order that he may receive his portion of the funds in the hands of the administrator. This mode of proceeding is just and equitable. It prevents one creditor from obtaining an undue advantage over the others, in the assets in the hands of the administrator, and ultimately, from enforcing a demand upon the innocent surety of the same.

When a creditor declines to pursue the ordinary remedy, and chooses to pursue the administrator personally, he resorts to the penal provisions of the statute and Code of Practice, and must bring himself within their provisions, before he can demand the penalty.

"The classification and order of the payments," spoken of by Article 993 of the Code of Practice, to which our attention is called, is that mentioned in a preceding Article in the same chapter of the Code, viz, Art. 988. It contemplates the case where the administrator has funds, and is ordered to pay the same to the creditors according to their rights, and not a case where funds are not in the hands of the administrator at the time of such classification, *Succession of Hart*, 8 Rob. 121; *Hickman v. Flenniken*, 12 An. 268; C. C. 1168, 1170.

In the classification of debts in this case, the administratrix did not profess to have any funds in hand, and hence, she was not ordered to pay any sum to any one of the creditors, and the classification and order of payments spoken of by Art. No. 993 did not take place. No execution could, therefore, issue thereon in favor of the creditors, within ten days after its homologation, because no sum was awarded any one of them. The second step required by this Article was also abortive. It was wanting in a *tableau of distribution*, from which to date

LORET  
v.  
CASTILLE.

the ten days, and it does not appear that a majority of creditors in amount have required a due proportion of the sums subsequently collected.

There is no reason to disturb the judgment pronounced by us in this case.

It is, therefore ordered, that the prayer for a re-hearing in this case be refused.

GUSTAVE HARRY v. OZÈME CONSTANTIN.

In an action for damages on account of slanderous words, malice is an essential fact, and should always be proved.

**A**PPEAL from the District Court of the Parish of Lafayette, *Martel, J.*  
*Deblanc & Fuselier*, for plaintiff and appellant. *C. H. & E. Mouton*, for defendant.

BUCHANAN, J. The plaintiff claims damages of the defendant, for slanderous words spoken by the latter, concerning the former. The petition charges that defendant, to avenge an imaginary wrong, has, within one year, knowingly, maliciously and falsely stated that plaintiff, for a sum of money, (*pour une somme de —*.) had hung the slave *Joseph*."

The answer specially denies that defendant ever slandered plaintiff, as charged; avers that "on one occasion, defendant stated to one *Emile Begueneaud*, that one *Valery Saunier* was playing a bad trick (*une farce, un badinage*.) upon plaintiff, by charging him with having executed the slave *Joseph*; that defendant had always been friendly to plaintiff, and meant no malice against him, nor had he the least idea of insinuating, or of making *Begueneaud* believe that plaintiff had been guilty of such an act; that defendant afterwards had an explanation with plaintiff, and that plaintiff was satisfied with the explanation given, and said that he would punish *Valery Saunier* for what he had said."

Upon this issue, the parties went to trial before a jury. Many witnesses were examined, and the verdict of the jury was in favor of defendant.

Plaintiff appeals.

The essential fact of malice does not appear to us to have been made out by the evidence, copied in the record. The allegation of the answer, that the report which the petition charges to have been circulated by defendant, was one that originated with another person, is fully proved by the witnesses examined in the cause. It is also proved, that this was made known to plaintiff, and that *Saunier*, the originator of the report, was confronted with him, and avowed the fact of his having told it to defendant, as alleged in the answer. The whole thing appears to have been a jest, in very bad taste, it must be confessed, invented by other persons than defendant, without the least foundation in truth, and which was not believed by any person.

A jury of the vicinage, acquainted with the parties and the witnesses, was the proper tribunal to decide an issue of this kind; and we perceive no sufficient reason for disturbing their verdict.

Judgment affirmed, with costs.

## STATE OF LOUISIANA v. E. BADON.

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Where the facts show that the Sheriff was authorized by the committing magistrate to take the bond of an accused, and the sureties on the bond were approved by him, and the bond is clothed with the formalities required by law, the sureties on it will be bound, on the failure of the principal to appear.

In calling upon the sureties on a bail bond to produce in court the body of the principal, the words "instantly" and "in open court," are not sacramental terms; it is sufficient when the accused has failed to appear, after having been called at the courthouse door, to call upon his sureties.

The failure of the Clerk to endorse a document as filed, which was offered in evidence, is of no consequence when the document is actually filed in the records, and is contained in the statement of facts.

**A** PPEAL from the District Court of the Parish of Vermillionville, *Voorhies, J. A. Olivier*, District Attorney, for the State. *R. F. Patten*, for defendants and appellants.

**VOORHIES, J.** The appellants, who are the sureties of the accused on his bail bond, opposed its forfeiture in the lower court, on the ground: "That the said bond, or pretended bond, was taken and acknowledged by *A. Légé*, Sheriff of the parish of Vermillion, without any authority of law to take or accept bonds in such cases; and that said bond is drawn and made payable to the State of Louisiana, and not to the Governor of the State." This exception was overruled, and judgment of forfeiture was entered. Whereupon the sureties appealed.

We will proceed to notice the three points presented by the appellant's brief:

I. "That the bond was taken by the Sheriff, under a verbal demand or request of the Magistrate, and was never afterwards accepted by the Magistrate, or ratified by him by official order."

The obligation or recognizance on its face is a valid one; and, if the Sheriff has been legally authorized to act in the premises, its forfeiture should be decreed.

The record contains a written order directed by the Magistrate to the Sheriff to take the bond of the accused for his appearance during the trial on the commitment, and a subsequent written order, admitting the accused to bail, upon furnishing his bond for the same amount. But in the latter order, the Magistrate does not specially delegate to the Sheriff the power to take the bond.

The two orders had in view the bailing of the defendant; and it appears that under them, the Sheriff took but one bond. The first order has for its object the bailing of the prisoner pending the examination before the committing Magistrate, and the other order extended the time until the final disposition of the case before the District Court.

In inquiring whether the Sheriff was authorized to act in taking the bond in question, it is proper not to lose sight of the first order which expressly delegated this power to him. The subsequent filing of this bond and transmission of it to the District Court, by the Magistrate, may, at all events, be considered as an approval or ratification of the act of the Sheriff, if his authority could otherwise be questioned. In the very objection raised by the appellants, it is admitted expressly that the second order was accompanied by a verbal delegation of power from the Magistrate to the Sheriff.

In the case of the *State v. Wyatt*, 7 An. 702, the court said: "The Sheriff had

STATE  
v.  
BADON.

no power to bail the prisoner, but might perform the ministerial duty of taking the bond, when requested by the Magistrate. The Magistrate should have named and approved the security, and given a written order to the Sheriff to discharge the prisoner on his executing the bond; but he proves that he sent the message to the Sheriff, and it is not for the security to dispute his own sufficiency, which the Magistrate subsequently approved. The proceedings of the Magistrate were extremely irregular, in such an important matter; but the bond is most formal, was executed for a legal consideration, and has been forfeited, and judgment rendered upon it in strict conformity to law."

In the case of the *State v. Ansley*, 13 Ann. 299, Mr. Chief Justice Merrick as the organ of the court, said: "Where a party enters into the obligation of suretyship for the appearance of a person charged with crime, he incurs a civil obligation, which, like all others, is to be considered in reference to the substance of things. It is not an idle form; it means something. Now what does the District Judge intend by his order? What did the parties intend when they complied or attempted to comply with the same, and what obligation did they thereby incur?"

"We think, inasmuch as the accused was in the custody of the Sheriff or his deputies, it may fairly be inferred that the Sheriff and his deputies, (no other person being mentioned,) were intended as the proper persons to take the bond, and that neither the accused nor his sureties, who have put this construction upon the order of the court for the bond, and have secured his discharge upon this construction, can now be permitted to gainsay this conclusion, upon which they have acted."

Under all the circumstances of the present case, it must be conceded that the Sheriff, *Légé*, had sufficient authority to act in the premises; and that the bond taken by him is not a nullity, inasmuch as it was based upon a written order of commitment and bail, and is clothed with all the forms and formalities required.

II. The second objection is: "That the securities were never called upon to produce *instantly* in open court, the person of the defendant or accused."

The appellants' counsel contends, in his brief, that although the sureties were called upon to produce the body of their principal, yet the words *instantly* and *in open court*, were not used. This is not a serious objection, and we cannot be expected to hold that these terms are sacramental. When the accused had been called at the courthouse door, and had failed to make his appearance at that time in open court, recourse was then had to his sureties, who were his legal custodians. The appellants themselves were not at the time mistaken upon the meaning of the action of the court, for it is but on appeal that they have discovered this objection.

III. The third objection is: "That the bond was not in evidence, or produced on the trial, or before the court, as a part of the proceedings, it having never been filed in court."

The first document offered in evidence by the District Attorney, as appears by the statement of fact, was the bond dated 2d day of August, 1858, taken by *A. Légé, Sheriff*. The case quoted in 12 An. 189, of *The State v. Wilson*, has no bearing whatever upon this point. The failure of a Clerk to endorse on a document that he has filed it, is of no consequence, when the document is actually filed in the records, and is carried on the statement of facts.

Judgment affirmed.

STATE OF LOUISIANA v. JOHN NICHOLSON AND GEORGE WILSON.

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In a criminal case, it is within the discretion of the District Judge to grant a continuance on the affidavit of the accused, of the absence of a material witness, who is a non-resident and not subject to the process of law, but the appellate court cannot interfere with the exercise of that discretion.

Where the offence charged in the indictment was in the words of the statute, uttering and giving in payment a forged and counterfeit bank note, *knowing the same to be forged and counterfeited*, and in the indictment the words, "*knowing the same to be forged and counterfeited*," were omitted—*Held*: That the defect was not remedied by the charge in the indictment that the counterfeit bill was uttered and given in payment with an "intent to defraud."

The statute of 1855, requiring that *formal objections* to an indictment shall be taken before the jury are sworn and not afterwards, does not apply to matters of substance essential to the very existence of the offence, and on such objections as formerly, the judgment may be arrested.

By section 8th of the "Act to regulate the mode of procedure in criminal prosecutions," approved March 14th, 1855, the State is only relieved from the necessity of alleging and proving an intent to defraud some particular person, but is still required to allege an offence in other respects, corresponding with the statute which creates it.

When the sentence against the prisoner exceeds the maximum of imprisonment under the statute, the case will be remanded with instructions to the District Judge to pronounce judgment upon the verdict according to law.

**A** PPEAL from the District Court of the Parish of St. Landry, *Martel, J.*  
*P. D. Hardy*, District Attorney, for the State. *J. F. Morrogh*, for defendants and appellants.

**VOORHIES, J.** The defendant, *George Wilson*, was found guilty of uttering a forged and counterfeit bank check, and sentenced to imprisonment at hard labor.

He asks relief at our hands, on the ground that his application for a continuance in the court below was overruled.

The petition for a continuance states :

"That *George Bingham*, a resident of Vicksburg, State of Mississippi, *Eli Shepherd*, residing on Pearl River, Mississippi, and *H. Wheeler*, a resident of Covington, State of Kentucky, are material and important witnesses for him in his defence, and with all due diligence which he might use, it would be impossible for him to procure their attendance at this term of the court. . . . That he hopes and expects to obtain the attendance of said witnesses at the next term of your honorable court, and that the affidavit is not made for delay, but in order that justice may be done in the premises. That *though the said witnesses do not reside within the jurisdiction of this court, and are not subject to its process, yet affiant has every reason to believe that said witnesses, who are his friends and are well acquainted with him, will repair instantly here to testify in his behalf, as soon as they are informed of his situation.*"

The prisoner is entitled to a continuance, when a material witness is absent ; but it must appear that due diligence has been used to obtain his attendance, and that his presence will be procured by the next term of court. This rule is not without important qualifications, one of which is, that the absent testimony must be within the process of court. Wharton Am. Cr. Law, p. 595.

It is, however, within the discretion of the District Judge, according to the circumstances of the case, to grant relief to the prisoner ; but this court could not interfere with the exercise of that discretion by the Judge of the inferior court.

STATE  
v.  
NICHOLSON

If the latter did not attach much weight to the prisoner's statement that, although his witnesses were non-residents and not subject to process of law, he had every reason to believe that they would willingly appear on his behalf, we cannot interfere.

As these witnesses were not subject to the process of the court, it was useless to inquire whether, before finding of the indictment, it was the duty of the prisoner to use due diligence to procure their attendance.

It is, therefore, ordered and decreed, that the judgment of the District Court be affirmed.

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ON A RE-HEARING.

*The State of Louisiana v. George Wilson—same v. John Nicholson and George Wilson—same v. same.*

MERRICK, C. J. Since the opinions were delivered and the decrees of the court were rendered in the above entitled cases, the defendant, *George Wilson*, has applied for a re-hearing, and the parties, by counsel, have consented that these cases be consolidated and considered together, inasmuch as judgment was so pronounced by the lower court, under section 40 of the Act of the Legislature, approved March 14, 1855. Acts of 1855, p. 135.

If the cases be so considered, they present other questions than those which we have decided.

It is, therefore ordered, that a re-hearing be granted said *George Wilson*, alone, in each of the above entitled cases.

And now, the parties consenting that judgment be immediately pronounced upon the re-hearing, we proceed to consider the questions presented by the appellant upon the records, as they now stand.

Record No. 557, has its defects supplied by the judgment in the other two cases, 558 and 559. The appeal in this case must be reinstated.

It is only necessary to consider one of the questions presented by the appellant, *Wilson*, in this case. His counsel objects that the indictment is defective, because it does not follow the statute and does not charge that the defendant uttered and gave in payment the forged and counterfeit bank note "*knowing the same to be forged and counterfeit.*"

Although the foregoing allegation is omitted, the indictment does charge that the counterfeit bill was uttered and given in payment with an "intent to defraud."

The question then arises, whether the latter expressions in the statute (which has been averred in the indictment,) does not really comprehend the first, viz, a knowledge of the forgery? It appears to us that it does not, and that knowledge of the forgery, or that the bill, &c., is a counterfeit, is an essential ingredient in the offence, and according to the ordinary rules of criminal pleading, ought to be alleged. It is possible that a counterfeit bill might be passed with an intent to defraud, without a knowledge of its being such, as where the accused supposed it was really a bill upon an insolvent bank, at the time that he uttered the same.

We cannot, therefore, but suppose, that the Legislature, in using both expressions, considered that both a knowledge of the false nature of the counterfeit, and intent to defraud, were essential to constitute the offence.

The new statute to regulate the mode of procedure in criminal cases, (Acts

1855, p. 171,) does not preclude the defendant from urging this objection in this court.

The statute only requires that *formal objections to an indictment*, shall be taken before the jury are sworn, and not afterwards. It does not apply to matters of substance, essential to the very existence of the offence intended to be charged in the indictment. Such objections may be made as formerly, and the motion in arrest of judgment, was a proper mode of bringing the objection to the attention of the court. *State v. Delerno*, 11 An. 648.

But it may be supposed, that section 6 (p. 172) of the statute, relieves the State from alleging the *scienter* in the indictment. We are of the opinion, that the object of this section is to obviate the necessity of alleging and proving on the part of the State, an intent to defraud some particular person. The State is still required to allege an offence in the indictment, in other respects corresponding with the statute which creates it. The judgment of the court in case No. 557 of this court, and No. 961 of the lower court, must be arrested and the accused discharged from custody under the same.

The reversal of the judgment in cause 557, leaves only two other convictions at the same term against *George Wilson*, and the penalty of ten years imprisonment in the penitentiary cannot be inflicted. The *maximum* of imprisonment in each of the two remaining cases, cannot exceed three years, and these two cases must be remanded, with instructions to the District Judge, to pronounce judgment upon the verdicts therein rendered, according to law.

We adhere to the reasons given by us, why we cannot disturb the finding of the jury, on account of the motion for a continuance.

The following judgments will, therefore, be entered :

*The State of Louisiana v. George Wilson—No. 557.*

In this case, it is ordered, adjudged and decreed, that the judgment heretofore pronounced by us, be set aside, and the cause reinstated ; and it is now ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that judgment upon said verdict be arrested, and the accused, *George Wilson*, discharged from custody under said indictment.

*State of Louisiana v. John Nicholson and George Wilson—No 558.*

In this case, it is ordered, adjudged and decreed by the court, that the judgment heretofore pronounced by us be set aside, as to the said *George Wilson* only ; and we do now order, that the judgment of the lower court be avoided and reversed, as to said *Wilson*, but without disturbing the verdict of the jury. And it is further ordered, that this case be remanded to the lower court to be proceeded in, and to pronounce judgment against said *George Wilson*, upon said verdict, according to law, and the views of this court herein expressed.

*State of Louisiana v. John Nicholson and George Wilson—No. 559.*

It is, ordered, adjudged and decred by the court, that the judgment heretofore pronounced by us as to the said *George Wilson* be set aside ; and we do now order, that the judgment of the lower court, so far as it effects the said *George Wilson*, be avoided and reversed, without disturbing the verdict of the jury. And it is further ordered, that this cause be remanded to the lower court to be proceed in, and to pronounce judgment upon the said *George Wilson*, according to law, and the views expressed by this court.

## HEIRS OF PRÉJEAN v. ROBIN, Administrator.

The proper construction of Art. 593 C. P. is that the tutor of a minor, like every other person who is *sui juris*, can only appeal within the year which follows the signature of the judgment : but the minor whose interests are affected by a judgment, has a year after attaining the age of majority, in a case where no appeal has been previously taken, to deliberate whether he shall appeal from it or not.

**A** PPEAL from the District Court of the Parish of St. Landry, *Martel, J.*  
*B. F. Linton*, for plaintiffs and appellants. *Swayze & Moore*, for administrator.

BUCHANAN, J. The judgment of the District Court, from which the present appeal was taken, was rendered and signed the 14th of August, 1857.

The appeal was by petition filed in court the 8th of November, 1858, although an order had been made at chambers, allowing a devolutive appeal on such petition, the 25th October, 1858.

The appellee now moves to dismiss the appeal, as having been taken too late. This motion must prevail. C. P. 593.

The Article of the Code says, indeed, that the year for appealing commences running for minors, from the day of attaining the age of majority. But this limitation does not apply to tutors, of whom there are several among the present appellants. The reason of the limitation does not apply to *them*, for they might have exercised the right of appeal from the first day of the rendition of the judgment ; while the minor cannot act for himself in a court of justice, so long as his minority lasts.

We hold the proper construction of Article 593 of the Code of Practice to be, that the tutor of a minor, like every other person who is *sui juris*, can only appeal within the year which follows the signature of the judgment. But the minor whose interests are affected by a judgment, has a year after arriving at the age of majority, in a case where no appeal has been previously taken, to deliberate whether he shall appeal from the same.

To allow the tutor the same length of time for appealing, would injuriously procrastinate the settlement of estates of minors ; and in cases like the present, where majors and minors are jointly interested, would extend to the former a delay for final adjudication of lawsuits, which the law certainly never intended.

The appeal is, therefore, dismissed, with costs.

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## C. GAUTHIER v. F. GREEN.

The general rule for the measure of damages for the inexecution of a contract, by Art. 1928 of the Civil Code, is the loss suffered or the profit of which the obligee has been deprived.

**A** PPEAL from the District Court of the Parish of Calcasieu, *Martel, J.*  
*Simon, Jr. & Relden*, for plaintiff. *T. H. Lewis* and *J. H. Overton*, for defendant and appellant.

BUCHANAN, J. This is a suit for damages for non-delivery of beeves to the purchaser, under a contract of sale.

GAUTHIER  
v.  
GREEN.

The only point in the cause is presented by a bill of exceptions taken by the defendant and appellant, to the refusal of the Judge to charge the jury "that the measure of damages for the violation of a contract to deliver personal property, is the value of the property at the place, and at the time it should have been delivered by the terms of the contract."

The Judge did not err. If this were a contract of affreightment, the charge asked would have been correct; because the place of delivery under such a contract, is the place of destination of the goods which are contracted to be carried. But the beeves in this case were bought with a view of reselling them in another market; and the proof is that the same beeves were in fact sold, subsequently, by defendant, at a considerable advance over the price which the plaintiff had agreed to give him.

The general rule for the measure of damages for inexecution of a contract, by Article 1928 of the Code, is the loss suffered, or the profit of which the obligee has been deprived. The verdict of the jury, tested by the evidence, does not seem to have exceeded this measure of damages.

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Judgment affirmed, with costs.



C A S E S  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF LOUISIANA,  
AT  
NEW ORLEANS.

~~~~~  
NOVEMBER AND DECEMBER, 1850.
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PRESENT:

HON. E. T. MERRICK, *Chief Justice.*

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| HON. A. M. BUCHANAN,<br>HON. C. VOORHIES,<br>HON. J. L. COLE,<br>HON. T. T. LAND, | } | <i>Associate Justices.</i> |
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BARNES, LYMAN & Co. v. C. C. WAYLAND & Co.

The answers of a garnishee, when categorical, make full proof of the facts stated against the seizing creditor, until contradicted by other evidence.

The credibility of a garnishee cannot be impeached, by showing him to be unworthy of belief; to contradict his answers, the facts stated in them must be disproved.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
J. Livingston, for plaintiffs. *J. A. Bartlette*, for defendants. *George L. Bright*, for garnishee and appellant.

LAND, J. The plaintiffs, judgment creditors of *Wayland & Co.*, applied for a *fieri facias* on their judgment, and garnished *M. Gernon*, under the 13th section of the Act of the 20th of March, 1839, p. 166, and propounded to him the following interrogatories:

First. Have you in your possession, or under your control, any money, rights, effects, or credits, belonging to *C. C. Wayland & Co.*? What is the value, and the amount? Is it sufficient to pay plaintiffs' judgment, say \$1,500?

Second. Did *C. C. Wayland & Co.* pay you any money in the month of January last past, or the present month of February? If aye, state the amount, and the circumstances attending said payment. Was the amount so paid sufficient to satisfy plaintiffs' judgment? If not, to what amount would it satisfy said judgment?

To which he answered as follows:

To the first—None whatever.

To the second—In January, *Wayland* paid me the rent of the month of December, \$275. He also paid me in the month of January, after I had instituted

BARNES
v.
WAYLAND.

proceedings against him in this honorable court, in the matter of *J. B. Walsh*, absentee, the sum of \$1150. Of this sum, \$275 was for the rent of the store of *Walsh*, for the month of November, 1858, for which a note had been previously given. Then, also, two notes: one for \$540 due *Walsh* for old rent, and one for \$500 due me individually. These three amounts, in the aggregate \$1315, were by me compromised with *Wayland*. I received from him, in full satisfaction of all these demands, the sum of \$1150; and, in consideration of such settlement, I consented to release, and did release, *Wayland* from arrest, he being at the time in the custody of the Sheriff.

On the filing of these answers, a rule was taken by the plaintiffs on the garnishee, to show cause why judgment should not be rendered against him for the full amount of their judgment, interest and costs, on the grounds, that his answers to the interrogatories on facts and articles were evasive, unsatisfactory, and not true in fact. That his statement of the amount paid over by *Wayland & Co.* for old rent, and a debt due to himself, were evasive, insufficient, and unsatisfactory, in not stating how long the old rent had been due, and for what *Wayland & Co.* became indebted to him. That the alleged compromise was made under duress, that the garnishee acted with full knowledge of the insolvency of *Wayland & Co.*, and that the compromise was a fraud upon the plaintiffs, who were judgment creditors of *Wayland & Co.* at the time.

The rule was made absolute, and the garnishee condemned to pay the amount of \$1150 to the plaintiffs; from which judgment he prosecutes this appeal.

First. In our opinion, the answers to the interrogatories were responsive and categorical; and that there is nothing in the record which proves that the garnishee received from the defendants, *Wayland & Co.*, any greater amount than stated in his answer to the second interrogatory; and there is no evidence to prove that he had in his possession any money, rights, effects or credits, belonging to *C. C. Wayland & Co.*, at the time of the service of the process of garnishment on him, or afterwards.

The answers of a garnishee, when categorical, make full proof of the facts stated against the seizing creditor, until contradicted by other evidence. *G. W. Helme v. C. W. Pollard & Co.*, ante, page 306; *McDowell v. Crook*, 10 An, page 31.

The affidavits of the garnishee in the case of *J. B. Walsh v. C. C. Wayland & Co.*, do not contradict his answers to the interrogatories in this case; and if they be inconsistent, as contended, that inconsistency has no relevancy to the issue of fact made by the plaintiffs' rule, as to the truth of his answers now under consideration. Nor can the testimony of the witness, to the effect that the garnishee said to him that he had received nothing from *Wayland & Co.*, although he had made a satisfactory settlement with them, be considered as evidence in favor of the plaintiffs, to disprove the truth of the garnishee's answers; for, if this testimony be true, it is against the plaintiffs—because it goes to prove that the garnishee received nothing at all from *Wayland & Co.*, when he admits in his answers that he had received the sum of \$1150. There is a very material difference between impeaching the testimony of a general witness, and disproving the answers of a garnishee to interrogatories on facts and articles. The testimony of a witness may be impeached by evidence showing him to be unworthy of belief, but the answers of a garnishee cannot be assailed in that way; his rights and liability depend on his answers to the interrogatories which are propounded to him, and the facts stated in his answers must be disproved.

Secondly. The garnishee was not interrogated as to the nature of the indebtedness of *Wayland & Co.* to himself individually, or to his principal, *Walsh*, and his answers, therefore, cannot be said to be evasive, on this ground.

Thirdly. The questions of duress, insolvency, and fraud, stated as the third ground why the garnishee should be condemned to pay the full amount of the plaintiffs' judgment, were wholly foreign to the issues between the parties at the time the rule was taken, and could not be raised in that collateral way, and had no connection whatever with the interrogatories, or the garnishee's answers thereto.

It is, therefore, ordered, adjudged and decreed, that the judgment be reversed; and it is now ordered, adjudged and decreed, that there be judgment in favor of the garnishee, with costs in both courts.

BARNES
v.
WAYLAND

J. B. GRIBBLE v. McKLEROY & BRADFORD.

14 793
123 104

A motion made to order the plaintiff to make a choice of his cause of action, and declare whether he sues on a contract, or a *quantum meruit*, is in its nature dilatory and can only be made *in limine litis*.

When a party sues on a *quantum meruit*, and the petition discloses an express contract, he can only recover on the contract, although he may be permitted to prove the value of his services.

The date is not of the essence of a contract of letting and hiring, and proof of the fact that it was made on a day different from that alleged, is sufficient to sustain it.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*

Lea & Marr, for plaintiff and appellant. *Clark & Bayne*, for defendants.

LAND, J. The plaintiff sues for an alleged balance of salary due him, as the former confidential clerk of the defendants, cotton factors in this city. He alleges, that on or about the 15th of November, 1853, he entered into and continued in the service of the defendants, (his engagement being renewed from year to year,) until the 15th of November, 1856, when it was again renewed for the ensuing year. That his account with the defendants was settled on the 1st of July, 1856, by crediting him at the rate of \$3000 per annum for the preceding year, and that no definite arrangement was made for the future, although he remained in the service of the defendants, performing onerous duties, and holding the power of attorney of the firm, from that time until about the 1st of November, 1856, during which period the defendants were absent from this city, and that he is entitled to demand and to be paid for the services thus rendered, at the rate of \$300 per month, for the period embraced between the 1st of July and the 15th of November, 1856. He further alleges, that during the month of November, 1856, *Mr. McKleroy* promised him a minimum salary of \$3000, with the assurance that it should be as much larger as the business of the house would justify; that he continued his services and gave entire satisfaction, until the 17th of April, 1857, when he was capriciously discharged by *Mr. Bradford*; and that he is entitled to demand and to be paid the sum of \$4000 for the year beginning the 15th of November, 1856, and ending the 15th of November, 1857.

The answer of the defendants is a general denial, modified by the admissions that the plaintiff was in their employment, and that from the 1st of July, 1856, they had determined to allow him \$250 per month, so long as there should be a

GRINBLE
v.
McKLERoy.

mutual agreement between them. The answer contains a special averment, that the plaintiff voluntarily left the employment of the respondents at the date mentioned in his petition, and also a claim in reconvention for the sum of \$395 74, the amount for which it is alleged the plaintiff had overdrawn his account.

Before going to trial upon these pleadings, the defendants moved the court to order the plaintiff to make an election of his cause of action, and to declare whether he sues on a contract or on a *quantum meruit*. The motion was in effect overruled, and was properly disregarded on the trial of the cause. The motion was made after issue joined, was in its nature dilatory, and should have been made *in limine litis*, if sustainable at all, in this action.

The District Judge did not err in receiving evidence of the *special agreement* alleged in the plaintiff's petition. Where a party sues on a *quantum meruit*, and the allegations of his petition disclose, as in this case, an express contract, he can only recover upon the latter, although he may be permitted to prove the value of the services rendered. Nor did the Judge err in receiving evidence of the value of the services; for it has been held in several cases that, if the plaintiff sues for services on a special contract, he may give evidence of their value. See the case of *Gourjon v. Cucullu*, 4 La. 117. If a party can prove a fact on the trial of his cause, he may certainly allege it in his petition.

The allegation, that *Mr. McKleroy* promised the plaintiff a certain salary of \$3000 for the year, with an additional promise of a contingent increase dependent on the success or profits of the business of the firm, and that the plaintiff continued his services, discloses, as against him, the existence of an express contract of letting and hiring, which relates back to the commencement of the service or employment for that year. This allegation gives character to the suit, and determines the plaintiff's right of recovery to be on the contract, and not on the *quantum meruit*.

There is, however, a material difference between the parties as to the time of the commencement of the year for which the plaintiff is entitled to recover for his services. The defendants contend that it was on the 1st of July, 1856, the date of the settlement of the plaintiff's accounts, and the beginning of the financial year of their firm; the plaintiff, on the other hand, contends that the year commenced on the 15th of November, 1856, the date of the alleged new understanding. The settlement of the plaintiff's account, at the end of the financial year of the firm is a presumption, that the commercial year of the house had become, with his assent, the year of his employment, in the absence of evidence to the contrary, and that this contract with *Mr. McKleroy* was for that year. And the presumption is not rebutted by the unsustained allegation in his petition, that the year commenced on the 15th of November, 1856.

The plaintiff, however, is not estopped by his averment of a verbal promise of a salary of \$3000 for the year, made in the month of November, 1856, and that the year of his employment commenced from that date—but is entitled to the benefit of the evidence and the admissions in the record, showing the commencement of the year to have been on the first of July, 1856, at the salary specified in his petition. The date is not of the essence of the contract of letting and hiring, and evidence that it was made on a day different from that alleged is sufficient. The question is one of variance between the allegations and the evidence. He is, however, concluded by the averment of a *contract*, from recovering, as before observed, on a *quantum meruit*, for the whole or any part of his services.

GRIBBLE
v.
McKEROY.

We are satisfied, from the admissions in the pleadings, and the evidence of the cause, that there was a contract between the parties, by which the plaintiff was employed at a salary of \$3000 for the year commencing on the 1st of July 1856, and that his claims for services cannot, consequently, be considered as extending beyond that period.

Upon the question, whether the plaintiff was discharged without cause, or left the employment of the defendants voluntarily, we are not satisfied that the judgment of the lower court, which is in favor of the plaintiff, on this point, is erroneous. The views taken by the District Judge of this case, rendered somewhat intricate by the duplicity of the plaintiff's pleadings, are correct. From his judgment, both parties, plaintiff and defendants, have separately and regularly appealed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be affirmed, with costs of this appeal, one-half to be paid by the plaintiff, and the other half to be paid by the defendants.

SUCCESSION OF HENRY GRANT.

An attorney-at-law is a competent witness in a case in which he is employed, and his testimony can only be excluded on legal grounds; the relations which exist between him and his client go to the effect and not to the admissibility of his testimony.

A copy of several consecutive sections of an Act of another State, taken from a digest of general statutes, and certified to be a true copy by the Secretary of State, should be received as *prima facie* evidence of the whole law of the State upon the subject treated of in the sections.

The capacity and signature of a Justice of the Peace who has taken a deposition under commission in another State, must be established by the certificate of the Governor under the great seal of the State.

The registry of an act under private signature, does not make proof of its execution by the parties to it.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
Emerson & Huntington, for curator. *Race & Foster*, for opponent and appellant.

LAND, J. The curator of the deceased having filed, by order of the court, a second tableau of distribution, the Mercantile Bank of Salem, Massachusetts, claiming to be a mortgage creditor of the succession, made opposition thereto, on the grounds that the curator had refused to allow and place the claims of the bank on the tableau.

The bank has appealed from a judgment of nonsuit on the opposition, and our attention is called to several bills of exceptions, taken by the opponent, to the rulings of the Judge, on the trial of the cause.

The first bill is to the refusal of the Judge to receive the testimony of one of the attorneys-at-law of the bank, on the ground of his interest in the event of the suit. The attorney was interrogated on his *voir dire* to establish that interest. He swore that "no fee had been stipulated with his client, but that he might charge more should he succeed in the cause, than if he were to fail, and that it is customary with his firm to charge less when their clients fail, than when they succeed in their suits." The interest disclosed by the attorney, is not a direct and legal interest which renders a witness incompetent.

SUCCESSION OF
GRANT.

In the case of *Sprigg v. Beaman*, 6 La. 64, Porter, Justice, says: "In the instance before us, though the witness felt the obligation which his habits of business had imposed, to vary his charge of compensation with the event of the suit, there was surely no legal obligation on him to do so. The legal responsibility of the client, was to pay him the value of his services, and this value was to be tested by the labor and pains bestowed on the cause, and the degree of responsibility incurred, not by the success which attended his efforts. The physician who conquers a disease is, in law, entitled to no more remuneration than when he is baffled by it, and sees all his exertions fruitlessly terminate with the loss of his patient's life." The attorney was accordingly held to be a competent witness, although he swore on his *voir dire*, that he would feel bound by his rule of conduct, to apply it to that case, which rule was to charge his clients less should they fail, than if they were to succeed in their suits.

An attorney-at-law is a competent witness, and his testimony can only be excluded on legal grounds. The relation which exists between him and his client, goes to the effect, and not to the admissibility of his testimony. If the law is unwise or impolitic, which makes an attorney-at-law a competent witness for his client, the remedy is in the hands of the Legislature, and not of the courts. The District Judge, therefore, erred in refusing to receive the testimony of the witness.

The second bill of exceptions is to the ruling of the Judge, rejecting a certified copy of the interest law of Massachusetts, on the ground that it appears to be "an extract from the law, and not the entire law." The certificate of the Secretary of State is as follows:

"I hereby certify the foregoing to be a true copy of the first, second, third and fourth sections of the thirty-fifth chapter of an Act for revising and consolidating the General Statutes of the Commonwealth, approved by the Governor, on the 4th day of November, in the year 1835."

The Act certified, appears to be an entire Act upon the subject of interest and usury in the commonwealth of Massachusetts, and to have been copied from a digest of the general statutes of the State. The sections of the Act mentioned in the certificate, are numerically consecutive, and seem to cover the whole subject of interest, and there is nothing on the face of the certificate, to create a presumption that the Act contained any other sections, than those certified. The copy should have been received as *prima facie* evidence of the interest law of Massachusetts.

The third and fourth bills of exceptions, are to the refusal of the Judge to receive in evidence a draft drawn by the cashier of the Union Bank of New Orleans on the Mercantile Bank of Salem, and also a receipt of the former bank to the latter—the signatures to which had been proved to be genuine, for the purpose of showing that the draft had been paid to the Union Bank, for the use and benefit of the succession of the deceased, *Henry Grant*, and also to his refusal to receive in evidence, the testimony of a witness, to show the connection of the draft with the succession, and in what manner, and for what given, and that the same was for account and benefit of the succession, in order to protect good collaterals pledged by the deceased *Grant* to the Mercantile Bank. The evidence was rejected on the ground, that the draft appeared to have been drawn by the Union Bank on the Mercantile Bank, two years after the death of *Henry Grant*, and ten years before his succession had been opened, and was in no manner connected legally with the succession or chargeable thereto.

The objection should have been overruled, for one of the questions at issue, was whether the draft could be connected with the succession of the deceased, and made a legal charge against the same. Although the evidence may have been insufficient to make out the plaintiff's case in that particular, it should have been received for what it was worth, and considered on the merits, in connection with the whole evidence offered in support of the claims of the bank.

The fifth bill of exceptions is to the refusal of the Judge, to receive in evidence certain depositions taken under a commission in the State of Massachusetts, on the ground, that the official capacity and signature of the Justice of the Peace by whom they purport to have been received, had not been legally proved by the certificate of the Governor, under the seal of the State.

The District Judge did not err in ruling out the depositions on this ground. The certificate is subscribed by the Secretary of State alone, and not by the Governor. In the case of *Buford v. Johnson*, 10 R. 456, which presented a question similar to the one now before us, the court say: The certificate of the Governor, under the great seal of the State, is the usual, and in our opinion, the best evidence of the fact sought to be established. It was in the reach of the party, and could easily have been procured. See *Thatcher v. Goff*, 13 La. 362.

The sixth and last bill of exceptions is to the refusal of the Judge to receive in evidence a deed of trust, purporting to have been executed by the deceased, to the Mercantile Bank of Salem, on the ground that the original act was under *private signature*, and could not be received in evidence before the signatures had been proved, and that the registry of the act in a Notary's office did not dispense with proof of the signatures. The Judge did not err. The registry of an act under private signature, does not make proof of its execution by the parties. This point was ruled by us at Alexandria, on the authority of previous decisions. 14 An.

It is, therefore, ordered, adjudged and decreed, that the judgment be reversed, and cause remanded to the lower court for further proceedings according to law, and the *Succession of Henry Grant* pay the costs of this appeal.

D. L. SHEARER, for the use of E. PEELE, v. LOUISIANA MUTUAL INSURANCE COMPANY.

14 797
52 808

When an open policy of insurance is made out in the name of *D. L. S.* "for account of whom it may concern," and a clause is inserted to the effect, that the "*insurance is on merchandise, to cover all shipments to the address of the assured, from time of shipments, and risks to be reported as soon as known*" — *Held*: That to recover under such a policy the value of a lost shipment, it must be shown that it was made to the address of the assured, or if made to the address of another person, that the risk was reported by him.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
F. Haynes, for plaintiff and appellant. *Race & Foster*, for defendants.

BUCHANAN, J. This action is brought to recover the value of merchandise shipped on freight from New York to New Orleans, and insured under an open policy of the nominal plaintiff, *D. L. Shearer*, by the defendants.

The defence is:

1st. Want of insurable interest in the assured.

SHEARER
v.
LA. M^C. INS. CO.

2d. That no risk was taken by defendants.

3d. Fraudulent suppression of facts known to the assured, at the time of the application for insurance.

It is only necessary to examine the second ground of defence.

D. L. Shearer, a commission merchant and auctioneer in New Orleans, had an open policy in defendants' office, which contained the following definition of the objects at risk :

"This insurance is declared to be on merchandise, to cover all shipments to the address of the assured, from time of shipments, and risk to be reported as soon as known."

The policy is made out in the name of *D. L. Shearer*, for account of whom it may concern.

Now, whether we consider the party insured in this instance, or under the particular risk spoken of in the evidence, to be *Shearer* or *Peele*, a point which the evidence leaves in considerable doubt, the ground of defence which we are examining must equally prevail.

If it be *Shearer*, the shipment of goods per ship *Saxon*, for a voyage from New York to New Orleans, entered on the book annexed to the policy, under date of the 23d of April, 1857, was not covered by the terms of the policy, because the shipment was not "to the address" of *Shearer*.

If, on the contrary, the party assured in this risk was *Peele*, then this action must fail ; because *Peele* did not report the risk as soon as it was known to him, by receipt of the bill of lading through the mail, which is proved to have been from two to three weeks anterior to the report of the risk to the insurance office. The condition, that the risk was to be reported as soon as known, was a lawful one, which the insurers had a right to insert in their contract ; and the significance of which is exemplified in a striking manner by the facts of this case.

It is specially to be observed, that defendants, through their legal representative, the President of the company, immediately on being informed by *Mr. Shearer*, that the shipment in question was not to his address, and the same day that the entry of this risk had been entered upon the book annexed to *Shearer's* open policy, by a Clerk in the office, to whom *Shearer* had not communicated this fact, declared formally to *Shearer* that the defendants did not consider this shipment to be covered by the policy.

Judgment affirmed, with costs.

JEAN FOSS v. M. BRENTTEL et al.

When a judgment on a rule passes finally upon the merits of a controversy between parties, it will have the same effect as a decree rendered in any other form of proceeding.

A PPEAL from the Third District Court of New Orleans, *Duvigneaud, J.*
L. U. Gaianne, for plaintiff and appellant. *McCarty & Coleman*, for defendant.

MERRICK, C. J. As we understand the appellant's brief, this case presents but two questions, viz : Whether an order of court making a rule absolute can, where it has the effect to dispossess a person of property, have the effect of the thing adjudged ? And if so : Whether the judgment on the rule in the contro-

versy between the defendant, *Mrs. Brentel*, alone, and *Jean Foss*, relative to the possession of the stall in the Dryades market, can be pleaded in bar of the suit of *Jean Foss* against *Mrs. Brentel* and *John Weber*?

Foss
v.
BRENTEL

If the judgment on a rule passes finally upon the merits of a controversy between parties, no valid reason can be urged why it should not produce the same effect as a decree in any other form of proceeding. As it ends all controversy in a cause, and with it the cause itself, it is a *judgment*, and as such must produce all effects declared by law to be the incidents of a judgment.

The controversy between *Mrs. Brentel* and *Foss* is, as to those two, a controversy between the same parties, in the sense of Article 2265 of the Civil Code. *Foss* cannot deprive her of her plea of *res judicata*, by joining another person with her in the second suit. This would be an easy mode of defeating the plea in all cases.

But as to the defendant, *Weber*, the case is somewhat different. He was not a party to the suit between *Mrs. Brentel* and *Foss*, and, strictly speaking, the plea of *res judicata* does not apply to him. But in the former suit, the possession of the stall was decreed to *Mrs. Brentel*, and it is the execution of this judgment which plaintiff seeks to arrest. Now, *Weber* can defend himself, by showing title in *Mrs. Brentel*, and authority from her, and as the plaintiff sets up no special cause of action against *Weber*, we think when the plea of *res judicata* is sustained in favor of *Mrs. Brentel*, and she is permitted to execute her judgment, the plaintiff has no longer any interest in maintaining his action against *Weber*, and, as a consequence, must fail in his suit. C. P. Art. 15.

It thus appears that the judgment of the lower court ought to be affirmed, and it is so decreed.

GERMAN EVANGELICAL CONGREGATION v. H. PRESSLER.

14 799
1123 161

Courts of justice cannot regard the wishes of the majority of the members of a corporation, unless expressed in a valid form, in conformity with the bye-laws and charter.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
G. & C. E. Schmidt and *E. Hiestand*, for plaintiff and appellant. *Durant & Hornor*, for defendant.

MERRICK, C. J. The present appeal is taken by the plaintiffs from a judgment upon a rule dismissing the suit. The question turns upon the validity of a supposed resolution of the society ordering this suit to be discontinued.

It appears to be conceded by plaintiffs' counsel, that the corporation can be bound by a joint resolution of the council and congregation. The resolution said to have the effect of discontinuing the suit was passed under the following circumstances :

Under the bye-laws of the corporation, the council (who seem to be the detainers of the powers of the corporation, and consist of seven persons,) are elected by the vote of the members of the congregation, upon the nomination of the council going out of office. The old council are to nominate not less than fourteen persons, and not more than twenty-one, out of whom the seven councilmen or wardens for the ensuing year are to be elected. The officers of the church council are

GERMAN EV. CON. a president, secretary and treasurer. These officers are required to be present at
v. the meetings of the church council and congregation.
PRESSLER.

A meeting having been called by the president, in accordance with the by-laws, for the election of a new council, or board of wardens, to take place on the 28th day of November, 1858; and having assembled accordingly, the president proceeded to organize the meeting and announce that it was held for the purpose of an election.

Some members insisted upon passing some resolutions previous to the election. *Kaiser*, the president, declared them out of order. An appeal was made to the congregation, who decided in favor of the resolutions. The council, it seems, continued intent upon proceeding with the election, and received some votes. Much disturbance then arose. *Kaiser*, the president, directed some police officers, whose presence he had procured, to arrest certain persons disturbing the congregation. They paid no attention to his request. Presently, *Pressler*, the defendant, came in, and at the instance of some in the congregation, he directed the police officers to arrest *Kaiser* and the other officers of the council, with one or two of the councilmen, making five in all. The latter took with them the books of the corporation, and were locked up at the guard-house by the police. The congregation then, in the absence of the old board, proceeded to organize the meeting and passed the resolution directing the discontinuance of this suit. They also elected a new board of councilmen or wardens.

On a writ of *quo warranto* issued at the instance of the old board, the new election was declared to be illegal.

The District Judge being of the opinion, that the resolution was in accordance with the wishes of a large part of the congregation, directed the dismissal of the suit, and the plaintiffs appeal.

The suit having been regularly instituted, cannot be dismissed without a resolution of the corporation. The congregation alone, under the by-laws and charter, have no such power. A majority of the council must be present, and the resolution must be entered by the officers of the council upon the books of the corporation. When, therefore, the president and members of the council were illegally removed, there were no persons present to conduct the election, or to give validity to the resolutions of the congregation. The *conclusum universitatis* was wanting. It is quite clear, that the paper circulated among the members of the corporation and signed by the members, however numerous, cannot supply the place of a resolution which can only be passed by the corporators organized as a body, in conformity with the by-laws and charter.

However unprofitable this sort of litigation may be, the courts cannot regard or know the wishes of the majority, unless expressed in a valid form. See the case of *St. Mary's Church*, 7 S. & Rawle, 530.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that this case be remanded to the lower court for further proceedings according to law, the defendants paying the costs of the appeal.

EDWARD SHIFF & Co. v. P. CARPRETTE AND W. C. QUIRK.

14	801
47	973
14	801
51	486

District Courts cannot dissolve attachments issued by Justices of the Peace, except on appeal.

When a party has a claim exceeding in amount the jurisdiction of a Justice of the Peace, and bearing a privilege upon property attached by another party in a Justices' court, his remedy is by a suit in the District Court, claiming his privilege and enjoining the officer having the writ of attachment issued by the Justice from proceeding with its execution, and paying over the proceeds to the attaching creditor; or by a rule taken upon the attaching creditor, to show cause why he should not be paid by preference out of the proceeds of the sale of the property attached.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*

G. LeGardeur, for plaintiffs. *W. D. Hennen* and *P. Childress*, for defendants and appellants.

COLE, J. Plaintiffs leased to *F. A. Kelman*, the first floor of the premises situated at No. 81 Canal street, for one year from the 1st of November, 1856, to the 31st of October, 1857, in consideration of the yearly rent of eight hundred dollars, payable quarterly.

Kelman, being indebted for the quarterly installment expiring on the 1st of August, 1857, and being unable to pay the same, abandoned the premises, sent the keys thereof to plaintiffs, and left the State.

Before leaving, he sent plaintiffs, by the same person that was to deliver the key of the store, a letter, in which he gave them to understand he was about to abscond, and requested them "to proceed to the store at once, and take possession, conjointly with others equally deserving as themselves."

Plaintiffs, in consequence of the abandonment of the premises and of the surrender of the keys by *Kelman*, took, under Article 3185 of the Civil Code, and by virtue of the letter addressed to them by *Kelman*, immediate possession of the articles left in the store by *Kelman*, the value of which was insufficient to satisfy their claim.

Shortly afterwards, *W. C. Kirk*, Constable of the First Justice of the Peace, under a writ of attachment issued at the suit of *P. Carprette*, seized, took possession of, and carried away the articles then in possession of plaintiffs, and established to have been worth \$150.

These articles were afterwards, on motion of *Quirk*, sold for storage, and it does not appear what became of the proceeds.

In the meantime this suit had been brought by *E. Shiff & Co.* against *Quirk* and *Carprette*, and a writ of sequestration issued to the Sheriff, commanding him to seize and hold in his possession the goods seized by *Quirk*, under the attachment issued by *Carprette*. But they refused to give up the property.

Plaintiffs also claimed five hundred dollars as damages for the illegal action of the defendants.

Under these circumstances, the court gave judgment in favor of *E. Shiff & Co.* against *Quirk* and *Carprette*, for the value of the goods carried away and never accounted for by them, to-wit, one hundred and fifty dollars.

Carprette only has appealed.

The letter of the lessee would alone have authorized plaintiffs, in the absence of any superior right on the part of others, to take possession of the goods and sell them.

SEIFF
v.
CARPRETTE

Their letter requested them to proceed to the store at once, and to take possession, conjointly with others, of these articles ; but as no one appeared there to take possession, except plaintiffs, they were entitled to take the whole of them, as the value of the articles taken away and now in dispute was insufficient to pay their claim as lessors.

Besides, Article 3185 of the Civil Code, declares that : " The right which the lessor has over the products of the estate, and on the movables which are found on the place leased, for his rent, is of a higher nature than mere privilege. The latter is only enforced on the price arising from the sale of movables to which it applies. It does not enable the creditor to take or keep the effects themselves specially. The lessor, on the contrary, may take the effects themselves and retain them until he is paid."

This Article authorized plaintiffs to retain the goods found on the premises, and the letter of the lessee empowered him to sell them.

These goods were attached by defendants, as they were about being sold at public auction.

Plaintiff then had them sequestered, and prayed in his petition to have the attachment dissolved, which was granted in the judgment.

We are of opinion, it is not in the power of District Courts to dissolve attachments issued by Justices of the Peace, except on appeal.

If a party has sued out before a Justice of the Peace an attachment of property, and A has a claim, bearing a privilege superior to that of the attaching creditor, but exceeding the jurisdiction of the Justice, A can then protect himself by suit in the District Court, claiming a privilege, and by an injunction enjoining the officer having the writ of the Justice, from proceeding with the execution of the attachment and paying over the proceeds to the attaching creditor, or by a rule served upon the latter to show cause why he, A, should not be paid by preference.

In this way the jurisdiction of the District Court does not clash with that of the Justice of the Peace. The former merely exercises its legitimate jurisdiction, and decides that the privilege of A is superior to that of the attaching creditor. As in a *concurso*, the Judge before whom the claims of different creditors are contested, has the right to accord a preference to one having no judgment over one having a judgment, if the privilege of the former be superior.

The judgment of the District Court is correct, except as to the dissolving of the attachment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be amended, by reversing that part of it which dissolves the attachment, and that in all other respects it be affirmed ; and that plaintiffs pay the costs of appeal.

CITY OF NEW ORLEANS v. E. J. HART & Co.

The Act approved March 19th, 1856, entitled "*An Act to authorize the City of New Orleans to tax real and personal property*," is not repealed by the general repealing clause of the Act approved March 20th, 1856, amending the Act incorporating and providing a government, &c., for the City of New Orleans.

The formalities of assessment and collection of City Taxes, as prescribed by the Act of the 20th March, 1856, did not apply to the taxes for that year, as the Act of the 19th March, 1856, authorized an assessment for the year which had not then expired, in accordance with its provisions.

The meaning of the word *income*, under the Act of 19th March, 1856, is money received in compensation for services, such as wages, commissions, brokerage, &c., and is totally different from the fruits of capital invested in merchandize, stocks, &c.

The Act of 1856 makes no allowance for commissions or compensation to be paid by the tax payer to the Assistant City Attorney; the Act of 1853, which allowed him a commission of five per cent., has been repealed.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*
W. O. Denègre, for plaintiff. *H. D. Leovy*, for defendants and appellants.
 BUCHANAN, J. Defendants are sued for a tax on income, for the year 1856.
 They plead :

1st. That the formalities required by law for the assessment and collection of taxes were not observed in this case.

2d. That the tax is excessive, and that defendants had no opportunity of correcting the error.

3d. That the Assistant City Attorney is not entitled to the commission of five per cent., or any other compensation to be paid by defendants, for the collection of this tax.

I. We agree with the District Judge, that the tax sued for in this suit is a tax levied under the Act of 19th March, 1856, (Session Acts, p. 109,) and not under the amended City Charter, or Act of 20th March, 1856, (Session Acts, p. 136). The former of these two Acts was not repealed by the 133d section of the latter. The formalities of assessment and collection of City Taxes, as prescribed by the Act of 20th March, 1856, did not apply to the City Taxes of 1856, which were assessed under the Act of 19th of March, 1856.

The Act of 19th of March, 1856, authorized an assessment for that year, which was not then expired; and it is proved that this assessment was made in the year 1856. The assessment and taxation were not, therefore, retroactive, as contended by counsel of defendant in argument.

II. It is proved and admitted, that thirty days notice to correct errors in this assessment roll was given, by advertisement in the public papers. In connection with this ground of defence, the defendants have offered in evidence, a receipt for tax on capital, for the same year, 1856, and urge that the tax now sued for is a tax upon profits of capital already taxed.

The Act of 19th March, 1856, clearly defines the meaning of the word *income* as liable to taxation. It is money received in compensation for labor or services, such as wages, commissions, brokerage, &c., and is totally different from the fruits of capital invested in merchandize, stocks, &c.

III. The Act of 19th March, 1856, makes no allowance of commissions or compensation, to be paid by the tax payer, to the Assistant City Attorney. The Act of 1853, which allowed to the Assistant City Attorney a commission of five

NEW ORLEANS
v.
HART.

per cent., to be added to the amount of every bill for taxes collected by him, has been repealed. 13 An. 510. The Judgment appealed from is amended in this respect.

It is, therefore, adjudged and decreed, that the judgment of the District Court be amended; and that plaintiff and appellee recover of defendants and appellants three hundred dollars, with interest at one per cent. a month from July 7th, 1857, until paid, and costs of the District Court; the costs of appeal to be borne by appellees.

CITY OF NEW ORLEANS v. CRESCENT NEWSPAPER.

Art. 106 of the State Constitution, which declares that "*the press shall be free*," does not exempt capital invested in a newspaper from taxation.

The decision in the case of the *City of New Orleans v. E. J. Hart & Co.*, ante p. 803, affirmed.

APPEAL from the Second District Court of New Orleans, *Morgan, J. W. O. Denègre*, for plaintiff. *J. Magne*, for defendants and appellants.

BUCHANAN, J. This is a suit for a city tax of seventy-five dollars, upon capital, for the year 1856. The capital was invested in a daily newspaper, printed and published in the city of New Orleans.

The defence set up is, illegality and unconstitutionality of the tax. Defendants plead that the imposition of a tax by the municipal authority, upon newspaper property, is a violation of Article 106 of the State Constitution, which reads as follows:

"The press shall be free. Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for an abuse of this liberty."

The learned counsel of defendants founds his argument upon the first sentence of this Article; and urges, that, being a perfect sentence in itself, terminated by a full stop, and embodying a doctrine absolute and unqualified, this court is bound to give to it the utmost latitude of meaning of which the words are susceptible: and accordingly, as in fiscal matters, merchandise is said to be *free*, which is not liable to a duty of importation, it follows that the stock of a printing establishment cannot be taxed.

We do not thus understand the Article of the Constitution. The second sentence of that Article explains and elucidates the meaning of the first sentence. *The press is free*; that is to say, every citizen may publish his sentiments on all subjects. No censorship of the press shall exist. No officer of government shall dictate what may, or what may not be printed. Such is the freedom of the press, as secured by this Article. And note the restriction upon that freedom; a restriction operating, not in the form of prevention, (which would be impossible without a censorship,) but in the form of penalty. The publisher, says the Article, is responsible for an abuse of the freedom of publication. The limitation, no less than the grant, points evidently to a different kind of freedom from that fiscal freedom for which the defendants contend.

The grounds of illegality in the assessment of this tax, are the same as alleged in the case of the *City v. E. J. Hart & Co.*, just decided. For the reasons there given, this defence is overruled.

There is an illegality apparent upon the face of the record, which we are bound to correct. The judgment of the District Court allows five per cent. commission upon the amount of the tax to the Assistant City Attorney, to be paid by defendants.

The allowance is claimed under a State law, which has been repealed, as was decided by us in the case of the *City v. Jeter*, 13 An. 510.

In the absence of a State law, this commission is to be viewed as a penalty imposed by authority of a municipal corporation, of which the legality is examinable in this court, under the terms of Article 62 of the Constitution. This point has been decided in the case quoted above.

It is, therefore, adjudged and decreed, that the judgment of the District Court be amended; and that plaintiff and appellee recover of defendants and appellants, seventy-five dollars, with interest at the rate of one per cent. a month from the 7th of July, 1857, until paid, and costs of the District Court; those of appeal to be paid by plaintiff.

M. A. FAVARON v. J. M. RIDEAU.

The object of the law requiring the authorization of the husband, before the wife can be sued, is fully accomplished when the husband joins the wife in an answer to the suit, even when they have not been designated as husband and wife in the petition.

When a married woman who had been authorized to defend a suit by her first husband, marries a second time, while the suit is pending, it is not necessary that the authorization of her second husband should be obtained.

A PPEAL from the District Court of the Parish of St. Tammany, *Wilson, J. A. Bowie*, for plaintiff and appellant. *J. C. David*, for defendant.

COLE, J. This suit is instituted by plaintiff, to annul a judgment.

The District Court gave judgment for the defendant, and plaintiff has appealed.

The suit sought to be decreed null, was brought against plaintiff and *F. Dury*. It represented that plaintiff, designated in the petition as *Mary A. Riche*, and *F. Dury* were sometime before living and carrying on business together; at times under the name of *F. Dury*, and since, about one year and a half, under the name of *Mary Ann Riche*, the concubine of *F. Dury*, who has, under her name, their property, to shelter *F. Dury* from seizure by his creditors. The petition prayed that *F. Dury* and *Mary Ann Riche*, who styles herself *Mrs. Dury*, be cited.

They were both cited, and filed the following answer:

"*François Dury* and *Mary Ann Riche*, residents of the State and parish aforesaid, and defendants in the above entitled case, now appear by counsel, and for answer to plaintiff's petition, deny all the allegations therein contained, require strict proof of the same, and pray to be hence dismissed, with costs.

(Signed) Angus Bowie, Defendants' Attorney."

Plaintiff, *M. A. Riche*, now seeks to annul the judgment rendered against her in that suit, on the ground, she was the wife of *F. Dury* at the time of the institution of said suit, and the wife of *P. Favaron* at the time and before judgment was rendered against her, and that she was never authorized to defend said suit or stand in judgment by the court, or by either of her said husbands.

FAVARON
v.
RIDKAU.

Plaintiff's petition in the present case, represents that she intermarried with *F. Dury*, on the 13th of March, 1854, and lived with him, as husband and wife, until his death in March, 1857. That on the 29th of April, 1857, she intermarried with her present husband, *Pascal Favaron*, and has lived with him ever since as husband and wife. That on the 8th of May, 1856, the suit in which the judgment is sought to be annulled was filed against her and *F. Dury*, her husband, and on the 13th of June, 1857, judgment was rendered against her in the same.

The causes of the alleged nullity appear then to be :

1st. That she was not sued as the wife, but the concubine of *F. Dury*.

If *Dury* and his wife thought proper to conceal the sacred connection between them, as husband and wife, they cannot hope to derive any benefit from this to the prejudice of their creditors.

Dury and his wife could have excepted to the mode in which they were sued, but instead of this, they filed a joint answer.

If they were really husband and wife at the commencement of the suit, they cured the error of the plaintiff in calling her the concubine of *Dury*, by jointly filing an answer.

The object of the law in requiring the authorization of the husband, or court, before the wife can be sued, is fully accomplished when the husband joins the wife in an answer to the suit, even if they have not been designated as husband and wife in the petition.

2d. The second ground of nullity is, that her second husband, *P. Favaron*, never authorized her to appear in the suit, and therefore judgment could not be rendered against her.

Having been authorized by her first husband, by his and her joint answer, it was not necessary for the plaintiff to have afterwards obtained the authorization of her second husband.

Judgment affirmed, with costs of appeal.

H. W. R. JACKSON v. F. & J. B. SCHMIDT.

To exempt the proprietor and undertaker from the charge of negligence and liability for damages caused by the falling of the wall of a house in course of demolition, the notice of danger required by law to be given in such cases must be of such a character as to put the party injured in fault.

When it is contended that a *barricade* had been erected, it must be shown that it was an actual obstruction to passage, in order to constitute sufficient notice or warning of the impending danger, and thereby exonerate the proprietor from responsibility in case any one is injured by the falling of the wall, or any part of the materials composing it.

When in such a case the proprietor, through an error of judgment, had not given sufficient notice, vindictive damages should not be allowed.

APPEAL from the Fourth District Court of New Orleans, *Price, J.*
W. D. Hennen & J. B. Lyman, for plaintiff. *C. Roselius & G. LeGardeur*, for defendants and appellants.

LAND, J. This suit was commenced for the recovery of twenty thousand dollars damages for bodily injuries, in consequence of the falling of the wall of a house on Poydras Street, in this city, received by the plaintiff, on the morning of the 15th of August, 1857.

JACKSON
v.
SCHMIDT.

J. B. Schmidt is sued as the owner of the house, and *Francis Schmidt* as the agent who personally supervised and assisted in its demolition. The plaintiff obtained a verdict and judgment for ten thousand dollars, and the defendants have appealed. They contend :

First. That the law requires simply, that a *warning* or *notice* should be given to the public, of the danger of approaching a house, or other building in course of demolition, and exonerates the owners or undertakers from all liability, when that warning or notice has been given.

Secondly. That the evidence shows affirmatively, that the defendants had given the notice or warning required by law.

Thirdly. That the damages are extravagant and excessive.

I. The defendants concede that in a case like this, to-wit, of the demolition of a building in a city, that if the owner or undertaker have taken no precautions whatever to put the public upon their guard ; but on the contrary, have suffered them to pass and repass, without any warning or notice of the impending danger, and an accident should happen, the owner and undertaker would clearly be responsible for the consequences of the accident.

The question first presented is, therefore, one of fact and of law, to-wit : was a notice or warning given at all, and if given, whether it was such as required by law ?

The defendants contend, that there was on each side of the house a plank placed across the banquette from the angle of the building to the gutter, and that this was a sufficient warning to all persons of ordinary prudence, that there was some danger to be avoided. Upon this question of fact, the evidence, if not contradictory, is not all affirmative. Several of the witnesses swore that they saw no barricades, and met with no obstructions on the banquette, in front or near the building which was being demolished.

Granting the existence of the plank at the corners of the building, was it such a notice or warning of the danger to be apprehended, as the defendants should have given ?

It appears that the plank was placed in an oblique or slanting direction from the wall of the house to the verge of the gutter, and that it could be *passed under near the wall of the house*, and *stepped over near the verge of the gutter*.

The law has not declared what notice shall be sufficient to exempt the proprietor or undertaker, in a case like the present, from liability for damages caused by the falling of a wall of a house in course of demolition, or of any part of the materials composing it.

In such a case, the *notice of danger* must be of *such a character* as to put the party injured *in fault*, and exonerate the proprietor from the *charge of negligence* or want of due care.

In a populous city, and on a crowded thoroughfare, the notice or warning, on which defendants rely, was insufficient in law to exempt them from liability. The planks or boards were placed *in such a manner*, that they could be *passed under*, near the wall of the building, and *passed over*, near the verge of the gutter, *with little, or no inconvenience, or trouble*.

In our opinion, it is not necessary for a proprietor who is demolishing, or erecting the walls of a building, to cause *impassable barricades* to be constructed ; but it is necessary, in such a case, that the *barricade* should form an *actual obstruction* to passage, and cause *delay, inconvenience, or trouble*, to those passing by the building, *in order to constitute notice or warning* of the impending danger, and

JACKSON
v.
SCHMIDT.

thereby to exonerate the proprietor from responsibility for the damages denounced against him by Art. 666 of the Civil Code, which is in these words :

" Every one is bound to keep his buildings in repair, so that neither their fall nor that of any part of the materials composing them, may injure the neighbors or passengers, under the penalty of all losses and damages which may result from the neglect of the proprietor in that respect."

This view of the case disposes of the first and second grounds, on which defendants rely for a reversal of the judgment.

The third ground is, that the damages are extravagant and excessive.

The defendants were guiltless of any intention to injure the plaintiff, and took insufficient steps to warn him and others of the danger of passing along the wall of the building. The negligence with which they are charged seems to have been as much the result of an error of judgment, as to the sufficiency of the warning or notice given, as of any culpable omission of duty. And as a misfortune has happened which they unwisely *in modo* sought to prevent, we are of opinion that the damages are excessive, and should be reduced. This is not a case in which *vindictive damages* should be allowed—but only actual damage or loss. We are of opinion that five thousand dollars will cover all the actual damage sustained by the plaintiff.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be amended ; and that instead of ten thousand dollars, it is ordered, adjudged and decreed, that the plaintiff do have and recover of the defendants *in solido* the sum of five thousand dollars, and costs in the lower court. And it is further ordered and decreed, that plaintiff pay the costs of the appeal.

C. H. DAVIS v. LAURENT MILLAUDON.

14	808
51	920
14	808
106	80

A bill of exceptions to the refusal of the Judge to grant a trial by jury, cannot be noticed when it contains neither the reasons of the Judge for his refusal, nor the grounds on which the ruling was excepted to.

When on the trial a party is taken by surprise, by the introduction of evidence legally admissible, to establish facts not disclosed by the pleadings, he has a right to a continuance on a proper showing.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
G. S. Lacy and *R. A. Upton*, for plaintiff and appellant. *P. A. Ducros*, for defendant.

COLE, J. On the 17th of February, 1858, the defendant, *Laurent Millaudon*, sued out an order of seizure and sale against the plaintiff's plantation, known as the Coiron Estate, in the parish of St. Bernard.

This writ was issued to enforce the payment of a mortgage note, assumed by the plaintiff in his purchase of this plantation from *B. L. Millaudon*, who had purchased the same of defendant.

Davis applied for a writ of injunction, basing his application upon four distinct grounds, of which two have been abandoned in this court, so that it is only necessary to consider the remaining two, which will be done in their order.

1. That there was a deficiency in the quantity of land, which gave *Davis* the right to a diminution of price.

DAVIS
v.
MILLAUDON.

Plaintiff in injunction contends that as his vendor, *B. L. Millaudon*, in the act of sale, subrogated him to all his rights of warranty against his previous vendor, *L. Millaudon*, the defendant in injunction; that therefore, he was entitled to plead this deficiency as an offset to the note sued upon, which was given as a part of the price, to *L. Millaudon*, of said plantation, by *B. L. Millaudon*, and assumed by *Davis* in his purchase of the latter.

The sale from *B. L. Millaudon* to *Davis* is a sale *per aversionem*.

Davis cannot, therefore, call upon the vendor of his own vendor to warrant him against a deficiency, which the latter has not guaranteed to himself. *Davis* cannot, therefore, claim as an offset to the note assumed by him any deficiency which may exist within the designated limits of the land bought by him.

The parol evidence to make *L. Millaudon* a party to the act of sale from *B. L. Millaudon* to *Davis* was properly excluded.

II. That *Davis* had just reason to fear being disquieted in his title and possession to the property sold, by *Rodolphe Ducros*, or the heirs or assignees of *Rodolphe Ducros*.

Upon this point the District Judge remarks, and we coincide with his opinion, "that *Davis* is fully protected against eviction, and his title is good."

The bill of exceptions to the refusal of the District Judge to grant a trial by jury cannot be noticed, because it contains neither the reasons of the Judge for its ruling, nor the grounds on which the appellant's counsel excepted to its decision.

Davis also objected to the introduction in evidence of certain documents, which were a chain of titles from *Rodolphe Ducros* to *Mme. J. M. Ducros* and *L. M. Ducros*, for the purpose of showing the legal rights of the said *Mme. J. M. Ducros* and *L. M. Ducros*, to quiet *Davis*' title, as averred to be done in an act executed on the 8th of June, 1858. The objection was based upon the ground that there is no allegation in the pleading of the defendant in injunction, of the relinquishment of a claim on the part of *Rodolphe Ducros*, or his successors, authorizing the proof of the fact, and that *Davis* was taken by surprise.

The evidence was admissible. *Davis* averred as one of the grounds of injunction, that he had just reason to fear being disquieted in his title and possession by *Rodolphe Ducros*, or his heirs or assignees, and the testimony was offered to rebut this allegation.

If *Davis* were taken by surprise, it would have been in his power to have obtained a continuance by a proper showing.

The District Judge dissolved the injunction, but did not grant damages, because, as he says in his opinion, the evidence adduced by him shows, that although wrong in his mode of proceeding, he at the same time acted in good faith. The letters and plan which he had received from the Surveyor General were calculated to create great perplexity in his mind."

The District Judge further justifies himself in not allowing damages, that the defendant in injunction, in order to show that *Davis* was protected against all eviction and had a good title, relied upon the trial, in part, on a chain of titles, the last of which bears a date posterior to the institution of the suit.

Davis contends that he is not liable for the costs of the lower court previous to the alleged perfection of the title. If he had wished to have relieved himself from them, he ought to have made a tender of the money, payable when his vendor should furnish him with security against the danger of eviction.

Judgment affirmed, with costs of appeal.

SUCCESSION OF JOHN S. THOMPSON.

An appeal will lie from an interlocutory order on a party to deposit in court a sum of money, the right to which is in contestation between the other parties to the suit.

Where several parties claim a sum of money, to which the party in possession of the money does not assert any right, the court may order the money to be deposited in the hands of the Clerk of the court, until the respective rights of all the claimants are adjudicated upon.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*
H. R. Grandmont & H. C. Miller, for appellant. *H. D. Ogden and T. W. Collins*, for appellees.

On motion to dismiss the appeal :

MERRICK, C. J. The present appeal is taken from a judgment upon a rule ordering *Mills Judson & Co.* to deposit in court \$800, alleged to belong to the succession.

There is a motion to dismiss the appeal, on the ground that the judgment is only interlocutory and not final. The decree is, that the money be deposited in court to abide the event of two other suits pending in the same court. We think the plaintiff is entitled to the appeal. It may be that the court will come to the conclusion that plaintiff, the administrator, is entitled to an absolute decree in his favor.

The rule to dismiss is discharged.

On the merits :

COLE, J. The cause of the controversy is the same as in the suits Nos. 6262 and 6338, just decided.

A rule was taken on *Judson & Co.* to show cause why they should not pay the sum of eight hundred dollars, the proceeds of the two notes into the hands of the administrator of *Thompson's* estate.

Upon trial of the rule, the District Judge ordered the money to be deposited in the hands of the Clerk of the court, to abide the decisions of the suits of *Doyle* and of *Mrs. Johnston*.

The administrator of *Thompson's* estate appealed.

There is no error in the judgment. It was in the furtherance of justice, that the court should not order the money to be delivered to one party, when there were several contesting for the same, until the respective rights of all the claimants were adjudicated upon.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court below upon the rule be affirmed, and that the succession of *John S. Thompson* pay the costs of both courts.

JAMES ROSS et als. v. J. W. CROCKETT et als.

Where church membership is a necessary qualification of the trustees who are to manage the affairs of the corporation, a trustee who withdraws himself from the church and joins a church of another denomination, which latter church prohibits a connection by its members with the former, such trustee will be considered as having abandoned his office of trustee, and as having no further interest in the property of the church he has left.

A majority of the Board of Trustees cannot undertake to act in their individual names for the board itself, and no act can be done affecting the ownership of property, except by a resolution of the board when regularly constituted and sitting in consultation.

A PPEAL from the Third District Court of New Orleans, *Duvigneaud, J.*
B. J. Sage, for plaintiffs. *C. Roselius* and *E. A. Bradford*, for defendants and appellants.

MERRICK, C. J. This case was before the court in 1854, and was remanded for further proceedings. The judgment of the lower court was, however, affirmed, so far as it dismissed the suit as to the "Christian congregation." For a statement of facts, as far as the case had then progressed, we refer to 9 An. 337. It will there be seen that the suit was remanded for the purpose of trying the rights of the plaintiffs to the office of trustees of the Elijah Steel Church.

After the case was remanded, the plaintiff, *James Ross*, caused himself to be dismissed from the suit, and the Elijah Steel Church was made a party defendant, as contemplated by the decree.

Service was made upon the officers of the corporation *de facto*, and, at the instance of plaintiffs' attorney, also upon *James Ross*, styled by the plaintiff, President of the Elijah Steel Church. *Mr. Ross*, without any resolution of the board of trustees authorizing the same, undertook to answer for the corporation, and filed an answer confessing the plaintiffs' demand. The plaintiffs also disregarding the former decree of the court, amended their petition, and a second time made the Christian congregation a party defendant.

After a trial on the merits, a decree was rendered, declaring the plaintiffs and four of the defendants, the only trustees of the church, and annulling the sale to the Christian congregation, of the property sold by Elijah Steel Church to that congregation.

On the trial of the case, the greatest latitude was given by the parties to the introduction of evidence, in order that everything which could throw light upon this transaction, might be made available, and hence much irrelevant testimony has been admitted, which is without any legal influence on the questions we have to decide.

It is quite evident that the unhappy differences which have arisen between these parties, are the result of a want of unanimity in judgment as to what was the interest of the church, and it is not necessary to suppose that they were controlled by any other motives.

The plaintiffs ask the court to do a vain thing, to restore them to the office of trustees of the church, for it is evident that they do not intend to act as such, and most of them have united themselves to churches of other denominations, where they cannot, according to the rules of those societies, longer act as members or trustees of this church. One has moved away.

Moses Greenwood, one of the plaintiffs, says : that " he presumes that his place

ROSS
v.
CROCKETT

as trustee of the Elijah Steel Church has been filled. It is now a prosperous and harmonious church. It is one of the largest of that denomination in this city. *He has no design to become a trustee of that church again.*"

James Ross, and two others of the plaintiffs, joined the same Presbyterian church with *Mr. Greenwood*. By the rules of this church, their membership and connection with other churches ceased. A fair construction also of the rules of the church which they left produce the same effect.

Why, then, should the harmony of the church be again disturbed by restoring corporators, who have not the qualifications to hold the office, and no intention to serve in that capacity?

It is not only necessary that a plaintiff should have a right at the commencement of his suit, but it must continue until the day of the judgment. Thus the plaintiff whose debt is paid, compensated or novated during the pendency of a suit, must see a judgment rendered against him. So, too, if an administrator, tutor or executor, is destituted of his office during the pendency of the suit, judgment must be rendered in favor of his successor. We will recur to this branch of the case again, after noticing another point relative to the portion of the decree annulling the sale to the Christian congregation.

It is plain, we think, that the plaintiffs who sue simply as corporators, cannot stand in judgment for this part of their demand. The corporators cannot act singly nor sue singly on account of the corporation. And as this touches the ownership of property, it must be done by a regular resolution of the board, where the reasons for and against the measure, can be urged by the other trustees. The *conclusum universitatis* can only be formed in this manner. A majority of the board even cannot, without consultation with the others, and without any resolution of the board, undertake to act in their individual names, for the board itself. The Code says, what is due to the corporation is not due to any of the individuals who compose it. C. C. 428.

The suit to rescind the sale of the property to the Christian congregation, can only be sued for in a direct action in the name of the Elijah Steel Church against the former, and wherein the rights of the two churches can be contested between themselves, if it shall be their interest to have such controversy.

Returning now to the question, whether these plaintiffs have a right to be reinstated as trustees in the church, we will examine the proceedings of the board of trustees, after adverting to the provisions of the charter on the subject.

The first article of the charter is in the following words, viz :

"This corporation shall be governed by the rules and discipline of the Methodist Episcopal Church South, which now exist, or may hereafter, from time to time, be adopted by the general conference of the Methodist Episcopal Church South, provided that such rules and discipline be not inconsistent with the laws of the State of Louisiana."

By the "discipline" then in force, it was provided, on the subject of trustees, that :

"No person shall be eligible as trustees to any of their houses, churches, or schools, who is not a regular member of their church." And,

"No person who is trustee, shall be ejected while he is in joint security for money, unless such relief be given him as is demanded or the creditor will accept."

Provisions was made in the form of conveyances recommended by the General Conference to be followed, to secure church property and for the appointment of trustees. The property was to be held in trust and confidence :

ROSS
v.
CROCKETT.

"That they shall at all times, forever hereafter, permit such ministers and preachers belonging to said church, as shall, from time to time, be duly authorized by the General Conferences of the ministers and preachers of said Methodist Episcopal Church South, or by the annual conferences authorized by the said General Conference, to preach and expound God's holy word therein; and in further trust and confidence, that as often as any one or more of the trustees hereinbefore mentioned, shall die or cease to be a member or members of the said church according to the rules and discipline as aforesaid, then and in such case, it shall be the duty of the stationed minister or preacher (authorized as aforesaid) who shall have the pastoral charge of the members of the said church, to call a meeting of the remaining trustees as soon as conveniently may be, and when so met, the said minister shall proceed to nominate one or more persons to fill the places of him or them whose office or offices has (or have) been vacated as aforesaid. Provided, the person or persons so nominated, shall have been one year a member or members of said church, immediately preceding such nomination, and be at least twenty-one years of age; and the said trustees so assembled shall proceed to elect, and by a majority of votes, appoint the person or persons so nominated to fill such vacancy or vacancies, in order to keep up the number of nine trustees forever; and in case of an equal number of votes for or against the said nomination, the stationed minister or preacher shall have the casting vote."

In 1854, this provision was adopted in a more formal manner by the General Conference, and republished in the "discipline" as one of the general rules of the church.

It is argued, that as the form of trust deed recommended by the Methodist Episcopal Church South is inadmissible in Louisiana, these trustees did not, as to these subjects, adopt "The Church Rules," for they say they adopt them only so far as applicable and consistent with the laws of the State.

It is quite true, that a proviso is contained in the Act of incorporation, that the regulations of the discipline are adopted only so far as not inconsistent with the laws of Louisiana, but this we think does not prevent the Methodist Episcopal Church South, from carrying into effect the general regulations of such church, in the forms authorized by our law, and there is no reason why the whole "discipline" should not be examined in order to ascertain the polity of such church.

It appears to us, there is nothing unreasonable in construing the discipline to mean, that trustees who were members of the Methodist Episcopal Church South at the time of their appointment as such trustees, do abandon their office when they withdraw themselves from the church and join the churches of other denominations, particularly when the new church also prohibits a connection with the old. What further interest can they have in the property of the church, which they have abandoned, when they are pledged to advance the interest of the church to which they have newly attached themselves? Is it not but reasonable to suppose that they have abandoned the office which they held, when they abandoned the church for the benefit of which it was established?

It is true, it has been shown, that in some cases churches have been organized by appointing trustees who were not members of the Methodist Church at the time of their appointment. But this appears to us to be a matter of expediency in organizing a new church, when there are not a sufficient number of male members to form a board of trustees. The disability of such trustee, is known at the time of his appointment, but it is otherwise, where a member of the church is appointed trustee, and he afterwards voluntarily withdraws himself

Ross
v.
CROCKETT.

from that church and attaches himself to a church belonging to another denomination of Christians. It may well be supposed in the last case, that he abandoned the office as well as church. Such, we apprehend, would be the construction put upon the act by most persons.

The meetings of the board of trustees of the Elijah Steel Church were held at the church. The last meeting of the old board was held in July, 1848. It does not appear from the minutes how the trustees were notified of the meetings of the same.

On the 7th of January, 1850, a meeting was held at the usual place, there being only the four defendants present as trustees, and the preacher having the pastoral charge announced the vacancy of the office of the plaintiffs, and they proceeded to fill the same according to the mode directed in the discipline as above recited. This board held three meetings in February, 1850, and with its successors in office, it has continued to hold its meetings at the usual place ever since, and so it has continued to manage the temporal affairs of the church which, as the witnesses say, is a harmonious and prosperous church.

The plaintiffs also attempted to hold a meeting as a board. They met at the house of *James Ross*, on the 26th day of March, 1850, but it does not appear that any notice was given to the other trustees. They passed a resolution purporting to rescind a previous resolution to sell certain property. Since that meeting, it does not appear that plaintiffs have concerned themselves in any manner about the affairs of the church.

As to *James Ross*, he has voluntarily dismissed his action. *Messrs. Moss Greenwood, Newberry and Bowers*, have attached themselves to the Presbyterian Church. The *Rev. Mr. Curtis* has left the State, and is officiating elsewhere as a minister of the Methodist Episcopal Church South in another Conference.

Hering had not met as a trustee with the board for sometime previous to January, 1850, and was expelled for a breach of discipline April 6th, 1850.

It may be, as contended by the plaintiffs, that there were not sufficient grounds at the meeting on the 7th day of January, 1850, to declare the offices of the plaintiffs vacant, as was done. But, however that may be, these plaintiffs, if they desired to preserve their rights, ought to have preserved their qualifications to enjoy them. They ought not now to be permitted to disturb the property relations of two other churches, when they cannot have the slightest interest in either.

Judgment reversed, and judgment for defendant, with costs of both courts.

E. B. CALMES v. DUPLANTIER et al.

The possession of slaves under a contract of hire by the husband in his lifetime cannot be made the basis of a prescriptive title in the wife, who continued in possession of the slaves after her husband's death, and claimed to be the owner of them.

A purchaser who is aware of the defects of the title of his vendor cannot claim the benefit of the prescription of ten years.

APPEAL from the District Court of the Parish of East Baton Rouge.
U. B. & E. Phillips and J. W. Burgess, for plaintiffs. *T. G. Morgan and H. M. Favrot*, for defendants and appellants.

COLE, J. This suit is instituted by plaintiffs for the recovery of certain slaves, of which they aver themselves to be the legal owners.

CALMES
v.
DUPLANTIER.

There was judgment for plaintiffs, and *Penniston*, one of the defendants, has appealed.

Plaintiffs allege, that these slaves were hired to *Fergus Duplantier* in August, 1839, and remained in his possession until his death, in July, 1844. That on the 17th of July, 1844, *Joséphine Duplantier*, widow and universal legatee of said *Fergus*, took possession of said slaves and his other property, assuming to pay all demands against the estate of her husband. That these slaves were held in bad faith both by her and her husband. That on the 3d of September, 1853, *Joséphine Duplantier* sold them to *Fergus Penniston*, in whose possession they now are.

Joséphine Duplantier, in her answer, does not pretend to set up any title to these negroes, but relies entirely on the alleged insufficiency of proof to maintain the title of plaintiffs.

Penniston sets up no title whatever, except that derived from *Joséphine Duplantier*. He pleads the prescription of ten years, but this plea is not urged in argument in this court, neither can it be sustained.

Prescription was interrupted by a suit brought by the present plaintiffs on the 8th December, 1845, against *Joséphine Duplantier*, widow and universal legatee of *Fergus Duplantier*, for the recovery of the same slaves mentioned in the petition in the present case. Answer was filed on the 12th October, 1846, and the suit was dismissed on the 4th of May, 1852, on motion of defendant's counsel. It is also established, that *Penniston* is nephew to *Joséphine Duplantier*; that he has lived all his life with *Fergus* and *Joséphine Duplantier*, except when he was at school. Besides, *Mrs. Duplantier* could not change the nature of the tenure of her husband's possession of the slaves. She could not claim the benefit of prescription as a *bona fide* owner of the slaves; for her husband held them by the contract of hire, and not by title as proprietor.

Neither can *Penniston* succeed in the plea, for he must have been aware of the defects of title of his aunt and vendor.

The District Judge, in his opinion, has elaborately examined the questions of fact in this case, and considered that plaintiffs ought to recover the slaves. We can see no reason to dissent from his conclusion. The contest in this case is between defendants, who have no real title whatever, and plaintiffs, who have sufficiently established their title to recover from those evidently in wrongful possession of the slaves. *Miller v. McElwee*, 12 An. 478.

Judgment affirmed, with costs of appeal.

MERRICK, C. J. Having been applied to as counsel in this case, I decline taking part in it.

LIQUIDATOR OF CLINTON AND PORT HUDSON RAILROAD COMPANY v. C. W.
EASON AND WIFE.

Where the liability of a stockholder in an incorporated company, on a mortgage given to secure his subscription to the capital stock, depends on a future contingency, prescription will not begin to run until the contingency has happened, which was to make the payment of the subscription demandable.

Where property encumbered with a mortgage to secure the subscription of a shareholder to the capital stock of a corporation, is sold with shares of stock, for a certain price, and without guaranty against the mortgage, the purchaser is liable to the original stockholder who, when called on for payment of the subscription, may call in warranty his vendee, although there had never been any transfer of the stock on the books of the company.

APPEAL from the District Court of East Feliciana, *Haralson, J.*
J. McVea, for plaintiff. *Muse & Hardee* and *J. B. Smith*, for defendants
and appellants.

COLE, J. Two suits were brought against the defendants to compel them to pay in the one two-fifths, in the other three-fifths, being the total amount, of their subscription to the capital stock of the Clinton and Port Hudson Railroad Company.

There was judgment for plaintiff and defendants have appealed.

Appellants rely in this court on the plea of the prescription of five and ten years to the claim of the New Orleans Gas Light and Banking Company, and of ten years against the claim for their stock subscription.

The plea cannot prevail against the claim of plaintiff for the amount due on their subscription to stock.

In the act of mortgage given by defendants to the company, the following clause exists :

"All which property is to remain so mortgaged and hypothecated, until such time as any and all loan or loans of money effected or to be effected by said company, as contemplated by sections 4 and 5 of the amendatory Act herein before named, as also any interest that may have accumulated thereon shall have been paid, and the said company acquitted thereof."

By the 5th section of the Act passed in 1833, to incorporate this company, the President and Directors were authorized to borrow money for the objects of the act, by the pledge of stock or other security, and to issue certificates or other evidence of such loans.

At the next session of the Legislature in 1834, the Act of incorporation was amended, and the capital of the company was increased to \$500,000, of which two hundred and fifty thousand dollars was to be obtained by a loan on real security, and to secure the loan a subscription of stock to the amount of \$300,000 was authorized.

In order to procure the loan of \$250,000, authorized by this amendment, the company were empowered to issue bonds, and did so issue them for the preceding amount, bearing five per cent. interest. The terms of the bonds were as follows : \$75,000 falling due eight years after date ; \$75,000 falling due fifteen years after date ; and \$100,000 becoming due twenty years after date.

This amended Act also provided, that to secure the payment of the capital and interest of said bonds, the subscribers shall be bound to give mortgage to the

satisfaction of the President and Directors of the company, or property to be in all cases equal in value to the amount of the stock respectively held by them. C. & P. H. R. R.
v.
EASON.
Sess. Acts 1834, pp. 114, 115 and 116.

On the 11th of January, 1836, the New Orleans Gas Light and Banking Company were released from their obligation to establish a branch at Port Hudson, in the parish of East Feliciana, on condition that they would purchase the bonds aforesaid, of the Clinton and Port Hudson Railroad Company, amounting to \$250,000, and lend the company \$100,000, at the rate of six per cent. per annum. Session Acts of 1836, p. 1.

The New Orleans Gas Light and Banking Company complied with the condition of the Act of 1836.

The mortgage now sued upon was given, among those of others, to secure the loan of \$250,000, and the bonds that should afterwards be issued to represent the same.

The said Banking Company is yet the holder for a large amount of the bonds of the said Railroad Company, secured by stock mortgages, and of bonds given for the loan of the \$100,000, and large arrearages of interest are due.

As then one of the conditions of the mortgage of the subscriber to the capital stock of the Railroad Company was, that the property was to remain hypothecated until all loans of money effected, or to be effected, by virtue of the amended Act before described, were paid, and as they are not yet paid, prescription cannot even begin to run.

For this condition involves the principle that the mortgagors cannot have an action to force the mortgagee to raise the mortgage, until all the loans of money made under the amended Act were paid. Suppose the defendant were even now to institute a suit to have their mortgage erased, their action could not be maintained, because this condition in the mortgage obligated them to let the mortgage rest undisturbed until the loans aforesaid were paid.

It may also be observed, that as the mortgage of defendants was granted to secure the bonds given for the loan of \$250,000, there was, therefore, a tacit condition in this contract of mortgage, that the amount of the mortgage should not be demandable until it was necessary to pay these bonds. The act of mortgage also shows that this tacit condition was in contemplation of the parties at the moment of the execution of the mortgage, for it contains the following clause :

“ And the said *Calvin W. Eason* and his said wife, further agree and covenant with the said company, that if on the *requisition* of the Board of Directors thereof made in conformity to the provisions of the amendatory Act of the Legislature mentioned herein, they, the said *Calvin W. Eason* and his said wife, or their heirs or legal representatives, as the case may be, shall fail to pay the said sum of two thousand dollars, or any part thereof, together with any interest that may have accrued thereon, or shall fail to pay any installment, or the whole of any loan or loans of money that he, the said *Calvin W. Eason* shall have obtained from said company, on the credit of this present act of mortgage, as contemplated and provided for by section twenty-four of the before named amendatory Act, together with any interest that may have accrued thereon, then and in such case interest at ten per cent. per annum is to be allowed on any or all sum or sums of money so required, until such time as the same shall be paid.”

It thus appears the defendants were not to be obliged to pay until a *requisition* was made upon them for the whole or any part of the amount of their mortgage, and it was then only in default of the whole or a part thereof, that the penalty of

C. & P. H. R. R. ten per cent. interest was to be allowed on any or all sum or sums of money so
v. required, until such time as the same shall be paid.
Eason.

This act of mortgage, therefore, left to the *discretion* of the Board of Directors the epoch at which they should exact the payment.

The mortgage debt was not, therefore, *demandable* until the Board of Directors should determine it ought to be demanded.

Now, it appears, that this Railroad Company forfeited its charter, was put in liquidation as an insolvent corporation, and that commissioners were duly appointed under the Act of 1842. Session Acts of 1842, p. 234.

And by Act of 1850, entitled, "an Act for the further liquidation of the Clinton and Port Hudson Railroad and Banking Company," (Sess. Acts. of 1850. p. 225,) the Governor was authorized to appoint a liquidator, whose duty it shall be to "liquidate the affairs of said insolvent corporation, so far as it has not already been done, as speedily as possible, in pursuance of the provisions of this Act, and the several Acts now in force relative to the liquidation and final settlement of the affairs of insolvent corporations." It is admitted in the record, that "through the agency of the Commissioners appointed, and liquidators duly appointed from time to time by the Governor, there has been a continuous and uninterrupted administration of this insolvent corporation, from 1842 up to the date of this suit, and up to the time of this admission."

The Commissioners, and afterwards the Liquidators, were appointed to administer this corporation in the stead of the Board of Directors. It became then their duty, and was in their legal discretion to demand the payment of the subscriptions to the capital stock when, in their opinion, they were needed.

It is established by the decision in the suit of the *Gas Light and Banking Company v. B. Haynes, Liquidator of the Clinton and Port Hudson Railroad Company*, 7 An. 115, that the plaintiffs in that case represented they were the holders of the bonds of this Railroad Company, secured by stock mortgages to the amount of two hundred and twelve thousand dollars, and of bonds given for the loan of money to the amount of \$92,000, and that there was no means of payment, except by calling upon each of the stockholders of the company for the full amount for which he has subscribed and is liable. They pray that their debt may be acknowledged as due by the company, and that the Liquidator may be ordered to collect from the stockholders the full amount of the stock subscribed by them, and to enforce the mortgages given by the stockholders to secure their subscription to the stock and the bonds issued on the faith of those mortgages.

The Liquidator denied any right of action on the part of plaintiffs against him as Liquidator, and that plaintiffs were bound to resort for payment of their bonds and interest to the individual corporators in their individual capacity. This court held, that it was the special duty of the Liquidator, imposed by the Act of 1850, to collect all the assets of the Clinton and Port Hudson Railroad Company, including the subscriptions of the shareholders, by suit or otherwise, as speedily as possible, and to distribute the amount collected every six months, by filing a tableau of contribution in court, to be homologated by judgment, after legal notices to the creditors.

It is thus shown that the Liquidator did not make the demand of the stockholders, because he was of opinion he was without authority so to do, and, it is admitted in the record, that three-fifths of the debt of defendants for their subscription to the capital stock was legally demanded of them on the 11th day of September, 1852, and the remaining two-fifths on the 22d June, 1854.

Even supposing that prescription could run when it was stipulated in the mortgage, that the property should remain hypothecated until all the loans of money therein designated were paid, still, as it was a condition in the contemplation of the contracting parties, that a demand should be made upon the shareholders by the administration of the company, when, in its discretion, payments of the whole or a part of the subscription to the stock were necessary, prescription could not, therefore, begin to run before the debt represented by the amount of the subscription of each stockholder ought, in the discretion of the administration, guided by the provisions of law, to be demanded of the shareholders, and before it was actually demanded.

Citation in the petition for three-fifths of the subscription, was served on the defendants on the 30th of December, 1853, and as demand is admitted to have been made for the same on the 11th of September, 1852, prescription had not accrued.

In the petition for the remaining two-fifths of the subscription, the answer of defendants was filed on the 5th of November, 1858, and as it is admitted the demand was made on the 22d of June, 1854, prescription had not accrued for the balance of the claim.

It should also be remarked, that mortgages to secure the payment of subscription to the capital stock of corporations, are given to guaranty the payment of their liabilities, in the event their assets do not, without the amount of stock-mortgages, suffice to satisfy them. It would seem, then, as the liability of the stockholder depends upon a future contingency, that prescription ought not to begin to run until at least the contingency had happened.

But the defendants contend, that all the obligations of the railroad company became due as soon as it was declared to be insolvent in 1842, and it was the duty of the creditors of the company to have forced by process of law the administration of the company to make the necessary calls upon the shareholders for contributions, and to enforce their collection. C. C. 2049. That by Article 3508 of the Civil Code, all personal actions, except those enumerated in the title of prescription, are prescribed by ten years, if the creditor be present; and as the company was put in liquidation in 1843, prescription has accrued in their favor against any action to compel them to contribute any part of their subscription to the capital stock, in order to pay the debts of the company.

Defendants rely upon *Brown v. Union Insurance Company*, 3 An. 181, and upon *T. O. Starke, Receiver of the Atchafalaya Bank, v. Burke, Watt & Co.*, 9 An. 342. The principles decided in those cases are not applicable to this.

The charters of the Union Insurance Company and of the Atchafalaya Bank provided for the payment of their stock at certain designated periods of time, except that the charter of the former declared that a specified part of it was payable at no particular period, the Directors being authorized to call in at such time and in such proportions as they might see fit, and the charter of the latter provided that the payment of a designated part of the stock might be prolonged by the Directors.

The principles recognized in these two decisions are, that the creditors of an insolvent corporation are entitled to cause it to be administered, if the administration of the company neglects to act and to force the stockholders to pay the whole or a part of their stock for the purpose of distribution in a *concurso* among the creditors of the company; and that if ten years have elapsed from the time that any installment of stock was due, then prescription had accrued.

C. & P. H. R. R.
v.
EASON.

In the insurance case, the court refused to recognize the validity of the plea of prescription for the part of the stock, for the payment of which no period was fixed.

As no period was fixed for the payment of the stock of defendants, except that which should be designated by the administration of the Railroad Company, and as ten years had not expired from the time when the payment of the stock was demanded, which might be considered the time fixed for payment of the stock, it is clear that even under the two decisions just quoted, prescription had not accrued in favor of the defendants against the claim of the company for the payment of their stock.

In the case of the *New Orleans & Great Northern Railroad Company v. Estlin*, it was merely decided that the prescription of three years, of the Act of 1852, (Session Acts, p. 90.) is not applicable to the case of a demand for balance of subscription to the capital stock of a corporation. 12 An. 184.

In *Haynes, Liquidator of the Clinton & P. H. R. R. Company v. Isaac Wall & Wife*, the court held, under the second exception plead in the case, that the plea of prescription could not be maintained where the suit against the stockholders was brought in less than ten years after the maturity of the first series of the bonds of the company. 13 An. 259,

In *Succession of Shropshire*, 13 An. 528, this court held that there is no prescription of obligations of individuals for the security of stock subscribed and unpaid, so long as the liquidation of the company continues.

This decision corresponds with the *obiter dictum* of the court in *Gas Light & Banking Company v. Haynes, Liquidator*, 7 An. 116, except that in that case, the remark is made in answer to the plea of prescription against the claims of the Gas Light Company, whilst in the *Succession of Shropshire*, the decision applies to the plea of prescription against the payment of stock subscriptions.

The decision in the *Succession of Shropshire* conflicts with those in *Brown v. The Union Insurance Company* and *Starke, Receiver, v. Burke, Watt & Co.*, 3 An. 181, 9 An. 342.

It is unnecessary in this case to express any opinion upon the principle involved in these conflicting decisions, because we have already shown that even if the prescription of ten years could be plead by stockholders of an insolvent company against the payment of their stock, that sufficient time has not elapsed to make the plea effective for the defendants. And as to the plea of prescription of five and ten years, against the claims of the Gas Light Company, this question will, (if it has not been settled by previous decisions,) as the court said in 7 An. 116, more properly arise on tableaux of distribution and contradictorily with all the creditors of the corporation.

We have been induced to consider the plea of prescription of ten years in this case at length because it is represented to be one of great importance, not only to the immediate parties to this suit, but to a great many of the citizens of the State.

The only other question to be disposed of is the liability of *George Keller* to warrant the defendants against their responsibility for their subscription of stock.

The judgment of the District Court rejected the claim in warranty.

It is contended by *Keller*, that he is not liable in warranty, because the 23d section of the Act of 1834, (Session Acts 1834, p. 120) provides that a mortgage stockholder of the Clinton & Port Hudson Railroad Company "may transfer his

stock and be released from his mortgage, upon the new stockholders furnishing mortgage to the satisfaction of the President and Directors of said company." And that, it is admitted by defendants, "there never was any transfer on the books of the company of their mortgaged stock, and that the books show no act of ownership on the part of the warrantor. Nor does the stock register show any mortgaged stock to have been owned by said warrantor."

We are of opinion that the 23d section of the Act of 1834 prescribes the mode in which a mortgage stockholder may be released from his obligations to the company, and that it does not prevent a third party from binding himself to guaranty the stockholder against the mortgage debt due by the latter to the company.

When the stockholder sells his shares, it is all he can do to transfer his title to them. It then devolves upon the purchaser, under this 23d section, to furnish a mortgage to the satisfaction of the President and Directors of the company. If he does not, the original stockholder still remains liable to the company, and the purchaser is not a stockholder, but he is still liable to the original stockholder, if he has assumed the mortgage, because it devolved upon him, and not upon the original stockholder, to furnish a mortgage and thus perfect the sale.

In the sale of the tract of land upon which the mortgage was given to the company by the defendants, the latter sold not only the land, but also their twenty shares of stock for a certain price, and the act of sale declares that the vendor warrants the title to this land against everything, except the mortgage in favor of the Clinton and Port Hudson Railroad Company, to secure the payment of the stock herewith transferred, and that the property was sold subject to the mortgage of the company.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be amended as follows: That the part thereof which rejects the claim in warranty of defendants against *George Keller* be avoided and reversed, and that the defendants have judgment in warranty against *Keller*, and recover from him twelve hundred dollars, with ten per cent. interest thereon from the eleventh day of September, 1852, and the further sum of eight hundred dollars, with ten per cent. interest thereon from the twenty-second day of June, 1854, till paid, and their costs in the lower court; and that the judgment so amended be affirmed, and the costs of appeal be paid by said *Keller*.

MERRICK, C. J., having been of counsel in this case, recused himself.

WM. P. EALER V. McALLISTER & Co.—GEORGE G. EALER V. same.

A valid attachment of an accepted draft filed in a suit may be made, by citing as garnishee the Clerk of the court in whose custody the draft is, and proving by his answers to interrogatories his possession of the draft.

It is too late after an answer to the merits, to move to set aside an attachment, on the ground of the insufficiency of the attachment bond, when it is not alleged that the surety had become insolvent since signing the bond.

APPEAL from the Third District Court of New Orleans, *Duvigneaud, J. Lea & Marr*, for plaintiff. *L. E. Simonds*, for defendant and appellant.

BUCHANAN, J. The first of these suits (which are submitted together) is upon

C. & P. H. R. R.
v.
EASON.

14 821
105 136

14 821
110 1032

14 821
117 934

14 821
124 808

EALER
v.
McALLISTER.

defendant's acceptance of a draft in favor of *L. L. Ealer*, and endorsed in blank by the payee.

The defendant admits the signature of the acceptance, but pleads specially that he has been served with garnishment process under a *feri facias* issued by a court in St. Louis, Missouri, (where both parties reside,) upon a judgment obtained against one *Henry A. Ealer*, who is the real holder and owner of the accepted draft sued on; and that defendant is in danger of having to pay the said acceptance twice.

If this be so, the defendant is entitled to the protection of the court.

The evidence shows, that a writ of *feri facias* issued on the 5th of November, 1857, (one month and nineteen days before the institution of this suit,) to the Sheriff of the county of St. Louis, Missouri, from the St. Louis Court of Common Pleas, upon a judgment recovered by *Thomas H. Jones* against *Henry A. Ealer* and *Miles T. Redman*. The execution was returnable the second Monday of March, 1858, which, it seems, was the next ensuing term of the court from which it issued. On the same day that the writ issued, a summons was served by the Sheriff of St. Louis on the present defendants, commanding them to appear in court at the return term of the writ, and answer on oath such interrogatories as might be exhibited on the part of the plaintiff in execution, "touching the indebtedness of the said defendants."

There is no proof that any interrogatories were ever exhibited—which it seems must be done, according to the statute of Missouri, within three days following the commencement of the return term of the writ, in order to fix the garnishee. A case of attachment of this debt in Missouri, is therefore not made out. But a record has been offered in evidence, without objection, (No. 12,427 of the docket of the Fourth District Court of New Orleans,) which show that, subsequently to the institution of this suit, but before the trial in the court below, an attachment suit was instituted by *Thomas H. Jones* against *Henry A. Ealer* in a court of Louisiana, in which suit the accepted draft, annexed to the petition in this case, was attached as the property of another person than the present plaintiff by garnishment process, and interrogatories served upon the Clerk of court, in whose custody the said draft is.

The answers of the Clerk to interrogatories acknowledge the possession of the draft.

It is urged that this proceeding is inoperative as a seizure; and plaintiff's counsel has referred us to the cases of *Woodworth v. Limmerman*, 9 An. 525, *Price v. Emerson*, 7 An. 237, and *Stockton v. Downey*, 6 An. 584.

In the case of *Woodworth v. Limmerman* there was neither actual detention of the evidence of debt by the Sheriff, nor a citation in garnishment. The court says, "Without an actual seizure, or a citation in garnishment, there can be no attachment. Service of a mere notice on the Clerk, who is the legal custodian of the records of his court, or even on the debtor against whom a suit is pending, is no more effective than publication in a newspaper would be. It is not a mode of attaching property pointed out by law."

The difference between that case and the present is, that here a regular garnishment process by citation, with interrogatories annexed, was served on the Clerk of the court; which is a mode of attaching property by the law of Louisiana. C. P. 246, 247.

The case of *Price v. Emerson* is more similar to the present one, and is even a useful precedent, as far as it goes, for the protection which our decree will extend

EALER
v.
MCALLISTER.

to the defendants. In that case, an attempt was made by a Sheriff to obtain the actual possession and detention, by levy under execution, of notes filed in court by another party than the defendant in execution. The court decided that this could not be done, by reason of the confusion which would result from the summary seizure and removal of evidences of debt, which had been filed by litigants in courts of justice, for the purpose of enabling them to prosecute their rights. But the court went on to declare, that the plaintiff in execution was not without rights acquired under the proceeding had in that case. "It is true," says the court, "that possession is of the essence of a seizure, and it has been frequently held that no valid seizure of tangible property can be made, without taking it into possession; but in the absence of express law, it might be within the power of the court, in virtue of the equity powers conferred by Article 21 of the Civil Code, to recognize the proceedings as conferring inchoate rights to be established and matured upon proofs made under proceedings had by intervention or otherwise." And the decree was, that the Sheriff's rule be dismissed, *without prejudice to the rights of the creditors in the execution*; and that the Clerk of the court do retain the notes, subject to the further order of the court in the premises. Note, that the creditors in execution were not parties before the court in *Price v. Emerson*; yet the court considered it to be within its equitable powers to protect their interest, by allowing them to make themselves parties subsequently, and by restraining the Clerk from parting with possession of the notes in his custody.

In the present case, *Jones*, the plaintiff, in the attachment suit in the Fourth District Court, made an appearance in the court below upon an application for a new trial, by express permission of the court.

The case of *Stockton v. Downey* contains nothing beyond what is said in the other two cases reviewed, that requires particular notice.

Defendants, after answering to the merits, took a rule to set aside the attachment, on the ground of insufficiency of the surety on the attachment bond. The court dismissed this rule, on the application of plaintiff, as taken too late. We find no error in this ruling. It is not alleged that the surety had become insolvent since the bond signed.

The remarks above made are applicable to the second of the suits now submitted, which is instituted upon a receipt or certificate of deposit; and in which the same defences are set up.

There is error in the interest allowed by the court below, which should be five per cent. instead of six. There is no proof of the rate of interest in Missouri being different from our own.

It is, therefore, adjudged and decreed, that the judgments of the court below in the two cases of *William P. Ealer v. McAllister & Co.* and *George G. Ealer v. McAllister & Co.* be amended, by reducing the rate of interest allowed by said judgments from six per cent. to five per cent; that in other respects the said judgments be affirmed; and it is further decreed, that the Sheriff of the parish of Orleans hold the moneys made under the present judgments, subject to the decision of the Fourth District Court of New Orleans upon the attachment levied in the suit of *Thomas H. Jones v. Henry A. Ealer*, No. 12,427 of the docket of said court; and lastly, that the costs of these appeals be paid by plaintiffs and appellees.

MERRICK, C. J., concurring. The mode of seizing rights and credits under an attachment or *fi. fa.*, has of late years occasioned great difficulty and difference of opinion. In regard to promissory notes and bills of exchange, this court

KALER
v.
MCALLISTER.

regarding them as things, and making no distinction between the debt, and evidence of debt, has required their actual seizure whenever practicable.

But it seems to me, that when a promissory note or bill of exchange has been put in suit and annexed to the petition, or has been offered in evidence, it not only loses its commercial character, but its very identity, and is incorporated into the record of which it forms an essential part.

It is no longer private property as a bill of exchange or promissory note. The debt of which it is the evidence, exists in favor of the holder, but the note or bill has become a portion of the records, and is under the control of the public authorities, who, while they have the custody of the same, have no interest or ownership therein.

The object of the garnishment is to compel the debtor of money or property to admit his indebtedness, in order that it may be applied to extinguish the debt of his creditor. C. P. 246.

He is to answer as to the money he owes, or the property he has in his possession. C. P. 247.

Now, as the Clerk is but the simple custodian of the papers filed in a cause; as he has no control over them; as he cannot sell them, pledge them, use them in any way, or even suffer them to be taken from the files, without an order of the Judge, he has, in no legal sense, the *possession* of them. They are in the possession of the law, in *gremio legis*. How then can the garnishment be successfully addressed to the Clerk? Suppose, as in this case, the Clerk answers that the notes are on file in his office, can the court order the Sheriff to sell them as personal property? It may be the defendant in the action will have something to say. He may have formed his reconventional demand, or have some other reason to urge why the notes should not be taken from the files. Suppose the attachment issues from some other court, can the Judge of that other court order him to deliver documents, filed in his own court, to the Sheriff, to be sold?

If interrogatories are to be propounded to any of the officers of court, they ought to be propounded to the Judge, who alone has the most power over it, and who may authorize a paper (in a proper case) to be taken from the files—but this would be absurd. I have always thought, that when commercial paper is once put in suit and filed, the debt loses its negotiable character, and the process of garnishment ought to issue against the defendant in such suit, and not against the Clerk or any other officer of court. The defendant is the debtor and not the Clerk, and the proceeding against the debtor directly, avoids circuitry, and leads to a direct judgment at once, which cannot be accomplished in the circuitous proceeding against the Clerk. See 5 La. 486.

I think, therefore, that *Jones* acquired no rights by his garnishment of the Clerk, but as he *may* possibly have acquired some rights under his Missouri seizure, I concur in the decree which protects his right. See 2 Kent's Com. 119.

14	825
118	958

STATE, on the relation of J. N. HANAU, JR., v. CRESENT MUTUAL INSURANCE COMPANY.

Where an exception is filed with an answer to the merits, what is admitted by the exception for the purpose of testing the plaintiff's petition, may be denied by the answer, and if the exception be overruled, final judgment can only be rendered after a regular trial on the merits.

A PPEAL from the Third District Court of New Orleans, *Duvigneaud, J. Hyams, Labatt & Jonas*, for plaintiff. *M. M. Cohen & Randell Hunt*, for defendant and appellant.

MERRICK, C. J. This case has been argued before us by the appellant's counsel, on a question of practice.

The relator filed a petition, wherein, after alleging his right as a scrip holder of the company to inspect at reasonable hours, the book containing a list of the holders of scrip, he prayed that the President and Secretary of the company might be ordered to show cause why a *mandamus* should not issue to compel them to allow him to inspect, at reasonable hours, the books of the corporation.

The defendants were ordered to show cause on a day fixed.

The defendants filed an exception, and in the event said exception should be overruled, an answer to the rule.

It appears that the case was continued and argued from day to day, for four or five days, during the hours allotted by the rules of the court for that purpose, on the exception which was taken under advisement, and that the District Judge, instead of overruling the exception and hearing the parties on the merits of the rule, rendered final judgment, after having held the exception from the 25th day of February to the 16th of March, 1859, under advisement. Appellants counsel contend, that they were entitled to be heard on the merits; and so it appears to us. The defendants were entitled to a decision upon their exception before they could be compelled to offer evidence under their answer to the merits. The answer contained a general denial, admitted that the plaintiff was a scrip holder, and pleaded some matters in avoidance of the plaintiff's action. The truth of the allegations in the answer, have not been admitted, and however wide the range of argument may have been upon the exception, it does not appear that the District Court has passed judgment upon the whole case, as presented by the defendants in their answer. Final judgment ought not to be rendered against them until they have been heard upon the same.

After overruling the exception, that, or another day, should have been fixed for the hearing of the rule on the merits.

The answer, as soon as the exception was overruled, was ready to perform its office, and, as it denied the truth of plaintiff's petition, except as to his ownership of the scrip, the plaintiff could not invoke the aid of the court, without first showing that he had been aggrieved by the action of the company. What was admitted by the exception for the purpose of testing plaintiff's petition, was denied by the answer. See 2 An. 221, *Wood v. Henderson*, and *Syndics, &c. v. Mayhew*, 4 M. 177.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed; and that this case be remanded to the lower court for further proceedings according to law; the relator paying the costs of the appeal.

14 826
48 999
14 826
113 437
113 449

MARIA LATE v. EDWARD ARMORER AND THOMAS J. FRISBY.

The warrantor is not liable for the fees of the attorney employed by the party evicted.
The warrantor cannot object to the admissibility of evidence regularly taken by commission, previous to his being made a party to the suit.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
H. J. Hays, for plaintiff. *Ogden & Stansbury*, for defendant. *T. J. Semmes*,
for warrantor and appellant.

VOORHIES, J. The warrantor, *T. J. Frisby*, who is appellant from the judgment of the lower court, asks relief upon the assignment of two errors.

The first is, that the court allowed counsel fees to the defendant. This point has been determined in the case of *Heirs of Delord Sarpy v. City of New Orleans*, 14 An. 311, on which occasion the court said: "The warrantor is not liable for the fees of the attorney employed by the party evicted. Costs, in the third clause of this Article, (C. C. 2482,) refer to the taxed costs of suit, and not the fees of attorneys." The judgment in the present case is, therefore, erroneous in this respect.

The record contains a bill of exception to the admissibility in evidence, as to the warrantor, of some testimony taken by commission previous to his being made a party to the suit. The objection is, that he has thus been deprived of the privilege of cross-interrogating the witness.

Had this suit been decided in the absence of the warrantor, the judgment would have been binding upon him, unless he could have shown that he possessed proof, which could have occasioned the rejection of the demand, and which had not been employed. C. C. 2494.

But, although regularly summoned by the defendant, and present in court by his answer to the call in warranty, he has suggested no facts or means of defence of which the defendant might have availed himself in this controversy. The evidence objected to by him, he admits to be good to make out a case against the defendant; if so, the judgment upon such evidence is binding upon himself, unless he can make out a case under the Articles 2493 and 2494 of the Civil Code. But we have seen that such is not the position he assumes or occupies.

Were we to grant the warrantor's request by leaving the testimony in question to militate against the defendant alone, the result would, in this instance, be the same. The latter would yet have a *prima facie* case; and accordingly, the former having failed to show any means of defence whatever against the plaintiff's demand, judgment must be rendered sustaining the call in warranty.

It is, therefore, ordered and decreed, that the judgment of the lower court be amended, by striking out the allowance of counsel fees; and that, in other respects, it be affirmed; the defendant paying the costs of appeal.

THE STATE OF LOUISIANA V. DELIA SWIFT, alias BRIDGET FURY.

The mere belief of a person, that an assault is made upon him under circumstances denoting an intention to take his life, or to do him great bodily harm, will not justify taking the life of the person making the assault; there must have been a reasonable ground for such apprehension to render the killing justifiable homicide.

Although the statute has fixed the number of Grand Jurors at sixteen, it is not necessary that sixteen should be in attendance at the time of finding an indictment: that number is not sacramental.

An objection to the mode of drawing and empanneling the Grand Jury cannot be made the ground of a motion in arrest of judgment.

14	827
46	211
14	827
48	311
14	827
111	159
14	827
117	1053
14	827
117	1053
14	827
124	1053
124	1053

A PPEAL from the First District Court of New Orleans, *Hunt, J.*
E. W. Moïse, for the State. *B. F. Tappan*, for defendant and appellant.

VOORHIES, J. The defendant asks the reversal of the judgment of the court below, decreeing her incarceration for life in the State Prison, for the crime of murder; she assigns as errors several rulings, which will be disposed of *seriatim*.

The District Judge was requested by her counsel to give the following charge to the jury:

"That if the accused believed that an assault was made upon her by the deceased under circumstances denoting an intention to take away her life, or to do her some great bodily harm, and under that belief, at the time, she killed him, the killing was justifiable homicide."

The District Judge properly declined giving the above instruction, the fallacy of which consists in making the mere belief of the accused, that his life is threatened, a sufficient ground to take the life of another. The court below gave a correct exposition of the law, in stating to the jury "that if, in the opinion of the jury, the deceased made an assault upon the accused, &c., from the nature of the assault, the accused had reasonable ground to apprehend that there was a design to destroy her life, or commit some great bodily harm upon her person, and thereupon, at the time, the accused killed the deceased,—the killing was excusable homicide." See the case of *The State v. Chandler*, reported in 5 An. 490.

The next objection is, that only thirteen Grand Jurors were present when the bill of indictment was preferred against the accused; whilst the statute is imperative as to the number, requiring sixteen jurors to constitute that body.

The fact, that only thirteen jurors were present when the indictment was preferred, does not vitiate the proceedings, although the statute has fixed at sixteen the number of Grand Jurors. The law requires the concurrence only of twelve of them for the finding of an indictment. It is not necessary that the sixteen Grand Jurors be in attendance: that number is not sacramental. Formerly, as the law stood, no less than twelve, nor more than twenty-three were to be empaneled as a Grand Jury, although the presence and concurrence of twelve only were required for the transaction of business. The object of the statute was, to fix the exact number of persons who were liable to service as Grand Jurors, instead of the indefinite number above mentioned; but in other respects, the law is unchanged. The defendant's argument proves too much: if the sixteen jurors must be in attendance, to transact business, the concurrence of all of them is necessary to find a bill. Such is evidently not the purport of the statute, which

STATE
v.
SWIFT

merely directs the court to draw sixteen Grand Jurors, without reference to the mode or manner in which they transact business.

There is no irregularity in this respect in the proceedings.

III. The defendant's counsel, in a motion in arrest of judgment, assigns as error patent on the face of the papers, that the Grand Jury was not drawn and empaneled according to law.

The informality as to the drawing and empanneling of the Grand Jury, consists, as alleged, in the fact that, instead of being drawn from a list of one hundred and twenty-five members, they were selected from two separate drawings of fifty each, at a time not fixed by law,

The defendant's counsel contends, that there is no statute requiring the prisoner to challenge the array on the first day of the term of court, in the parish of Orleans; but that the statutes which provide to that effect for the State at large, expressly exclude the First Judicial District. It is not necessary to determine this point, as the objection could not be urged in a motion in arrest of judgment. It is not at all stages of the trial or in every form of exception, that this matter can be brought up successfully.

The prisoner's counsel urges that the defect, which he points out in the manner and time of drawing the Grand Jury, in the present instance, is a matter of record; but this does not suffice to give the accused the right to move in arrest of judgment. The defect is one of form, and not of substance. Blackstone says: "Arrests of judgment arise from *intrinsic* causes, appearing on the face of the record." The rule is laid down by Wharton as follows: "The practice also is not to arrest judgment on the ground of irregularities in the summoning, or the procedure of the Grand Jury." (Page 863).

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed.

GREEN, HARDING & Co. v. J. M. RELF & Co.—Same v. R. B. SYKES—
Same v. CADY & HOLMES.

An obligation signed by the members of a stock company to pay a certain amount proportionate to the stock of each, is not a joint, but a several obligation.

Where a majority of the stockholders have, by the charter, the right to order the winding up and liquidation of the affairs of the company, and a majority of them sign an obligation to pay their proportion of the outstanding debts, they cannot be released from the obligation on the ground that it was not binding upon any of the stockholders until all had signed.

APPPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Race & Foster, for plaintiffs. *Durant & Hornor* and *Ogden & Stansbury*, for defendants and appellants.

COLE, J. In 1852, a stock company or limited copartnership was formed, under the name and style of the "New Orleans and Florida Steamship Company," under the Act of the Legislature of the State of Louisiana, approved 13th March, 1837. B. & C. Digest, p. 613.

The object of the company is expressed in Art. 1st of their charter: "That the operations of said company shall be, to run a steamship or ships from the port of New Orleans to and from the coast of Florida, or any other part or places on the Gulf of Mexico, for the purpose of carrying freight and passengers."

The steamship "James L. Day" was purchased, and the company went into operation, with plaintiffs, *Green, Harding & Co*, as agents, to manage and carry on the affairs of the company.

The enterprise not proving successful, the members of the company, embracing the defendants and all the stockholders then forming the company but one, availed themselves of Art. 10th of the charter to wind up and liquidate the affairs of the company. Art. 10th is as follows :

"That at the expiration of the term for which the said company is formed, or sooner, if the majority of the stockholders shall so decide, the President and Board of Control shall proceed to wind up and liquidate the affairs of the said company in such manner as shall be decided by said stockholders."

Under this Article, document B was signed by all the stockholders but one. It reads as follows :

"The undersigned stockholders in the New Orleans and Florida Steamship Company, believing it for the interest of all concerned, that the affairs of said company should be wound up and liquidated, agreeably to the Article 10th of the act of copartnership, recommend that the steamer James L. Day, after due notice, be sold at auction on such terms as the President and Board of Control shall decide. The proceeds of the sale of the boat and all other property and assets to be applied to the payment of the debts of the company ; and in case they should prove insufficient for that purpose, and the claim of the company against the United States Government for carrying the mails cannot be immediately collected, then, in that case, the agents are hereby authorized to pay the outstanding debts of the company, and call upon the stockholders for their proportion of the same."

Acting upon this authorization, the agents proceeded to liquidate and settle up the affairs of the company.

The steamship James L. Day was sold at auction upon the terms agreed ; the other properties and assets of the company were disposed of, when there was found a deficit of \$19,546 79 against the company.

The claim against the United States being rejected by the Government, plaintiffs called upon the various members of the company for their several proportions of the deficit. Several of them paid the amount of their obligations, in proportion to the amount of stock possessed by them. The defendants having refused to pay, these suits have been instituted to compel them to pay their proportion according to the stock owned by them.

There was judgment for plaintiffs, and defendants have appealed.

Our attention is called by appellants to their exception to these suits, on the ground that the obligations of defendants are based upon a joint contract, and that all charged as obligors should be made defendants in one action.

The District Court properly overruled this exception. The defendants, in signing document B, obligated themselves to pay respectively a certain amount proportionate to the stock of each. This was not a joint, but a several obligation. C. C. Arts. 2073, 2075, 2079. Each of the stockholders promised separately for himself to do a distinct act, which was to contribute according to the amount of his stock, to pay the plaintiffs the amount they may have disbursed for the outstanding debts of the company.

There is also a bill of exceptions taken to the admission of document B. It is objected that it was not signed by *all* the stockholders of said company, and that it was not binding upon any until all had signed.

By Art. 10th of the charter, a majority of the stockholders have the right to

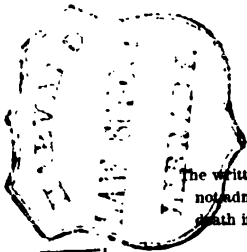
GREEN
v.
RELF.

order the winding up and liquidation of the affairs of the company. It is unnecessary for us to decide whether all the formalities required by law for a dissolution of the company have been followed; it is sufficient in the present case to say that the defendants have voluntarily entered into a contract by which they assumed certain obligations, and they do not appear to have been induced to assume them either by error or fraud.

According to the 10th Article alluded to in document B, a majority of the stockholders had the right to wind up and liquidate the affairs of the company; a majority of the stockholders signed document B; therefore, defendants cannot justly complain that every one did not sign it, and thus free themselves from obligations assumed on the strength of their signatures to document B.

Upon the merits, the judgment appears to be correct.

Judgment affirmed, with costs of appeal.



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50 1328

STATE OF LOUISIANA v. MAITREME.

The written or verbal statements of a prosecutor, are considered as merely hearsay evidence, and not admissible, except to rebut his declarations on the witness stand, or when received after his death in a case of homicide, as dying declarations.

A PPEAL from the District Court of the Parish of St. John the Baptist, Duffel, J. W. C. Lawes, District Attorney, for the State. H. St. Paul, for defendant and appellant.

VOORHIES, J. The defendant was prosecuted for the offence of stabbing and thrusting, with a dangerous weapon, with intent to murder. The jury returned a verdict of guilty for assault and battery; and the District Judge passed sentence accordingly.

The case is brought up on a bill of exception to the ruling of the inferior court, refusing to admit in evidence a letter written by the prosecutor, who, it appears, died previously to the trial; and also to permit a witness to testify to conversations held with the deceased prosecutor. This ruling was correct. The written and verbal statements of a prosecutor, are merely *hearsay*, and can be received in evidence only for rebutting his declarations on the witnesses' stand, or when they come within the category of dying declarations.

But, in the present instance, the statements of the prosecutor or injured party, are not offered as dying declarations, nor as discrediting evidence. Indeed, they could not be tendered for either of these purposes, as the question was not one of homicide; and, the prosecutor having died previously to the trial, there could have been no occasion to discredit his testimony. The defendant contends that they are original evidence, as emanating from a party interested.

This is a mistake. The injured party, in a criminal prosecution, is a mere witness: the State is the plaintiff, and the accused, the defendant.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

WILLIAM R. BELL v. MASSEY & POULTNEY.

Judgments are interpreted with reference to the pleadings and the nature of the obligations on which they have been rendered.

When parties are sued on an obligation on which they are jointly and severally bound, judgment will be rendered accordingly against them, without any allegation or prayer in the petition for a judgment *in solido*.

Where a suit is brought against persons bound jointly and severally according to law as commercial partners, a judgment rendered against them carries *solidarity* with it even when not expressed in it.

Where a promissory note made payable to the order of a firm, is endorsed by each member of the firm separately, in the absence of proof to the contrary, the payees will be presumed to be commercial partners, and each bound by his endorsement for the whole amount of the note.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Michel & Koonz, for plaintiff and appellant. *Durant & Hornor*, for defendant.

LAND, J. The question presented for our decision in this case, is the liability of the plaintiff on a judgment recovered by the defendants against him and others, on a promissory note, as follows :

\$439 05.

New Orleans, March 26th, 1856.

Twelve months after date, we promise to pay to the order of *Hawes & Bell* four hundred and thirty-nine dollars and five cents, value received.

(Signed)

(Endorsed)

MEDLEY & Co.

PETER HAWES,

W. R. BELL,

C. E. CHRISTENSEN.

The judgment in question is in these words : " That the plaintiffs, *Massey & Poultny*, recover from the defendants, *W. R. Bell, C. E. Christensen and William Phillips*, the sum of four hundred and thirty-nine dollars and five cents, with legal interest from the 29th day of March, 1857, until paid, and five dollars and fifty cents, costs of protest and costs of suit."

Judgments are interpreted with reference to the pleadings, and the nature of the obligations on which they have been rendered. The judgment against the plaintiff and other parties to the promissory note, tested by this rule, is a judgment *in solido*, or rather, a judgment against each one for the whole, because they were sued by *Massey & Poultny* as the makers and endorsers of the note, and the obligation alleged in the petition as the cause of action is, in law, an obligation joint and several, or several and not joint. Where parties are sued on an obligation on which they are jointly and severally liable, judgment will be given accordingly against them, without any express allegation or prayer for a judgment *in solido*. *Chapman v. Early*, 12 La. 230. And where a suit is brought against persons bound jointly and severally, according to law, as commercial partners, the judgment carries solidarity with it, although not expressed. *Prall v. Peet*, 3 La. 283.

The promissory note on which the judgment was rendered against the plaintiff, was made payable, as above stated, to the order of *Hawes & Bell*, and is endorsed by each of them separately and individually. In the absence of proof to the contrary, in such a case, the payees are presumed to be commercial partners, and each is bound, by virtue of his endorsement, for the whole amount of the note.

BELL
v.
MANNEY.

The appellees have joined in the appeal, and prayed for an amendment of the judgment.

It is, therefore, ordered and decreed, that the judgment be amended, and that plaintiff be declared to be liable for the whole amount of the promissory note on which judgment was rendered; and that the judgment in this case, thus amended, be affirmed, with costs.

FRELLSON, STEVENSON & Co. v. W. B. STEWART.

A judgment creditor has no right to proceed against the property of his debtor by process of attachment.

APPEAL from the Fourth District Court of New Orleans, *Price J. Elmore & King*, for plaintiffs. *Gaither & McPheeters*, for defendants and appellants.

LAND, J. The plaintiffs obtained a judgment against the defendant in the parish of Madison in this State, for the sum of \$1,771 85, and afterwards instituted this suit on their judgment, in the Fourth District Court of this city, and on the allegations that defendant was an absentee from the State, and that the Liverpool and London Insurance Company and the Sun Mutual Insurance Company were indebted to the defendant, caused process of attachment and garnishment to be issued in pursuance of the prayer of their petition.

A rule was taken by the attorneys of the defendant on the plaintiffs, to show cause why the writ of attachment should not be quashed and set aside, and this suit dismissed on the ground "*that an attachment cannot legally issue after judgment, and that the enforcement of a judgment cannot be made by said writ,*" among other grounds, which it is unnecessary for us to notice, as we consider this ground alone sufficient to dissolve the attachment, and dismiss the suit, for the following reasons:

First. Because a *judgment creditor* has no right, under our attachment laws, to proceed against the property of his debtor, by process of attachment. His remedy is by writ of *feri facias* for the collection of his judgment. C. P. Art. 641.

Secondly. Because a judgment creditor was not even entitled to the process of garnishment, before the passage of the Act of the 20th of March, 1839, p. 166, and the Act of the 18th of March, 1840, p. 43, amendatory thereof; and the plaintiffs did not comply with the provisions of these Acts, by applying for and causing a writ of *feri facias* to issue on their judgment, as they were bound to do, in order to avail themselves of the remedy given by these statutes. Parties resorting to the remedy of attachment, or garnishment, have ever been held to a strict compliance with all the formalities prescribed by law, under the pain of nullity. *Featherston's v. Compton*, 3 An. 380; *Petway v. Goodin*, 12 R. 445.

It is, therefore, ordered, adjudged and decreed, that the judgment be reversed; and it is now ordered, adjudged and decreed, that the writ of attachment issued in this case be dissolved, and that this suit be dismissed at the costs of the plaintiffs in both courts.

JAMES D. SWAN v. GEORGE MOORE.

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125	163
125	164

Where a party is interrogated on facts and articles, and his answer is ambiguous, but the fact sought to be established is rendered reasonably certain by the circumstances to which the party interrogated refers in his answers, it will be considered as sufficiently proved.

The want of belief on the part of one who has been informed of the existence of an unrecorded title to property, does not impair the effect of the notice thus received.

Creditors are as much bound by the actual knowledge of a prior unrecorded title as subsequent purchasers are, the law having made no distinction between them as to the effect of notice or knowledge derived from the registry of an act of sale or mortgage.

Actual knowledge of an *unrecorded title* on the part of a creditor is equivalent to *knowledge* or *notice* resulting from the registry of such a title.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
G. W. Christy, for plaintiff. *G. S. Lacy* and *R. A. Upton*, for defendant and appellant. *L. Charvet*, for warrantors.

LAND, J. This is an hypothecary action, in which the plaintiff alleges, that on the 25th day of January, 1856, he obtained a judgment against one *J. H. Cruse*, for the sum of \$931 38, and that on the 2d day of February, 1856, he caused his judgment to be duly recorded in the mortgage office of New Orleans. That on the 24th of July, 1854, the said *J. H. Cruse*, by public act of sale, conveyed and sold unto *George Moore*, the defendant, the undivided half of four certain lots of ground situate in the Second District of said city; and that although said act of sale was executed on the 24th of July, 1854, the same was never registered in the office of the Register of Conveyances in said city, until the 4th day of December, 1856, and more than ten months after the registry of his judgment. And that, by reason whereof, he has obtained a lien and mortgage on said real estate, and that the same now stands hypothecated in law for the payment of his judgment, the interest thereon, and costs of suit.

The defendant's answer, admitting the purchase as alleged, contains a special averment, that at the time the plaintiff pretends to have acquired the mortgage and lien, he was well aware that he, defendant, had become the *bona fide* purchaser and owner of said property, for a valuable consideration, and that it is in bad faith on the part of the plaintiff, to attempt to exercise the lien claimed in his petition. The answer contains a further averment, that the non-registry of the act of sale was in consequence of the neglect of duty of the notary before whom it was passed, and calls in warranty the notary, and the sureties on his bond, and prays for judgment over against them, *in solido*, in the event of the plaintiff obtaining judgment against him.

Upon the issues thus presented by the pleadings, there was a judgment in favor of the plaintiff, and a judgment dismissing the call in warranty, from which the defendant has appealed.

Before considering the case on the merits, it may be observed that the *reality* and *good faith* of the sale from *Cruse* to the defendant, are not put at issue by the pleadings, nor called in question upon the evidence.

For the purpose of proving the fact of knowledge alleged in the answer, the defendant propounded interrogatories on facts and articles to the plaintiff, who

SWAN
v.
MOORE.

answered the second interrogatory as follows : " I have heard it said that *Moore* claimed this property ; at what time I heard this, I do not recollect, but it was about the time that a case was pending between *Johnson* and *Cruse*, and the property was in the hands of the Sheriff, so I understood, at the time I heard this report, I did not believe it. I have no recollection that I knew this previous to the 2d of February, 1856. I have no recollection that I was informed of this anterior to the month of February, 1856."

This answer is ambiguous as to the date at which the plaintiff received notice of the defendant's claim or title ; but by reference to the suit of *Johnson v. Cruse*, mentioned in the answer, we find that suit was commenced on the 14th of January, 1854, and the property was in possession of the Sheriff, under a seizure, on the 8th of December, 1855, nearly two months prior to the registry of the plaintiff's judgment, which was by *confession* subsequent to the seizure by the Sheriff ; and we also find, by reference to the suit of the defendant, *Moore, v. Hufty, Sheriff*, that he had judicially claimed, and that the Sheriff had been enjoined from selling the property now in dispute, prior to the registry of the plaintiff's judgment, on the ground of the defendant's ownership of the property seized. And as the plaintiff has referred in his answer to the suit of *Johnson v. Cruse*, and the seizure of the Sheriff, as facts or circumstances fixing the date at which he heard it said that *the property was claimed by defendant*, it is reasonable to presume, that he heard of the defendant's claim prior to the registry of his judgment on the 2d of February, 1856. His want of recollection is not a negation of the fact, which is rendered reasonably certain by the circumstances to which he referred in his answer. His want of belief did not impair the effect of the notice which he received of the defendant's title.

There are but two modes in which persons not present can acquire a knowledge of an unrecorded sale of real estate : first, by information from others of the fact, and secondly, by an examination or inspection of the act of sale itself. Whether the information is received from hearsay, or from inspection, the party may well be said to have a knowledge of the sale. Indeed, it is almost universally the case, that knowledge of an unrecorded title, or claim, is acquired from information, or hearsay, and if the plaintiff could free himself from the legal effects of notice, or knowledge of an unrecorded title, by saying, *that he did not believe it*, although he had heard it, then there would be but one mode by which his knowledge of the fact could be established, and that is, by evidence of his inspection of the act itself. This would be tantamount to holding that knowledge of the existence of a sale, not derived from the registry of the act, is without any legal effect. For a party who does not believe what he hears touching an unrecorded claim, or title to real estate, may decline to inspect the act of sale, and thus put himself beyond the reach of all notice of title, except that which results from the registry of the act itself. The plaintiff was informed of a fact which was true, and evidenced by a notarial act—but without any inquiry or investigation on his part, says, *that he did not believe it*. How, then, could notice of defendant's title have been brought home to him, except by registry, as he declined to inspect the act of sale, *if it be true* that his *incredulity* freed him from the legal effect of his knowledge of title derived from other persons ?

It has been held, that actual knowledge of a prior unrecorded title, is equivalent to notice resulting from the registry of the act, from whatever source such knowledge may have been derived. *Splane v. Mitchellree*, 2 An. 265. It is well settled, that the formality of recording is for the purpose of giving notice to indi-

viduals, and that if a party have knowledge of that of which it is the purpose of the law to notify him, by causing an act or instrument to be recorded, the effect is the same, and he is as much bound by his knowledge, as if his information were derived from an inspection of the record. *Planters' Bank v. Allard*, 8 N. S., 144; *Rachal v. Normant*, 6 R. 88; *Robinett v. Compton*, 2 An. 846. In the cases of *Crear v. Sowles*, 2 An. 598, and of *Toulane v. Levinson*, *ibid* 788, on which the plaintiff's counsel relies as establishing a contrary doctrine, there was no proof in either case, that the creditor of the vendor had any knowledge or notice at the time he acquired his right of mortgage in the one case, by the registry of his judgment, or his right of privilege in the other, by the levy of his attachment, that the property of his debtor had been sold, and they are not, consequently, adverse authority to the cases cited. So true is this, that Chief Justice Eustis, who delivered the opinion of the court in the case of *Toulane v. Levinson*, and Judge Rost, who delivered the opinion in the case of *Crear v. Sowles*, concurred in the decision of the case of *Splane v. Mitcheltree*, which declared the doctrine of notice in relation to conveyances of real property to be a principle in the jurisprudence of this State.

It is however contended, that the doctrine of notice does not apply to creditors. In the case of the *Planters' Bank v. Allard*, 8 N. S., which is a leading case on the subject, the doctrine was fully considered, and it was declared to be a settled rule, that actual knowledge is equivalent to notice resulting from registry. And after reviewing the decisions of the court announcing the same doctrine, under the old Code, Judge Martin says: "These last decisions in construction of the old Code have not escaped the attention of the Legislature, and the spirit of them has been incorporated in Art. 2242 of the new Code." In the case of *Martinez v. Layton*, 4 N. S. 368, referred to by Judge Martin, as a decision under the old Code, it had been expressly decided that the doctrine of notice applied to creditors.

Article 2242 of our present Code is in these words: "Sales or exchanges of real property and slaves, by instruments made under private signature, are valid against *bona fide purchasers* and *creditors*, only from the day on which they are registered in the office of a notary, or from the time of the actual delivery of the thing sold or exchanged."

This Article of the Code, so far as it establishes the doctrine of notice, was not repealed by the Act of 1855, "relative to registry," nor by the Act "creating a Register of Conveyances for the Parish of Orleans," because the repealing clause in each of said acts excepts what is contained in the Civil Code on the same subject-matter. See Acts 1855, pp. 335, 345.

If Judge Martin and his colleagues were right in the conclusion, that the Legislature had established the doctrine of notice by the enactment of Art. 2242 of the Code, then it follows, as a necessary consequence, that *creditors* are as much bound by actual knowledge of a prior unrecorded title, as subsequent purchasers are,—for so the Legislature has expressly declared, and by the force of its will, has put the question beyond the reach of opinion or argument. But if these learned Judges were in error, and Art. 2242 be *repealed*, it remains to consider whether there be any decision of this court against the doctrine, as applicable to creditors, and if not, whether the doctrine is well founded in principle. The cases of *Crear v. Sowles*, 2 An. 598, of *Toulane v. Levinson*, *ibid* 788, of *Williams v. Hogan*, 2 La. 125, of *McManus v. Jewett*, 6 La. 541, of *Mary v. Lampré*, 6 R. 314, and of *Poydras v. Laurans*, 6 An. 772, decisions cited against the doctrine,

SWAN
v.
MOORE

are but declaratory of our registry laws, as they are found in the statute books, the last case deciding that possession is not evidence of a sale not recorded. In none of these cases were there *allegations* and *proof* that the creditor had actual knowledge of the vendee's unrecorded title, before, or at the time he acquired his right of mortgage, or privilege. It is true that the *dictum* in the case of *Toulane v. Levinson* is sufficiently strong and broad to expunge from our jurisprudence the whole doctrine of notice in regard to *purchasers* as well as *creditors*, and that the same *dictum* is reiterated in the case of *Poydras v. Laurans*, but this *dictum* was not necessary to the decision of either of these cases, and has not, therefore, the effect of a judicial decision, nor the force of authority. Indeed, one half of the doctrine announced by the *dictum* in the case of *Toulane v. Levinson* was conceded, in the case of *Poydras v. Laurans*, to be against the decisions of this court.

The question under consideration is not, whether an unrecorded title is without effect as to third persons, for that is fully admitted, and our registry laws are so plain on the subject, that argument but obscures and clouds the text—but the question is, whether *actual knowledge* of an *unrecorded title*, on the part of a creditor, is *equivalent to knowledge* or *notice* resulting from the registry of the acts, for if this be so, then the *act of sale* is, in the eye of the law, a *recorded title*, in relation to the creditor having knowledge of its existence. As this question has not been decided in any of the cases referred to, under the Code of 1825, or the legislation subsequent thereto, nor in any case which has come to our knowledge, and as the *dictum* of a Judge, or what is said in *arguendo*, has never been regarded as having the force and effect of a judicial decision, the question is, therefore, an open one, and has to be considered and decided on legal principles.

We find that creditors and purchasers are put on the same footing by our registry laws, whether contained in the Civil Code, or in the Session Acts of the Legislature. We find that an unrecorded title is without effect as to purchasers, as well as creditors, and that a recorded title takes effect from the day of registry against creditors as well as purchasers, and that, consequently, the law has made no distinction between them as to the effect of notice, or knowledge, derived from the registry of an act of sale, or mortgage. Why should the courts make a difference between them, when the Legislature has made none? Cannot a creditor commit a fraud on the rights of a vendee, as well as a purchaser, and is not the former bound by the obligations of good faith, as well as the latter? If a creditor witnesses an act of sale, and afterwards acquires from the vendor a special mortgage on the property sold, and attempts to enforce it by virtue of a prior registry, against the property in the hands of the vendee, does he not thereby commit an act of fraud on the rights of the vendee? If a creditor is present when an act of sale is passed, and afterwards obtains a confession of judgment from the vendor, and causes his judgment to be registered before the act of sale is recorded, and subjects the property to the payment of his judgment, does he not thereby perpetrate a fraud upon the rights of the vendee? If a creditor has actual knowledge of a sale, from whatever source derived, and afterwards goes to the vendor, and acquires a special mortgage on the property, or obtains a confession of judgment, and records the former, or registers the latter, before the act of sale is recorded, and claims a right of mortgage on the property, does he not likewise commit an act of fraud on the rights of the vendee? If the doctrine of notice is not applicable to the creditor, he may do any or all of these acts, which have been held to be fraudulent, and without effect, as to the vendee, in the case

of a purchaser, who stands on the same footing with the creditor, in relation to the registry laws.

But, it may be said, that the want of *good faith* on the part of a creditor, in these instances, would prevent him from availing himself of the non-registry of the vendee's title. If so, then the same reasons which have induced the court to apply the doctrine of notice to a purchaser, exist in full force against a creditor. For, if the creditor is in *bad faith*, *what is it that constitutes his bad faith?* It is certainly *his knowledge* of the vendee's *unrecorded title*, because if the mortgage were acquired *without knowledge*, or notice, it would be a legal right under the registry laws, which could be enforced in good faith. His knowledge, therefore, of the unrecorded sale necessarily constitutes his bad faith—which knowledge is all he could derive from the registry of the act, and which is the whole object of the law in requiring the act to be recorded, and he therefore stands with a purchaser upon the same grounds, in relation to the vendee, whether his knowledge be derived from registry, or from other sources, and the *same law*, and the *same reasons* which have induced the courts to apply the doctrine of notice to a purchaser, exist in full force against him.

The right to purchase property and to record the title, is not less absolute on the part of a purchaser, than the right on the part of the creditor to sue, and cause his judgment to be registered; and the former could with as much legal propriety urge his right to purchase, as a reason why the doctrine of notice should not be applied to him, as the latter could his right to sue, and to cause his judgment to be recorded; and therefore, no distinction can be made between them on this ground.

The maxim of our law, that the property of the debtor is the common pledge of his creditors, does not affect the question, because a sale in good faith is as valid and binding, under the registry laws, against creditors, as purchasers, and whenever notice, under these laws, is binding on purchasers, it is also made binding on creditors.

If, on the other hand, it be said that a creditor, with actual knowledge of an unrecorded title, may acquire a special mortgage, or obtain a confession of judgment, from the vendor, and by virtue of a prior registry, subject the property to the payment of his debt, the consequences of such a position would be these: although the Legislature has enacted a registry law which places *creditors* and *purchasers* on the same footing of equality, as to the formality of the registry of acts of sale and mortgage, and as to the effect of the notice resulting therefrom, and has, in plain and unambiguous language, declared that a registry of title *as to purchasers*, shall be valid *as to creditors*, yet the law of registry applicable to purchasers is different from the law of registry applicable to creditors; that purchasers are bound by their actual knowledge of title, from whatever source derived, and, consequently, bound by the obligations of good faith, but that creditors are not. The first of these consequences, is a disregard of the legislative will, which places creditors and purchasers on a footing of perfect equality as to the effect of notice resulting from registry. The second consequence is at war with the first element of jurisprudence, which is, that all men should live honestly. If it is dishonest for a purchaser, with knowledge of the vendee's title, to defraud him by a subsequent purchase, it is equally dishonest for a creditor with knowledge to *acquire and enforce a mortgage on property which he knows does not belong to his debtor*.

Hence we conclude, that as the law has made no distinction between these two

SUPREME COURT OF LOUISIANA.

classes of persons, as to the character and effect of notice resulting from registry, none can be made on principle ; and that, if the doctrine is applicable to the one, it is applicable to the other.

It is, therefore, ordered, adjudged and decreed, that the judgment, as between plaintiff and defendant, be reversed ; and it is now ordered, adjudged and decreed, that there be judgment in favor of defendant, with costs in both courts. And it is further ordered and decreed, that the judgment dismissing the call in warranty be affirmed with costs.

MERRICK, C. J., dissenting. The proof in this case is very far from showing, in my opinion, that the plaintiff had knowledge of a sale from *Cruse* to *Moore*, prior to the recording of his judgment. He says, he heard that *Moore* claimed the property, but he did not believe the report. So, too, as to the time ; the property was under seizure for some months, and it might have been long after the mortgage was recorded, that *Swan* heard the rumor. But as my colleagues have found the facts adversely to the plaintiff on this branch of the case, I advert to it only to show, that I do not think the plaintiff can be charged with a want of good faith in pursuing the remedies which the law has given him. *Cruse* was the debtor of plaintiff for work and labor, much of which was done and furnished prior to the act of sale from *Cruse* to *Moore*. There is, therefore, just as much reason to charge *Moore* with having bought to defraud creditors, as to charge *Swan* with an intention of defrauding *Moore*, and I see no reason to charge either with bad faith. They are innocent persons, each endeavoring to avoid a loss. *Swan* seeks to render the property which his debtor held, when he furnished him with the work and labor, liable for his debt. *Moore* seeks to withdraw this property from the creditor to whom the law had given a sort of pledge, by Articles 3149 and 3150 C. C., and claim it as his own. *Moore's* money never went into *Swan's* hands, therefore, nothing estops *Swan* from pursuing his legal remedies and making that property, (on the faith of which the credit may be supposed to have been given,) responsible for his debt.

In the further consideration of the case, I shall consider as proven, as my colleagues have done, that *Swan* had heard of *Moore's* claim upon the property before he recorded his judgment. That *Swan* had seen the act of sale, or had any certain information of its contents, I do not hear contended.

It is supposed by a majority of this court, that the case is controlled by Art. 2242 of the Civil Code, and some decisions under it. The Article is under the title, OF ACTS UNDER PRIVATE SIGNATURE. It is in these words :

" Art. 2242. Sales or exchanges of real property and slaves, by instruments under private signature, are valid against *bona fide* purchasers and creditors only from the day on which they are registered in the office of a notary, or from the time of the actual delivery of the thing sold or delivered."

If this Article of the Code was the only law on the subject, as it was considered at the time when the decisions cited were rendered, there would be no reason to depart from them. But as the law itself has been radically changed, and new provisions and requirements added, and as the same court which rendered the decisions relied on, followed the new law, it seems to me no longer an open question. Indeed, I cannot see how the lawgiver can use more positive language in his enactments, or the courts could show a more willing obedience to his requirements.

The law with regard to the parish of Orleans, under the title of Register of Conveyances for the parish of Orleans, declares, sec. 27, that " Acts, whether

they are passed before a notary public or otherwise, shall have *no effect* against *third persons*, but from the day of being registered." Acts of 1855, p. 345.

By another Act, a similar provision is extended to the country.

"Sec. 14. It shall be the duty of the Recorder to endorse on the back of each act transmitted to him, the time it was received by him, and to record the same without delay, in the order in which they were received; and such acts shall have effect against *third persons* only from the date of their being deposited in the office of the parish Recorders."

Then, under the head of registry, the lawgiver says generally :

"Section 1. That *no notarial* act concerning immovable property, shall have *any effect* against third persons, until the same shall have been recorded in the office of the parish Recorder or Register of Conveyance of the parish where such immovable property is situated."

And in the last paragraph of the second section of the same Act, it is declared, that :

"*All sales, contracts and judgments, which shall not be so recorded, SHALL BE UTTERLY NULL AND VOID*, except between the parties thereto. The recording may be made at any time, but shall only effect third persons from the time of recording." Acts of 1855, p. 335.

This is the last expression of the legislative will upon the subject, and it is *clear, precise, and contains no exception or qualification*.

To me, the argument by which it is sought to be proved, that this last expression of the sovereign will is not obligatory and binding to its full extent, seems liable to many objections.

If I ask, did not the Legislature have the power to pass this law? The answer from every quarter is, it did have the power. If I ask again, are not the precise, positive, and stringent provisions of this law, the will of the lawgiver? There can, it seems to me, be but one answer: He would not have taken the pains to have expressed his will with such minuteness and enforced it by reiteration in other Acts, unless such had really been his will. As the lawgiver has the power, and such is his will; what is it, but the law?

But it is said, the repealing clause of these statutes of 1855, does not repeal Article 2242 of the Civil Code. To this I reply, that it is not important to the decision of this case to decide, whether these Acts did or did not repeal the Art. 2242, for they are on a different subject. Art. 2242 relates to the registry of *acts under private signature* before the *notary*, doubtless in order to assure their dates.

These statutes are passed in order to give certainty, and publicity and perpetuity, to titles to real estate, and to furnish authentic evidence thereof, and the registry of *all acts notarial* or under private signature, is to be made before the *Register or Recorder*, and this difference must have been adjudged to exist, or the Act of 1810 could not have been held to survive the repealing Act of 1828.

Again, these statutes of 1855, are but a reënactment of the Acts of 1810 and 1827 (well known to the profession). According to the decision in the *Holmes and Wiltz'* case, their reënactment cannot be considered as destroying their former effect, and consequently their influence upon the Code.

But the repealing clause cannot bear the *construction* contended for. It is in these words, viz: "That all laws contrary to the provisions of this Act, and all laws on the same subject-matter, except what is contained in the Civil Code and Code of Practice, be repealed."

SUPREME COURT OF LOUISIANA.

What is the object of a repealing clause? Is it not to abrogate all provisions of law inconsistent with the newly declared will of the sovereign power? Is it to do the strange and inconsistent office of declaring the statute just enacted repealed by a former law? Are the statutes of 1855 repealed by laws passed in 1825?

All subjects are presumed to know the law. Much more, therefore, must the lawgiver be presumed to know what he has previously prescribed as a rule of action, and it must be held, that the Legislature knew the provisions of the Civil Code and Code of Practice, which it had enacted and caused to be promulgated. It did not, therefore, solemnly exert the sovereign power to do an act which it knew would be entirely nugatory, or, in its own language, *utterly null and void*, because in conflict with other inconsistent provisions of the ancient law which it then and there determined to declare should stand.

The repealing clause is what it purports to be, A REPEAL. It repeals all laws inconsistent. It goes further, it repeals all laws on the *same subject-matter*, except what are contained in the Civil Code and Code of Practice. If the Judge finds anything inconsistent with this new expression of the legislative will anywhere, he must declare it repealed, because *lex posterior derogat priori*. And he is not to regard anything on the same subject-matter unless he shall find it in the Civil Code and Code of Practice.

Having thus shown, as I think, that the new statutes are in force, or, in other words, not repealed by the ancient laws, I now proceed to show that these statutes, before they were reenacted in 1855, were repeatedly recognized as the law by this court, and carried into effect. It is sufficient for the purposes of this opinion to show that they have been so regarded by this court, and if it has made one exception, it only proves the rule and does not weaken the present case.

The exception admitted by the court is the solitary case, where the conduct of a subsequent vendee, who has recorded his deed before a former vendee, has been fraudulent. Here the courts deprive him of the advantage gained by his fraud, probably on the ground that a party ought not to be permitted to avail himself of a statute made to prevent fraud, in order to commit a fraud. See *Splane v. Micheltree*, 2 An. 265.

Not long after the Act of 1827 was passed, the same court, which had decided the cases of *Martinez v. Layton*, 4 N. S. and *Planters' Bank v. Allard*, 8 N. S., gave effect to the latter statute, notwithstanding the previous decisions, and held that an attachment by a creditor, defeated a sale which had been made the preceding day by the debtor, to a third person, but not recorded. *Williams v. Hagan*, 4 L. R. 125. This doctrine was reaffirmed in *McManus v. Jewett*, 6 La. 541. In the case of *Brassac v. Ducros*, 6 Rob. 338, it was held, that the sale of property of the community by the husband could not bind the wife who subsequently renounced the community; that she was a third party and stood in the position of a creditor, and could only be bound by the registry of the act executed by her husband. The doctrine of this case was admitted in the case of *Stockton v. Briscoe*, 1 An. 249.

In the case of *Many v. Lampré*, 6 Rob. 314, the statute of 1827 was again considered, and enforced against a vendee with a recorded title, his vendor's deed not having been recorded prior to the judgment. This last case has been overruled by the case of *Stockton v. Briscoe*, 1 An. 249, so far as it applies to a case where the junior title is recorded, but not as to the necessity of producing a recorded title to some of the vendees.

in the case of *Levinson*, the court declares, in effect, that no case of notice can be made out against an attaching creditor, equal to registry, and, notwithstanding the notice, they maintained the attachment. 2 An. 598.

In the case of *Tulane v. Levinson*, the court says :

"It is in evidence that plaintiff's attorney before the issuing of the *fieri facias*, under which they became purchasers, was apprised of the existence of the act of sale to *Bartlette*, and of its being recorded in the mortgage office ; but that on finding no record of it in the office of the parish Judge, he had the lot seized and bought in for his clients, the plaintiffs. As we consider the right of the plaintiffs to have the property sold to satisfy their debt, paramount to that of the defendant, under his unrecorded deed, by virtue of their recorded judgment, we do not know how that right can be impaired by this knowledge on part of the attorney. The theory, that notice is equivalent to registry in relation to conveyances of real property, we do not understand to have been adopted in our jurisprudence. The subject is one of great interest, and by no means free from difficulty." 2 An. 789 ; 1 An. 80 ; 2 An. 316 ; see also 4 Rob. 7 ; 2 Rob. 379 ; and 2 An. 610.

The doctrine of registry was again considered in the case of *Poydras v. Laurans*, 6 An. 772, and here Chief Justice Eastis, remarking upon the case before him, says :

"The counsel for the plaintiff has urged to the court the rule which obtains in England and most of the United States, that notice to a party constitutes such an equity as entitles him to protection. The statutes of England relating to the registry laws, which apply to certain counties only, as well as those of several of the States, are not similar to ours on the same subject. The decisions under those statutes, as to what will serve the holder of an unregistered deed, forms no part of our jurisprudence. Nor has the doctrine ever been recognized by this court, that possession under an act of sale, not recorded, was sufficient evidence of notice to creditors and subsequent purchasers to defeat the operation of the registry laws. In the case of *Toulane v. Levinson*, 2 An. 789, we said : 'The theory that notice is equivalent to registry, in relation to conveyance of real property, we do not understand to have been adopted in our jurisprudence.' " "The subject," continues the Chief Justice, "has been several times under consideration, and the difficulties attending every mode in which laws of that description have been carried into effect, in different countries, have been examined and weighed. The only cases in which there has been any exception to the effect of the registry of conveyances, are those of gross fraud on the part of purchasers." *Splane v. Micheltree*, 2 An. 265 ; *McGill v. McGill*, 4 An. 269.

After these repeated decisions of the court, it would seem needless to quote further authorities.

All I can say is, here are the statutes which are absolute, and there are the decisions recognizing their binding force. Why should we not follow them ? See also *Bullard & Currys Dig.* p. 603, and *Armstrong v. White*, 10 An. 609.

M. BROWN & Co. et als. v. V. DUPLESSIS AND CITY OF NEW ORLEANS.

The streets of an incorporated city are destined for public use, but not for a particular mode of public use.

The city of New Orleans has the right to sell the right of way in the streets to private individuals, for a specified time, with the privilege of laying rails and running horse cars over them, according to a tariff to be fixed by the Common Council; this right is conferred upon the city by the Act incorporating it, and upon all incorporated cities or towns in the State, by the Act of 1855, relative to the organization of corporations for works of public improvement.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
Koontz & Roselius, for plaintiffs and appellants. *Michel & Dufour*, for defendants.

COLL, J. The principal question in this case is, whether the corporation of the city of New Orleans has the power to sell the right of way for twenty years for the establishment of a railroad in the streets of the city; the cars to be drawn by horses or mules, and to be run as often, per day or night, as the contractors may deem proper, but not at greater intervals than every ten minutes, from daylight until ten o'clock P. M., and every thirty minutes from ten o'clock until midnight.

The Comptroller, in pursuance of the authority vested in him by an ordinance of the Common Council of New Orleans, offered the right of way for sale.

The adjudication was arrested by an injunction, at the instance of the plaintiffs, who allege themselves to be owners of real estate in the city, situate on the streets through which the railroads are to be laid and run.

Plaintiffs allege that the Common Council of New Orleans is without authority in law to sell or lease the right of way aforesaid, because said right and authority are not by law vested in the Common Council, but in the Legislature of the State of Louisiana.

They allege, further, that the city of New Orleans has not the right to lease said right of way, without first having obtained the consent of the property holders on said streets.

That the construction of said railroad track, and the running of cars upon said road, in said streets, will cause their property to depreciate in value; and further, will deprive petitioners and others, of the free and unreserved use of open streets, accessible at all times and places, for vehicles usually traversing the public streets of New Orleans, and will create and maintain an obstruction in said streets for twenty years.

Petitioners further allege, that the Common Council of New Orleans is not authorized in law to grant said right of way, in said public streets, for twenty years, for railroad purposes, to the exclusive use and benefit of the parties who may purchase the same, because said acts are an appropriation of a portion of the public streets of the city of New Orleans for private uses, which is illegal and reprobated by law. They also aver that the ordinance creates an obstruction, because it prescribes that on certain of said streets, the cars shall only be allowed to run in one direction, and never in the other direction.

The corporation of New Orleans took a rule on the plaintiffs to show cause why the injunction should not be dissolved, because the petition exhibited on its face no grounds for the issuance of the writ.

14	842
44	738
44	751
14	842
48	863

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Upon the trial of the rule, it was made absolute, and the injunction was dissolved. Plaintiffs have appealed.

The material inquiry in the decision of this case is, what are the rights of plaintiffs to the streets of New Orleans; for if their rights are not disturbed, they have no personal ground of complaint.

Streets, public walks and quays, are things which belong in common to all the inhabitants of cities and other places, and to the use of which all the inhabitants of a city or other place, and even strangers are entitled in common. C. C. 449, 444 and 445.

Plaintiffs cannot then claim an exclusive use of the streets, or complain if their use of the same be impeded by a similar use of the streets by other persons. No citizen is empowered to demand such an exclusive use of the streets, as will free him absolutely from inconvenience. It is an inconvenience for him who wishes to take an airing in his carriage, to be impeded by omnibuses and drays; but he cannot exclude them from the use of the streets.

Each citizen is entitled to the use of the streets in his mode of conveyance, whether in a carriage, buggy, cart, or on a dray, but he cannot complain if others adopt a mode of conveyance different from his own, and which prevents him from traversing the streets as rapidly as he might otherwise do.

No citizen has a legal right to complain that the streets are used by other citizens, in a peculiar manner, even if it causes him a little inconvenience, as long as he himself is allowed the free use of the streets in his peculiar mode.

The streets are destined for public use, but not for a *particular mode* of public use.

If the city of New Orleans wished to expend the money necessary for the laying of rails throughout the city, for the purpose of permitting all who wished to run their own cars thereupon, drawn by horses or mules, no one could complain, as long as it did not prevent other modes of traversing the streets, for traveling in cars on rails is one mode of using public streets, and there is no reason in the nature of things why it should be lawful to travel in a carriage or gig upon the streets, and not lawful to travel in a car upon rails fixed in the streets, but not so laid as to prevent the use of the streets by other modes of conveyance.

If it does not suit the public coffers, or the public convenience, that the city should lay rails for the free use of the public, it follows from the premises that the city has the prerogative of selling the right of way for a specified time, to one or more persons, who shall lay rails and have the privilege of running cars, drawn by horses or mules, according to a tariff fixed by the Common Council.

The selling of this right of way does not impede citizens from using the streets in any other mode of ordinary conveyance; it promotes trade and commerce; unites the distant parts of the city, and benefits the health of citizens, by enabling them to have their residences at a distance from the crowded thoroughfares of the city.

The selling of this right of way is not an alienation or appropriation of a portion of the public streets for private uses, any more than the licensing of omnibuses or hacks for a specified period, is an alienation or appropriation of the public streets.

Property holders on the streets through which the proposed railroads shall be constructed, cannot complain, for they still have the use of the streets in their desired mode of conveyance, with the additional privilege of riding for a small compensation in the cars. If the running of these cars should depreciate their

BROWN
v.
DUFFLINS.

BROWN
v.
DUPLESSIS

property, they cannot legally complain, because they are not divested of the use of the streets, and the destination of public streets is not for any peculiar mode of travelling, but for all such modes as shall best suit the convenience of the public.

The preserving a certain space in a street, for the use of the cars, which pursue one direction without deviation, cannot be said to obstruct the streets, for they can occupy, but for a short time, any particular part of the streets.

An omnibus or carriage, and every other vehicle, occupies a certain space in the streets, and it does not seem to be a sufficient objection to cars, that they move in a fixed direction; on the contrary, it is more easy to get out of their way, than out of the way of those vehicles whose course depends upon the volition of the driver.

It cannot be considered as an objection, that on certain streets, the cars shall run up, and shall never be run in the opposite direction.

This is a mere arrangement for public convenience, dependant upon the discretion of the Common Council.

It does not abridge the rights of the public, for they are not obliged to use the cars unless they think proper.

If the running of cars in one direction benefits the public, the Common Council cannot be deprived of the right of doing this much good, because the running of them *up* and *down* might benefit the city still more.

The City Charter empowers the Common Council to establish railroads, such as are proposed in this instance, to be run by horses or mules. It says: "The Mayor and Common Council shall have *full power and authority* to make and pass such by-laws and ordinances as are *necessary and proper*, and are not contrary to the Constitution and laws of the United States or this State; first, &c. * * * Second, to regulate and make improvements to the streets, public squares, wharves, and other property. * * * Twelfth, to make regulations for the proper government of carts, drays, carriages, omnibuses, and other vehicles of every description, which run in the streets, or any where within the limits of the city, and to determine through what streets the same shall pass." Revised Statutes, sec. 51, pp. 368, 370. Vide also, C. C. 859; 18 La. 284; *Drake v. The Hudson River Railroad Company*, 7 Barbour's Supreme Court Reports, 524.

The City Charter vests the Mayor and Common Council with full power to make such by-laws and ordinances as are necessary and proper, for regulating and making improvements to the streets.

It is left to their discretion, under the control of the courts, to decide what improvements shall be made in the streets, and we cannot say that they have abused this discretion in the ordinances now under consideration.

We would also observe, that the 13th section of the Act of 1855, relative to the organization of corporations for works of public improvement, declares that: "No railroad, plankroad nor canal, shall be constructed through the streets of any incorporated city or town, without the consent of the Municipal Council thereof." Rev. Stat. p. 116, § 13.

This section implies that the city has the power to establish railroads, if she thinks proper so to do.

Judgment affirmed, with costs of appeal.

HUGHES, HYLLESTED & Co. v. KLINGENDER BROTHERS.—W. MURE, Intervenor.

The comity of nations extends only to enforce obligations, contracts and rights under those provisions of law of other countries which are analogous or similar to those of the State where the litigation arises.

A contract executed in England, by which a ship was transferred to a trustee to secure the rights of a third person, the vendor retaining possession of the ship, cannot be enforced in this State to defeat rights already acquired by an attachment under our laws.

A *rente à réméré*, like any other sale, is perfected as to third persons, in the case of movables, by delivery, and the vendee becomes the owner of the fruits and the property absolutely, if it be not redeemed at the time stipulated.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
Benjamin, Bradford & Finney, for plaintiffs. *H. T. Hays*, for defendant.
W. D. Hennen, for intervenor and appellant.

MERRICK, C. J. This case was before us in January last, on the question of the right of the intervenor to bond the property attached. *Ante*, p. 52.

In the present case, the Bank of Liverpool, as vendee and trustee, claims the legal title of the ship.

The petition of intervention was dismissed on the trial in the lower court, and the intervenor appeals.

The case perhaps merits a synopsis of the instrument upon which the intervention is founded. It (the instrument) is of great length, and is under seal. It is signed by the defendants alone, and purports to have been executed on the 25th day of September, 1854.

In consideration of five shillings, and to secure the Bank of Liverpool, *Klingender Brothers* nominally sell to *Joseph Langton*, chief manager of said bank, his executors, &c., the ship *Warbler* in trust, that the same may be a continual security to the bank for the payment of costs, and for all sums of money due or to become due, by *Klingender Brothers* to the bank, and for loans, &c. Another clause authorizes *Langton*, the trustee, to sell the ship, and directs him to apply the proceeds, 1st, to costs, 2d, to amount due bank, and 3d, the remainder to *Klingender Brothers*. Another clause obliges the trustee, on satisfaction of the trust, to reconvey. The instrument contains other covenants on the part of *Klingender Brothers*, warranting title, relative to policies of insurance, &c., &c. The instrument is no doubt executed in conformity to the Acts of Parliament and the English law. See *Abbot on Shipping*, pp. 29 and 30, ed. 1854. Under that law, the intervenor would have been able in the English courts to protect himself against subsequent purchases and creditors, and the effects of bankruptcy. If it be admitted, that the intervenor has such rights upon the ship by the English law, the question naturally arises, why are not those rights entitled to be respected in Louisiana, particularly as all parties to this controversy have their domicile in England? It is not surprising that the question is repeated, and that the courts are again and again called upon to answer it.

The comity of nations extends only to enforce obligations, contracts and rights, under those provisions of law of other countries which are analogous or similar to those of the State where the litigation arises.

The instrument offered in evidence has no analogy to any mode known to our law of affecting personal property for the security of debts. It purports to sell

HUGHES
v.
KLINGENDORF.

to one man, to protect the rights of a third person, and yet the vendor is to retain possession. The contract is not a sale, nor a pledge; for there is no delivery, which our law deems *essential* in order to perfect either contract as to third persons. As our law would not enforce a similar contract between our own citizens, if made here, it will not enforce it to defeat rights already acquired by the attachment under our own laws.

In the case of *Malcolm et al. v. The Schooner Henrietta*, this court refused to recognize a mortgage upon a ship, executed in the form of a conventional mortgage under our own law, and declared that our law only admits of the hypothecations of ships according to the laws and usages of commerce. 7 L. R. 488; *ib.* 486.

In the case of *Grant v. Fiot*, it was again declared, that instruments in the form of conventional mortgages on ships or vessels confer *no right or privilege whatever*. 17 L. R. 160.

The same doctrine was re-affirmed in *Hill v. The Phenix Towboat Co.*, 2 Rob. 35, in which the court mention, as the only valid hypothecation, that made to procure the necessary supplies for ships which happen to be in distress in *foreign* ports, when the master and owners are without credit, and in cases in which, if assistance could not be procured by means of such instruments, the vessels and their cargoes must perish.

The subject was again fully considered in the case of *Harned v. Churchman*, 4 An. 312, and it was there said: "It is the duty of courts in all commercial nations to extend the rule of national comity to bottomry bonds and such other maritime hypothecations as are recognized by the general assent of the commercial world. But the public policy of recognizing implied hypothecations or liens as following property from foreign countries may well be questioned."

In the case of *Wickham v. Levistones*, the effect of a common law mortgage executed at Cincinnati, and registered in accordance with the Act of Congress, was considered, and this court refused to give it effect, because "such a mortgage is not recognized by our laws." 11 An. 702.

In the case of the *Succession of Broderick*, 12 An. 522, we refused likewise to give effect to an act purporting to be a mortgage of a steamboat which was executed in this city, and recorded in the office of the Collector of the Customs, under the Act of Congress of 29th July, 1850 (9 Statutes at Large, p. 440).

In the case of *Swasey & Co. v. Steamer Montgomery*, 12 An. 800, we refused to recognize a privilege created by the law of Alabama, for tolls for passing a certain channel, and we there announced the general doctrine that privileges must be regulated by the law of the *forum*, and that none can be claimed except such as are given by the Civil Code and statutes amendatory thereof. See also on this subject Abbot on Shipping, ed. 1854, p. 156, and note 2, and authorities there cited. See also a similar case stated by Savigny, 8th vol., p. 196-197, sec. 368, Berlin edition.; C. C. 3204, No. 7; 19 Howard, 22 and 82.

It may also be remarked, that the hardship of the rule adopted by the courts is not so great, when it is considered that in the case of ships it usually happens, that the parties holding liens and mortgages in the home port, have had the opportunity of enforcing the same, and have voluntarily permitted the ship to depart, without so doing. It may also be further remarked, that the statute of 1858, p. 3, bars privilege upon ships after the lapse of six months.

But in this case, it is contended by intervenor's counsel, that the instrument is assimilated more to a *vente à réméré* of our law, than a mortgage, and may be upheld by our courts in this form.

The *vente à réméré*, like any other sale, is perfected as to third persons, in the case of movables, by delivery, (which is wanting in the instrument under consideration,) and the vendee becomes the owner of the fruits and the property absolutely, if it be not redeemed at the term stipulated. Here *Langton*, so far from being owner, and making the fruits his own, had only authority, as an agent, to sell for the payment of debts. *Klingender Brothers* had received no serious price, and had nothing to return as such. C. C. 2414, 2439; 3 An. 278; 5 An. 99. The instrument cannot, therefore, be viewed in any other light than as a security for money.

There is a prayer, on the part of the appellee, for an amendment of the judgment in their favor, against the intervenor, so that the same shall be considered final. In order to avoid all doubt as to the effect of the judgment rendered, we will make the amendment.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be so amended as to reject and bar the demand in reconvention and third opposition of the said Bank of Liverpool; and that said judgment so amended be affirmed, the appellant paying the costs of the appeal.

HUGHES
v.
KLINGENDER.

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CHARLES E. KNABE et als. v. J. B. FERNOT et als.

An appeal will lie from an *ex parte* order setting aside an injunction, upon giving bond, under Article 307 C. P.

Where the dissolution of an injunction is calculated to work an irreparable injury, by depriving members of a corporation of privileges, the value of which cannot be estimated in dollars and cents, the injunction cannot be set aside upon giving bond.

APPEAL from the Third District Court of New Orleans, *Duvigneaud, J.*
Tissot & Filleul, for plaintiffs. *Collens & Woolridge*, for defendants and appellants.

MERRICK, C. J. The appeal is taken in this case from an *ex parte* order setting aside an injunction, upon giving bond, under Art. 307 C. P. The plaintiffs alleges :

"That plaintiffs and defendants are all members of a duly incorporated society established for masonic purposes; that the society owns a masonic hall and surrounding grounds, with the furniture and paraphernalia necessary for assembling masonically and performing masonic rites and ceremonies; that the enjoyment of this hall and grounds, furniture, &c., and holding masonic assemblies therein, are franchises of the members; that the defendants, being a small majority, conspired to deprive the plaintiffs of these franchises, and of all use of the property, all the intellectual and moral enjoyment afforded by masonic meetings and rights, and of all the recreation and pleasure of visiting the garden, &c; that defendants sought to appropriate the property and franchises exclusively to themselves, and for this purpose said defendants had procured a *separate* incorporation under the name of "St. Andrew No. Five," and then at a meeting of the society owning the property, caused one of their number to present a resolution *leasing the whole property for years to themselves, at a mere nominal price*; that the defendants carried this resolution *by their own votes*, and were about to carry out this fraudulent act by taking exclusive possession and expelling the petitioners from the

KNAPP
v.
FERNOT.

common property and franchises, and depriving them of all enjoyment thereof. They pray for an injunction against this disturbance, and for the nullity of the fraudulent and simulated lease," &c.

The simple question is, therefore, whether or not the dissolution of the injunction is calculated to work irreparable injury to plaintiffs.

It would be difficult to estimate in dollars and cents the damage the plaintiffs may sustain by being deprived of their supposed privileges as members of the corporation. A compensation even in damages could not, therefore, be readily awarded plaintiffs. If the plaintiffs have any right at all, they are entitled to maintain their injunction until they can be heard contradictorily with their opponents. The *ex parte* order setting aside the injunction, seems to have been unadvisedly entered.

Whether the proceeding is a proper one, or what are plaintiffs' rights under allegations, cannot be considered, in the absence of an exception or rule, or any issue formed by the proceedings.

It is, therefore, ordered, adjudged and decreed by the court, that the *ex parte* order of March 5th, 1859, dissolving the injunction, be set aside; and the injunction granted in this case reinstated. And it is further ordered, that this case be remanded for further proceedings; the defendants and appellees paying the costs of the appeal.

JOHN BROWN v. BARK LAURA SNOW, CAPTAIN AND OWNERS.

A party who has bound himself by a written contract to perform certain services for another, may sue for his services on a *quantum meruit*, where the contract has been violated and virtually annulled by the act of the other party.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Elliot, Budd & Lambert, for plaintiff. *Waples & Eustis*, for defendant and appellant.

COLE, J. The plaintiff alleges that he entered into a written contract to discharge the cargo of lime on board the bark "Laura Snow," for a specified sum, and in a designated time.

That defendants, by their own action, annulled the contract, wherefore he sues on a *quantum meruit*.

An exception was filed by the defendants to the suit, on the ground that it is on a *quantum meruit*, when by its own allegations it appears that there was a written contract.

The exception was overruled, and the plaintiff was permitted to prove the allegations of his petition. There was judgment for plaintiff and the defendants have appealed.

In this court, the defendants rely upon their exception for a reversal of the judgment.

In our opinion, the exception was properly overruled. As plaintiff considered the contract to have been violated and cancelled by the conduct of defendants, he was entitled to incur the risk of establishing this upon the trial and to sue upon a *quantum meruit*. He was not obliged to sue upon a contract virtually annulled by defendants, unless he had wished so to do.

Judgment affirmed, with costs of appeal.

MERRICK, C. J., concurring. I do not think a party who has entered into a written contract, may repudiate the same on the pretence of a violation of the contract by the opposite party. The very object of a contract is to make a special law between the parties, by which to adjust their rights in the event of a refusal to comply or a violation of the contract by either.

Whenever, therefore, it appears that the parties have entered into a contract, and either party insists upon the same, it cannot be disregarded.

In the case of *Hogan v. Gibson*, 12 La. 460, this court held, that if the plaintiff sued upon a *quantum meruit*, and the defendant proved a special contract, plaintiff could not recover. See also *Allen v. Martin*, 7 N. S. 300.

In the present case, the plaintiff has alleged the existence of a contract, but he avers that it has been annulled by defendants. The testimony (including the contract) has all been received without objection. It shows, as I think, that plaintiff is entitled to recover the amount awarded by the lower court, on account of the breach of the contract by the defendants, and I concur in the decree on this ground.

LAND, J., concurred in this opinion.

BROWN
v.
BARK J. SNOW

JOHN ARROWSMITH v. E. H. DURELL et al.

An action of jactitation cannot be maintained by a party who is not in possession.

Where an exception to the petition in an action of jactitation on the ground that the plaintiff was not in possession of the land, filed in *limine litis*, had been dismissed by the court, previously to the empannelling of the jury—*Held*: That the question of possession was not before the jury for decision.

When the plaintiff goes to trial without making the objection that issue is not joined on a reconventional demand, he cannot make objection afterwards, supposing even it is necessary to join issue upon a demand in reconvention.

Where a defendant pleads title in general terms, and the plaintiff does not require that the title should be set forth more specifically, nor crave over of the defendant's titles before going to trial, evidence of a specific title offered by the defendant, cannot be objected to.

A witness cannot be objected to on the ground of interest, because he is liable to the defendant as warrantor, if he has not been cited in warranty in the suit in which he is called to testify.

APPEAL from the Fourth District Court of New Orleans, *Price, J.*
C. Redmond and R. H. Marr, for plaintiff and appellant. *D. S. Bryon*, for defendant. *L. Janin*, for warrantor.

BUCHANAN, J. This is an action of slander of title or jactitation. The plaintiff alleges that he and his authors have been in full, peaceable, notorious, uninterrupted, undisputed, and exclusive possession, from the year 1758, to the institution of this suit, 1854, under a chain of titles particularly detailed, of a certain tract of land in this parish, described in the petition; that the defendant, *Durell*, has set up title to a portion of said land, and has even attempted to effect a sale of the same; that he has slandered plaintiff's title, to his damage, ten thousand dollars.

Defendant, *Durell*, denies generally, all the allegations of the petition, and specially plaintiff's possession of the land mentioned in his petition; pleads prescription, and calls in one *Mrs. Pontalba*, from whom he holds, to defend his title; prays for judgment against *Mrs. Pontalba*, for restitution of the price of sale, in case plaintiff should be adjudged to be the owner of the land. Finally, by a

ARROWSMITH
v.
DURELL

supplemental answer, he alleges that plaintiff had caused him, *Durell*, damage to the amount of \$20,000, by pretending title to this property, and by certain vexatious proceedings previous to the institution of the present suit; all of which had prevented said *Durell* from selling the property, which he might otherwise have done to great advantage and profit.

Upon these issues, the parties went to trial before a jury, which found a verdict in favor of defendants, upon the principal demand, and likewise upon the demand in reconvention, gave *Durell* a verdict for four thousand dollars damages against plaintiff.

An action of jactitation cannot be maintained by a party who is not in possession. But the possession of plaintiff was specially traversed, and yet there was not a particle of evidence offered by him, to maintain that allegation of his petition. He argues that this issue of possession was made in the form of an exception, which was overruled. But such does not appear to have been the understanding of the District Judge, who charged the jury that the issues of possession and title were both before them. Neither can we say that he erred. The entry on the minutes of the court is as follows :

"The court, considering that the exceptions filed by the defendants, go to the merits of the cause, it is ordered that the said exceptions be dismissed, with costs."

This order was made upon the exception being fixed separately for trial before the court, there being already a jury prayed in the cause, by whom the cause was subsequently tried.

The exception of want of possession presented an issue of fact, upon an essential part of plaintiff's case, in regard to which the burden of proof was upon plaintiff; and as no proof upon the point was tendered on the trial of the exception, it is not seen how the Judge could have put this exception out of court. We concur with the Judge below, in considering that the question of possession was before the jury for decision.

The next point that is made by appellant in this court is, that there was no issue joined upon *Durell's* reconventional claim for damages. But even supposing that it is usual and necessary to join issue upon a reconvention, of which we say nothing, plaintiff went to trial without making that objection. See *Erwin v. Bank of Kentucky*, 5 An. It was not even made one of the numerous grounds of the plaintiff's application in the court below for a new trial.

It is not necessary to examine plaintiff's objections to the warrantor's proof of title, inasmuch as plaintiff having made no proof of possession, his adversaries were, in strictness, not put upon proof of title in themselves.

The damages allowed by the jury, seem to be sustained by the evidence.

Judgment affirmed, with costs.

SAME CASE—ON A RE-HEARING.

BUCHANAN, J. A further consideration of the authorities on the subject of pleadings in the action of jactitation, since our previous judgment in this case, satisfies us that the question of possession of the *locus in quo*, was not properly before the jury which tried the cause. The exception, filed *in limine litis* by defendants, that plaintiff was not in possession of the land, and could not conse-

quently maintain an action of slander of his title to the same, had been dismissed by the court, previously to the empanneling of the jury. There only remained, therefore, the issue of title, and the reciprocal claims for damages of plaintiff and defendants.

Upon the question of title, the burden of proof was upon defendants; and the parties seem so to have viewed it, for all the evidence of title in the record, has been offered by the defendant, *Durell*, and his warrantor, *Mrs. Pontalba*.

Plaintiff and defendants both trace their titles to the same origin, namely, a grant from the Colonial Government of Louisiana, of date May 10th, 1758, to *Mouléon*. The petition alleges title in plaintiff by the following chain:

1. *Mouléon*, the grantee, conveyed to *Brazelier* on the 28th of June, 1768.
2. *Brazelier* conveyed to *Elizabeth Desvuisseaux*, October 15th, 1774.
3. *François D'Hebecourt* purchased at probate sale made by order of court, in the succession of *Elizabeth Desvuisseaux*, July 22d, 1820.
4. *Ferdinand D'Hebecourt* purchased at probate sale of *François D'Hebecourt's* succession, June 6th, 1833.
5. Plaintiff acquired from *Ferdinand D'Hebecourt*, by notarial act of September 7th, 1833.

Defendant's warrantor pleaded title in general terms; and the first bill of exceptions, on the part of plaintiff, which the record presents, is to the ruling of the court, which allowed the warrantor to give evidence of a specific title. The court did not err in this ruling. Plaintiff might have required the warrantor to set forth her titles more specifically in his pleadings; he might have had oyer of the muniments of that title before going to trial; but he did not think proper to do so; and by going to trial in the actual state of the pleadings, he could not deprive the warrantor of the right of establishing by precise and specific proof, the allegations thus generally made.

The next bill of exceptions was taken by the plaintiff to the admission of the testimony of *L. T. Chalon*, offered to prove that certain persons who signed notarial acts offered in evidence, were descendants and heirs of *Elizabeth Desvuisseaux*. It appeared from the testimony of this witness, given on his *voir dire*, that he had accepted the succession of his father, who was one of the persons under whom, as heirs of *Elizabeth Desvuisseaux*, the warrantor claimed to hold by virtue of the notarial acts thus signed by them; and the plaintiff objected to the competency of this witness on the ground of interest. This objection was properly overruled. Neither the witness nor any other descendant of *Elizabeth Desvuisseaux*, was cited in warranty in this case. The witness had, therefore, no interest in this suit, although he might possibly have an interest in the question. The objection only went to his credibility; and that was matter for the consideration of the jury, which they seem to have resolved by their verdict in favor of the defendant.

Two bills of exception were reserved by plaintiff to the admission of evidence of acts of civil possession of the premises by warrantor and defendant, on the ground of irrelevancy—the question before the jury being title, and not possession. Upon this point we agree with the appellant; but the bills of exception are immaterial, as the evidence is not of a character to have affected, in any event, the decision of the cause.

Two other bills of exception relate to evidence offered for the purpose of making out title to the premises in the father of the warrantor. It is unnecessary to consider these, because the proof of title derived from the heirs of *Des-*

ARROWSMITH
v.
DUNELL.

ARROWSMITH
v.
DURELL

Desvuisseaux, appears to us sufficient to justify the verdict upon this branch of the case.

The title of *Desvuisseaux* is not disputed by plaintiff. On the contrary, it is the foundation of his claim. It is only necessary to decide in whom that title now vests.

The warrantor produces a compromise between herself and the heirs of *Desvuisseaux*, of their conflicting pretensions; and a partition by which they mutually released their pretensions to certain portions of land in favor of each other. The plaintiff's petition, as we have seen, alleges that the rights of *Desvuisseaux's* heirs to the *Moulon* grant, had been alienated many years before the date of these documents, by an adjudication at probate sale to *D'Hebecourt*. But this rests entirely on his assertion. He has offered no proof of the fact.

Upon the point of damages, we cannot say that the verdict of the jury has done injustice. It was admitted by counsel, in the oral argument before this court, that if there was a case for damages at all, the amount allowed by the jury was sustained by the evidence. And we think such a case has been made out.

The former judgment of this court must, therefore, remain undisturbed.

G. A. SANFORD v. EUGÈNE WAGGAMAN et als.

Where the tutor of a minor has created an indebtedness, without authority of law, which exceeds the revenues of the minor, the creditor, to recover, must show that the indebtedness was absolutely necessary, either for the support of the minor, or the preservation of his property, and that the supplies furnished caused to the benefit of the minor.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*
D. L. McConnell, for plaintiff. *P. E. Théard* and *J. W. Duncan*, for defendant and appellant.

VOORHIES, J. The correctness of the plaintiff's account is not disputed; but the defendant, on behalf of his ward, contends that her estate is not liable legally for the payment of this claim.

The minor, *Adelaïde Julie Cambot*, was the owner of the Holbrook House, which was destroyed by fire some time in the year 1857. This was the only property owned by her; but its revenues were amply sufficient for her maintenance and education. Her estate was burdened with no debts. Her father, *J. B. L. Cabot*, then her tutor, collected the amount coming to her from the Insurance Company, and proceeded to rebuild the Holbrook-House, but on a larger scale. Several suits were instituted against him, in his capacity of tutor, by some of the material men and workmen, for the recovery of their respective claims; but in the meantime he was removed from the tutorship, and the present defendant appointed in his stead.

The defence to the present action is, want of legal authorization on the part of the former tutor to create this obligation, which, as alleged, was not necessary to the preservation of the property, nor to the maintenance and education of the minor, and has not enured to her benefit; and that from previously accrued revenues, and the amount collected from the Insurance Company, the former tutor had ample means in hand to rebuild the house, without creating new debts, especially without the advice of a family meeting.

SANFORD
v.
WAGUAMAN

The defence raised by the present tutor should prevail, unless the materials furnished by the plaintiff have enured to the benefit of the minor.

It is proper to remark, that the provision of the Code, Art. 343, that the expenses of the minor "ought never to exceed his revenues," has reference to those incurred for his support and education. See the case of *Tegart v. McCaleb et al.*, 10 An. 288. "On tient pour maxime," says Toullier (vol. 2, l. 1, t. 10, N. 1210,) "en cette matière, que la dépense du mineur ne peut en aucun cas excéder son revenu net, déduction faite des charges, rentes et réparations. Mais cette maxime est sans application lorsqu'il s'agit des dépenses utiles; c'est au juge à examiner ce qui est de l'intérêt du pupille, et s'il était du devoir du tuteur de faire la dépense qu'il a faite; et c'est par cette raison qu'on retranche du projet du code un article qui proposait de faire une loi de la maxime, qu'on ne peut faire dépenser au mineur au-delà de son revenu." C. N. 471. But this maxim was incorporated in the Civil Code, Art. 343, with regard to the expenses for the support and education of the minor.

The expenses incurred in this instance are of a different character; and the absolute necessity of rebuilding the Holbrook House is made manifest from the fact that it was the only property which the minor had, and which was susceptible of yielding the revenues necessary to her support and maintenance. At all events, the house was rebuilt, and it is in evidence that, as presently administered upon, it yields a large revenue to the minor. The question then is, can she reap these advantages, and repudiate the contract by which these means are secured to her? Evidently not. 12 An. 676, *Urquhart v. Scott*. If it be true that the minor's former tutor has squandered moneys coming to her, it does not follow that the loss must fall upon the plaintiff, whose claim is an honest one. *Succession of Johnson*, 4 An. 253; *White v. McDowell*, ib. 543; *Hall v. Woods*, ib. 85; *Darse v. Leaumont*, 5 R. 287, &c.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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119	539

NEW ORLEANS v. PIERRE D. POUTZ.

The principle enunciated in the case of *Municipality No. 1 v. Wheeler & Blake*, 10 An. 745, to the effect, that an *ex post facto* law which does not relate to crimes and offences, and does not impair the obligations of contracts, nor divest vested rights, is not unconstitutional, reaffirmed.

APPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
Hunt & Denègre, for plaintiff. *H. Griffon*, for defendant and appellant.

VOORHIES, J. The defendant is sued for taxes on capital, owned and employed by him within the limits of the late Municipality No. One, during a period of three years, 1848, 1849 and 1851. The plaintiff's warrant to levy these taxes, is the Act of 1850, approved February the 7th. The former, however, contends that the Act is retrospective in its character, and was intended to act upon things then wholly past; hence its unconstitutionality.

In the case of the *Municipality No. One v. Wheeler & Blake*, 10 An. 745, where the same question was raised, it was held, that this statute was not unconstitutional. The court said: "It is not an *ex post facto* law, as it has no relation to crimes and penalties. Art. 8 of the Civil Code, which is the creation of

NEW ORLEANS
v.
POUTZ.

the legislative power, cannot control the power that created it. However repugnant to logic and sound policy they may be, retrospective laws in civil matters do not violate the Constitution, unless they tend to divest vested rights, or to impair the obligation of contracts, neither of which can be predicated of the Act in question."

In the case of the *City of New Orleans v. Cordevielle & Lacroix*, 13 An. 268, the same point was decided in the same way, the court observing, that the constitutionality and legality of the law and ordinance, imposing the tax in question, had been fully discussed in the previous case of *Municipality No. One v. Wheeler & Blake*.

This is the fourth time that we are called upon to determine the point of the legality and constitutionality of what is termed the retroactive taxation by the City of New Orleans, under the provisions of the Act of the 7th of February, 1850. The doctrine of *stare decisis* finds, in this instance, its applicability, since we are called upon by the defendant, in order to grant him the relief sought, to reverse a rule repeatedly recognized and acted upon by this court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

CITY OF NEW ORLEANS v. SAMUEL LOCKE.

The decision in the case of *City of New Orleans v. Poutz*, ante p. 853, affirmed.

A tax bill is not an open account; there is no provision of law fixing the period of prescription of a tax bill at five years.

APPEAL from the Fifth District Court of New Orleans, *Eggleston, J.* *Johnson & Denis and Hunt & Denègre*, for plaintiff. *E. H. Durell and G. A. Breaux*, for defendant and appellant.

VOORHIES, J. This case presents the same question of unconstitutionality of retroactive taxation, as the one just decided of the *City of New Orleans v. P. D. Poutz*.

There is, besides, the plea of prescription of three and five years.

With regard to the prescription of three years, the court is referred to the 2d section of the Act relative to prescription, approved 5th of March, 1852. *Ses. Acts*, p. 90. The sections reads :

"All other open accounts, the prescription of which is ten years by existing laws, shall be prescribed by three years."

The imposition of a tax cannot be assimilated to an account, and still less to an open account. When a tax is laid, and the delays granted to question the correctness of the assessment have expired, the matter is closed in that respect. The right to resort to executory proceedings for the collection of both State and Municipal taxes, is a sufficient answer to the point, that a tax is an account, and especially an open account.

There is no provision of law fixing the period of five years for the prescription of a tax.

It is, therefore, ordered and decreed, that the judgment of the District Court be affirmed, with costs.

A. M. MORALES v. B. MARIGNY, her husband.

The matters treated of in the law 29 of title 11 of the 4th Partida concern the *forum*, and have no application in the courts of Louisiana.

Although the parties to a marriage contract have submitted themselves to the laws of a foreign country, as to the interpretation of the contract, the jurisdiction of the tribunals of this State, where they actually reside, must be exercised in accordance with our own rules of law.

The community of acquets and gains between husband and wife did not exist as a part of the general law of Spain; it prevailed in certain provinces of the kingdom, and not in others.

Although by the laws of Spain the ownership of the effects acquired during marriage is governed by the law of the province where the marriage was contracted, and not by that to which the spouses remove, yet this is only to be understood of such effects as are acquired in the former country, and not of such as are acquired in the latter.

The wife, under the laws of Spain, as well as under our laws, is entitled at any time to resume the administration of her paraphernal estate.

A PPEAL from the Third District Court of New Orleans, *Duvigneaud, J.*
P. E. Bonford, for plaintiff, argued :

1. Under the marriage contract, the sums to be received by defendant for plaintiff were paraphernal, and did not enter into the community.

The reasons given by the District Court for adopting this interpretation are conclusive.

The same construction has invariably been given to the contract by the defendant. See his receipt, in which he says that the clause relied on was "*pour la conservation des droits de la dite dame.*" See also his answer in this case, in which he formally admits he is the plaintiff's *debtor* for the sums received by him.

2. The court erred in rejecting from plaintiff's demand—

1st. The sum of \$20,239, being the estimate value of the lands asserted to be valueless from defect of title, and alledged to be included in the receipt for \$50,000, of the 4th March, 1818.

Because there are no legal or sufficient proofs that the transfers taken from *Chapella* or *Jorda* were the lands referred to in *Morales'* letter. *Morales* says they cost him more than \$20,239, whereas these concessions cost but \$6,400.

But more particularly, because these lands *did enure* to the benefit of defendant.

He transferred them *without warranty*, and *without recourse upon him*, to the Citizens' Bank, in part payment of a debt he owed that corporation.

This seems to have been overlooked by the Judge below.

This was in 1845; it was only in 1850, the Supreme Court of the United States, reversing the decision of the District Court, held these grants to be void. See *Reyne's* case, 9th Howard.

2dly. In rejecting the claim for \$2,000, the sum received from *McGuillemard*. The lands which it is said are represented by this receipt were also transferred in like manner as above to the Citizens' Bank, and thus enured to the benefit of the defendant.

3dly. The District Judge also erred in the estimate made of the defendant's general indebtedness.

That the gross amount of his indebtedness is \$88,171 instead of \$57,832 and considerably exceeds the estimate of his means, viz, \$70,611.

For these reasons, the appellee prays that the judgment of the court below be amended, by allowing the sum of \$56,171, instead of \$33,852, and by decreeing the separation of property prayed for, and that thus amended, the same be affirmed.

MORALES
v.
MARIGNY.

Alfred Hennen, for defendant, argued :

1. Plaintiff has no paraphernal property. By the marriage contract, all property given by, or inherited from her father, was to enter into the community. This was a valid and legal stipulation, and should be enforced.

2. By the clause No. 5 of the marriage contract, the Spanish law was to become the rule of decision of all controversies which might arise under, or concerning it.

If the plaintiff has any paraphernal property, she makes out no case, according to that law, by her petition or proof for claiming it.

The defendant is not insolvent, and if he were, by misfortune, but not from his misconduct, the Spanish law gives the wife no right of action. The law of Louisiana cannot be invoked to decide this controversy.

3. The bill of exceptions to the evidence of the plaintiff was correctly taken, and that evidence should be disregarded, though found in the record.

4. The amount of property received from the father of the plaintiff by the defendant was correctly settled by the court below—\$33,832.

5. The defendant is solvent, and able to pay any claim the plaintiff may have against him.

6. The judgment should be reversed, and the plaintiff nonsuited.

Partidas, lib. 4, tit. 11, laws 7, 16, 24 and 29, and gloss. of J. Lopez thereon : 4 Febr., p. 169, No. 9, ed. 1817 ; 5 An. 408 ; 5 M. 83, *Murphy v. Murphy* ; Gomez, Law of Toro 50, No. 44 ; 1 Escriche, 445 ; 9 Howard Rep. 127, *Reynes v. United States* ; 2 Kent's Com. 459 ; Pandects, lib. 23, tit. 3, l. 6, §§ 2 and 12 ; Code, lib. 5, tit. 18, l. 6 ; 8 Rodri., 143 ; Azo, p. 489, No. 17.

BUCHANAN, J. The law 29 of title 11 of the 4th Partida does not apply to this case. First, because it speaks of dowry alone, and this is not a controversy about dowry. Second, because the matters treated of in that law concern the *forum*, and must be governed by the rules of practice in Louisiana.

1. The petition claims \$30,000 for a donation *propter nuptias* ; but this portion of the claim is discontinued. All the remaining claims are paraphernal, and the answer of defendant acknowledges an indebtedness equal to the amount for which judgment is rendered. *Note*, that defendant has discontinued his claim in reconvention for \$6000. But the counsel of defendant argues that paraphernal property, under the Spanish law, is governed by the same rules as dotal *when the dominion of the paraphernal effects is given by the marriage contract to the husband*. That is not the case here. See the reasoning of the District Judge on this point, which is conclusive.

2. The parties submitted themselves, by their marriage contract, to the law of Spain as to the interpretation of their rights and claims upon each other ; but they did not, and could not, oust the tribunals of this State, the place of their intended and actual residence, of jurisdiction of their disputes ; and that jurisdiction is necessarily to be exercised according to our own rules. We must look to Articles 2345 and 2399 of our Code, to know when a restitution of the dowry may be sued for in Louisiana, and not to the 29th law of title 11 of the 4th Partida.

We conclude that, both by the judicial confessions in the answer of defendant, and by the terms of the law 29 of the Partida, as well as by the rules in relation to the jurisdiction, that law is excluded from our consideration.

Second point. But the counsel of defendant asserts that the sums comprised in the receipts of defendant in favor of his wife are not dotal, but effects of the community of acquets ; and he relies upon the expression at the end of the second clause, "*entraren en la comunidad*," "shall enter into the community."

Upon this point, we may remark with the Judge of the court below, that the obligation imposed upon defendant by that same (second) clause of the marriage contract, to give written receipts and acknowledgements for all sums to be re-

MORALES
v.
MARIGNY.

ceived on account of his wife, is inconsistent with the idea that it was the intention of the parties to transfer the ownership of such sums to the defendant.

Again, the community of acquets does not seem to have been part of the general law of Spain ; it prevailed in certain provinces of the kingdom, and not in others. This is perfectly plain from the 24th law of the 11th title of the 4th Partida, p. 532 of Moreau & Carleton's translation, and from the Gloss. of Gregorio Lopez, translated in the notes on pages 533 et seq. From that law and that Gloss. (recognized in Spain as of equal authority with the text,) it likewise appears that, although the ownership of the effects acquired during marriage is governed by the law of the country or province where the marriage is contracted, and not by that of the country to which the spouses remove ; yet this is only to be understood of such effects as are acquired in the former country, and by no means of such as are acquired in the latter. But all the sums received by defendant on account of his wife, were so received in *Louisiana*, many years after their removal to this State. But however this may be, the defendant has estopped himself by his pleadings.

The defendant is concluded by the admissions in his answer, which states as follows : " And further answering respondent says, that deducting the aforesaid sum of \$6,000 from the amount which (from his admissions above) was actually received by him from his wife, to-wit, thirty three thousand seven hundred and nineteen dollars, *he remains her debtor* for the sum of \$27,719 ; for which amount alone she can have judgment against him, if she succeed in showing she is entitled to the separation of property prayed for."

How can defendant be tolerated, after this formal admission of indebtedness to his wife for those sums received, in now asserting, through his counsel, that these sums belonged to himself as head of the community ?

The judgment of the District Court has followed, step by step, the admissions of defendant's answers. He has been allowed all that he demanded, and we are at a loss to perceive of what he complains. For as to the resumption of the administration of her paraphernal estate by the plaintiff, her right is absolute, not only under the Code, but even under the law 17 of the 11th title of the 4th Partida, quoted by defendant's counsel. Moreau & Carleton's Partidas, p. 523.

There is an answer to the appeal, praying for an amendment of the judgment, by allowing to plaintiff the amount of defendant's receipts, rejected by the District Court.

That amount represented some forty thousand acres of land east of the Mississippi river and west of the Perdido, granted by *Morales*, as Governor of Florida, to defendant, after the cession of Louisiana to the United States—grants which have been decided by the Supreme Court of the United States to be invalid *Reyne's case*, 9 Howard.

That amount receipted for, on this account, by defendant, would, therefore, appear to have been properly deducted from the plaintiff's claims. But her counsel contends that this amount has been available to defendant in payment of his debts ; these Florida grants having been assigned by defendant, with a great deal of other property, in October, 1845, to the Citizens' Bank, in payment of a large debt due by defendant to that bank ; which assignment was made expressly without any warranty of title whatever.

But it is extremely difficult, if not impossible, to assign any fixed value to these lands specially, in the *datation en paiement* in question. No estimation is made of any of the various pieces of property and tracts of land, included in the

MORALES
v.
MARIGNY.

same. And we cannot say, therefore, to what extent the defendant has benefited by this assignment of those grants.

Under all the circumstances, we are not prepared to allow the amendment prayed for by appellee.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

NOTE.—Reasoning of the District Judge referred to in the preceding opinion.

Assuming then, for the sake of argument, that this case is to be decided under the Spanish law, although the plaintiff has permitted her husband to receive from others her paraphernal property and administer it, the record furnishes no evidence whatever, that she ever, either expressly or impliedly, gave it to him, with the intention that he should have dominion over it *during the marriage*.

Indeed, as I understand, the defendant's counsel, he relies upon the second clause of the marriage contract, for a very different purpose. He relies upon it as showing, not that plaintiff agreed beforehand that all her future property should pass under the dominion of her husband, temporarily only, and while the marriage might last, but as showing that it was to pass forever into the "*comunidad*," in other words, that she should never have any paraphernal property; that everything coming to her after marriage, should become "*bienes gananciales*," and such, in my opinion, is the only interpretation favorable to the defendant, which the clause will bear.

It was inserted in the contract for such a purpose. I do not know in what light it would be considered by a Spanish tribunal, there being no corresponding obligation on the part of the husband. See Escriche, verbo "*Comunidad de bienes*." But, so far as concerns property accruing to the wife in Louisiana, it would become an important enquiry how far it conflicted with the policy of the State, which makes children forced heirs of their parents, and which is, also, the foundation of some of the Articles of the Code, which regulate the relation of husband and wife.

But in my opinion it was framed for no such purpose. Escriche in his *Diccionario razonado*, verbo "*Bienes gananciales*," after explaining the meaning of the term, observes: "Como en algunos casos pueden suscitarse dudas sobre si ciertos bienes son ó no de esta clase, es necesario tener presente, para mayor aclaracion de algunos puntos que ocurren, que se reputan gananciales los bienes propios del marido ó de la muger que se encuentran de tal suerte mezclados ó confundidos, que no se sabe á cual de ellos pertenecen, y ninguno de ellos puede acreditar su derecho de propiedad, ley 4, tit. 4, lib. 10, Nor. Rec.; por cuya razon, al contraerse el matrimonio suele otorgarse escritura pública en que conste los que tenia cada consorte.

The defendant at the time of the contract had a large property; in pursuance of the custom there spoken of, it is all described. The plaintiff had none; but she expected to receive some after the marriage. Hence the stipulation, for her equal protection, that the defendant should make a written acknowledgement in her favor, every time property should accrue to her during the marriage.

It is evident that such acknowledgements would have been useless to her, if all her property was to become "*bienes gananciales*," since, by such an arrangement, she would loose all separate right to it; and whatever might have been her con-

tribution, and even if she had made none, she would, at the dissolution of the marriage, be entitled to neither more nor less than half of the "*bienes gananciales*."

MORALES
v.
MARIGNY.

This view of the case is confirmed by the 5th clause of the contract which first, in general terms, places the contract under the protection of the Spanish law, and then expressly states that the "*gananciales*" shall be regulated by it.

Property accruing to either spouse by inheritance does not become "*bienes gananciales*" by force of that law. It is more than confirmed by the answer of the defendant, who admits that he owes his wife a very large sum, received on her account during marriage, though denying her right to recover it now.

W. A. HANNEY & Co. v. H. E. BOEHNER.

It is not necessary to state in the affidavit for a writ of arrest, where the defendant resides or has his domicile.

If the case comes within the exception in favor of non-residents, the defendant may plead the exception, and in proof of it, the proceeding in arrest will be set aside, if it was not alleged in the affidavit that the defendant had absconded from his residence.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*

G. L. Bright, for plaintiffs and appellants. *Race & Foster*, for defendant.

VOORHIES, J. This case comes up on a rule as to the sufficiency of the plaintiffs' affidavit to proceedings in arrest of defendant. The latter, in his rule, avers, "that the affidavit made by the plaintiffs to obtain the writ of arrest is untrue and insufficient; that he is at present a non-resident of this State; and further, that he is not on the eve of leaving the State permanently, but on the contrary, he intends returning."

As no evidence was introduced on the trial below, the difficulty is narrowed down to the question of the sufficiency of the affidavit, on the face of the paper.

There is no exception on file, that the plaintiffs have failed to disclose in their petition, "*the place of residence of the defendant, or the place where he lives.*" C. P. Art. 172.

In the absence of an exception to such an omission on the part of the plaintiffs, the court cannot supply the objection.

Is it necessary to state in the affidavit for a writ of arrest, what the residence or domicile of the defendant is? Such is not the requirement of the law. C. P. Arts. 212 and 214, as amended by the Act of 1840, p. 131, s. 2, and by the Act of 1855, p. 42, s. 3.

In the present case, the affidavit was made in strict compliance with the provisions of the Code, as amended by the statute of 1840. We are not called upon, by the pleadings, to express any opinion upon the question as to the defendant's right to avail himself of the exception introduced in favor of non-residents, by the third section of the Act of 1855, "relative to persons arrested and imprisoned for debt."

It was incumbent upon the defendant, if he wished to avail himself of this exception, to prove that he was a resident of another State or territory of the Union; and that proved, the failure of the plaintiffs to state, under oath, that the defendant had absconded from his residence, would have been fatal to the

HANNY
v.
BOELNER.

validity of their proceedings in arrest. *Tallamon & Dessommes v. Antonio Cardenas*, ante p. 509.

This court cannot take for granted, in the absence of proof to that effect, that the defendant was a non-resident in the sense of the Act of 1855.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed, and that this case be remanded for further proceedings; the appellee paying the costs of appeal.

MERRICK, C. J., dissenting. I think the judgment of the lower court ought to be affirmed.

It is made the duty of the plaintiff to set out in his petition the place of residence of the defendant. C. P. Art. 172, No. 3.

This is not done, and the defect is not supplied by the affidavit. The only reference to defendant's domicil (if at all) is upon the note made a part of the petition, wherein is endorsed, "Indianola, Calhoun Co., Texas."

I am of the opinion, that in the harsh proceeding of arrest, it should appear affirmatively by the affidavit, or petition and affidavit, that the plaintiff is entitled to the writ. That does not appear in this case. It may be that the defendant is a resident of Texas, or some other State of this Union. If so, the affidavit is clearly insufficient. The plaintiff cannot, I think, omit the allegation of residence, and then rely upon an affidavit which could only be good in the event the defendant were a resident of this State. C. P. 244.

THOMAS POWELL v. JOSEPH A. GRAVES.

A reconventional demand, although filed at the same time with the answer, and in the same paper, is not a part of the answer.

The Article 2700 of the Civil Code, declaring that judicial admissions cannot be divided, does not apply to admissions in pleadings.

Where the defendant has set up a reconventional demand and neglects to prosecute it, he cannot ask as error, that the judgment of the court below did not pass upon his demand.

A PPEAL from the Second District Court of New Orleans, *Morgan, J. Mott & Fraser*, for plaintiff. *Gaither & McPheeters*, for defendant and appellant.

BUCHANAN, J. This case has been already before this court (9 An. 435) and was remanded for a new trial, upon a bill of exception to the rejection of evidence offered by defendant, in support of the defence of fraud and want of consideration for the bill of exchange sued upon, contained in the answer. The alleged fraud was also the subject of a reconventional demand for damages, charged at \$2,200, appended to the answer. On the return of the cause to the District Court, it was regularly assigned and tried; counsel of record for defendant not present. Plaintiff offered in evidence the draft sued on, and the answer of defendant filed in this suit on the 18th of December, 1852. No evidence was offered for defendant. Judgment having been rendered in favor of plaintiff for the amount of the draft, defendant has appealed.

His counsel argues, that the offer of defendant's answer by plaintiff, made everything contained in that answer, evidence against him; and, consequently, that the judgment ought to have been in favor of defendant for the amount of his reconventional demand against plaintiff. This argument takes for granted, that

the reconvention was part of the answer. But this is not so. Although filed at the same time with the answer, and in the same paper, the reconvention was an incidental demand, or cross-action, instituted by defendant against plaintiff, in consequence of the action which plaintiff brought against him, defendant. C. P. 362, 363, 374.

And although defendant had the option, under our practice, of pleading this cause of action and of asking judgment upon it against plaintiff, either in his answer to plaintiff's suit, or by a distinct and separate suit, (C. P. 377,) yet it is not on that account to be confounded with the answer; which properly only consists of the pleas tending to the rejection of the plaintiff's demand, and not of such as have for their object to establish a claim against plaintiff in favor of defendant. C. P. 179, § 4; 319, § 2; 362.

Considered in this light, the answer offered in evidence by plaintiff, consisted of an admission of the execution of the draft, and an allegation of want of consideration for the same, by reason of false and fraudulent representations of plaintiff, which were the cause of the draft being made. Now, it is well settled that the Article 2700 of the Code, declaring that judicial admissions cannot be divided, does not apply to admissions in pleadings. 18 La. 6; 4 Rob. 144.

The burden of proof of fraud and error in this contract, was upon defendant; failing to prove which, he is bound as alleged in the petition.

It is alleged as error by appellant's counsel, that the judgment of the District Court did not pass upon defendant's reconventional demand; and we are asked to remand the cause for a new trial upon this ground. The District Court did not err. The defendant cannot be allowed to take advantage of his own neglect to prosecute his reconvention, in order to delay the plaintiff in the recovery of his debt, evidenced by the draft on file.

Indeed, the judgment in favor of plaintiff substantially disposes of the cross-action, which has for its basis the defence set up to the action of plaintiff. That defence having failed, there would seem to be an end of the cross-action or reconvention.

Judgment affirmed, with costs.

EMMA CORNER v. JAMES E. ZUNTZ et al.

Where executory proceedings are enjoined on the allegations of fraud, and payment supported by affidavit, an injunction bond is not required to be given.

APPEAL from the Fourth District Court of New Orleans, *Price, J.*
T. W. Collens and M. M. Cohen, for plaintiff and appellant. *P. E. Bonford and H. D. Ogden*, for defendant.

VOORHIES, J. The plaintiff having enjoined executory proceedings taken out by the defendants, upon certain mortgage notes transferred to them by the payee, a rule was taken by the transferee to have the injunction dissolved, on the ground:

- 1st. That the plaintiff gave no bond; and,
- 2dly. That no cause of action is disclosed by the pleadings.

The District Judge sustained the rule on the first ground, and dissolved the injunction.

The plaintiff appealed.

CORNER
V.
ZENTZ.

If her allegations of fraud and payment be taken for true, and that the defendant came by the notes since their maturity, she evidently has a cause of action. Her sworn statements to that effect, also dispense her from furnishing a bond of injunction. The 740th Article C. P. reads: "When the Judge grants an injunction, on the allegation, under oath, of any of the reasons mentioned in the preceding Article, he shall require no surety from the defendant, but he shall pronounce summarily on the merits of his opposition, if the plaintiff requires it, as explained below.

Now, by the preceding Article, a debtor may arrest the sale of his property by alleging: "That he has paid the debt for which he is sued," and also, "that the act containing the privilege or mortgage, is forged," or "that it was obtained by fraud, violence, fear, or some other unlawful means." C. P. 739.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed and avoided; and that the case be remanded for further proceedings according to law; the appellee paying the costs of appeal.

CITY OF NEW ORLEANS v. F. M. FISK.

By the Act of 1852, all suits for unpaid taxes due to the city are brought by filing in court the tax bill and citing tax payers by avertisement. The tax bill must be considered as the petition, containing all the demands to which the plaintiff is entitled by law, and consequently, in such a suit, eight per cent. interest under the statute must be allowed in the judgment, as is prayed for.

A PPEAL from the Third District Court of New Orleans, *Duvigneaud, J.*
W. O. Denègre, for plaintiff. *T. A. Bartlette*, for defendant and appellant.

LAND, J. The defendant has appealed from a judgment against him for the sum of twelve hundred and eighty-eight dollars and fifty cents, with eight per cent. interest thereon from the 7th of July, 1853, until paid. The judgment is for the amount of taxes due by the defendant to the *City of New Orleans*, and the only error assigned is the allowance of 8 per cent. interest by the judgment, on the ground that no interest was claimed in the plaintiff's petition.

Among the provisions in the 35th section of the Act of 1852, p. 52, are the following: "On the first Monday of July of each year, the Treasurer shall put in suit, in a court of competent jurisdiction, all unpaid bills for taxes, and shall, by an advertisement published in the official newspaper of the Council, cite all defaulters to appear in fifteen days from the date of the first insertion of said advertisement, before the respective courts in which said bills are put in suit, and answer to the demand contained in said tax bill; no petition shall be necessary, but the tax bill shall be considered as a petition; and the said advertisement shall be considered as a citation, and no other service of citation shall be necessary. All city tax bills shall bear eight per cent. interest from the first Monday of July of the year in which they are payable."

The tax bill was the petition against the defendant, containing the plaintiff's demands, and must be considered as containing all the demands to which the plaintiff was entitled by law, and consequently, a demand for eight per cent. interest under the statute.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs in both courts.

SUCCESSION OF ELIZABETH HUGHES—JOHN HUGHES et als., opponents.

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The appellate court will judge from the evidence, of the value of the services rendered by the attorney of the succession.

The expenses of litigation between the heirs of an estate as to their respective rights, cannot be made a general charge against the succession.

Under the prayer for general relief in an opposition to an executor's account, and upon proof received without objection, the court may reject the executor's charge for commissions, although the opposition itself does not present such an issue.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
Durant & Hornor, for opponents and appellants. *G. L. Bright, W. O. Denègre* and *M. Grivot*, for appellee.

MERRICK, C. J. Two of the opponents appeal in this case, and the appellee, the executor, by answer, prays that the judgment be amended in his favor, by allowing him \$960 commissions, which were rejected by the Judge *a quo*.

Hughes, Valette & Co. complain of the rejection of all of their claim of \$1,241 allowed upon the tableau, except \$181 70 paid for city taxes. The opposition to *Hughes, Valette & Co.*'s claim was made by the city, and it is now urged that the city had no interest in opposing the claim. We observe, however, that the city is placed upon the tableau as a creditor, and as the fund proposed to be distributed does not pay all the supposed debts, the city has an interest in the controversy, and is, therefore, entitled to be heard upon its opposition. The proof only establishes the item allowed by the District Judge. Sums paid by *John Hughes* unexplained, do not make proof of payment by *Hughes, Valette & Co.*, but we do not think final judgment ought to be rendered against them, as the case now stands.

John Hughes, tutor, opposes the allowance of \$2,500 attorney's fees to *George L. Bright, Esq.*, for services rendered the executor. The inventory amounted to \$44,955 27, and the executor charged commissions on \$38,400. Now, as the attorney's fee appears quite large with reference to the inventory, which shows but few debts due the estate, we shall look into the papers of the succession, they being in evidence, in order to judge for ourselves the value of the services rendered, and in this regard we have the same advantages as the attorneys who have testified to the services, by a similar examination.

We find the attorney has filed the following papers, and obtained orders thereon, viz :

- 1st. Petition for an order on the Notary to produce the will for probate.
- 2d. Petition that the will be registered and executed.
- 3d. Petition that an attorney be appointed to represent the absent heirs, and for an inventory.
- 4th. Petition to homologate the inventory.
- 5th. Petition for sale of household furniture, &c.
- 6th. Petition for sale of slaves, and rule on heirs to show cause why they should not be sold, and a trial of the rule; it being contested.
- 7th. Petition of the executor's attorney in fact, to have his power of attorney registered; and the
- 8th. Petition accompanying a tableau proposing to distribute \$10,657 22, and the tableau having about fifty items including debit and credit sides thereof.

SUCCESSION OF
HUGHES.

There appears to have been no litigation with third persons, except a suit against *Cory*, for which the attorney is allowed ten dollars. The litigation between the heirs as to their respective rights, does not become a general charge against the succession.

In the services, which we have enumerated, there does not appear to have been any matters difficult of solution or require much labor or professional skill.

It does not appear to us that more than seven hundred and fifty dollars ought to be allowed for all the services rendered by the attorney, and this seems to us a liberal and ample compensation.

The will of the deceased gave the disposable portion to the executor. He is not, therefore, entitled to charge commission as executor. C. C. 1679. But it is said the opposition does not make this issue, and, therefore, it cannot be considered.

The opposition contains a prayer for general relief, and the proof which appears to have been received without objection, shows that the executor is not entitled to charge this sum. Judgment may be rendered upon the proof.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be amended, by reducing upon the tableau the amount allowed *George L. Bright, Esq.*, as attorney's fees, \$2,500, to \$750; and that the right be reserved the said *Hughes, Valette & Co.*, to claim in any future proceeding, or by suit, all other items of their account, except for the sum of \$181 70, allowed them; and that such judgment, so amended, be affirmed; the appellees, *R. L. Hughes and City of New Orleans*, paying the costs of the appeal.

W. B. ROBERTSON & BROTHERS v. LAFAYETTE CALDWELL, Commissioner
Second Swamp Land District.

Since the Act of the Legislature of 1858, ordering back into the treasury all funds in the hands of Swamp Land Commissioners, proprietors whose levees have caved in or have been destroyed by the action of the current of the river, cannot require the Commissioner to proceed under the 10th section of the Act of the Legislature of the 16th of March, 1854, to construct said levees without a special appropriation by the Legislature for that purpose.

The general appropriation to the Swamp Land Board, by the Act of the Legislature of 20th of March, 1856, is in contravention of the 94th Article of the Constitution, which declares, "that no money shall be drawn from the Treasury, but in pursuance of a specific appropriation made by law, nor shall any appropriation of money be made for a longer term than two years."

APPEAL from the Sixth District Court of West Baton Rouge, *Beale, J. Barrow & Pope*, for plaintiffs and appellants. *J. H. New*, for defendant.

MERRICK, C. J. This suit is instituted against the Second Swamp Land Commissioner, to compel him, by the writ of *mandamus*, to build the levee on the plantation of plaintiffs in the parish of West Baton Rouge, under the provisions of the tenth section of the Act of the Legislature, approved 16th of March, 1854. Acts of 1854, p. 94.

The District Judge having dismissed the proceeding, plaintiffs have appealed.

The Act under which plaintiffs' claim relief, is an amendment of an Act approved 3d of April, 1853, to reclaim the swamp and overflowed lands donated the State by Act of Congress of 2d of March, 1849.

The tenth section of the Act of 1854, relied on, makes it the duty of the Engi-

ROBERTSON
v.
CALDWELL.

neers in their respective districts, to determine the locality, extent and dimensions of the necessary levees and drains; to drain and reclaim the swamp and overflowed lands; and another clause authorizes the proprietor whose levee has caved in or been destroyed by the action of the current, on the report of three freeholders, who express the opinion that the levee ought to be renewed or repaired by the Swamp Land Commissioners, to notify the Commissioner of the Swamp Land District of the same; and thereupon it is made the duty of such Commissioner to send his Engineer and have the levee constructed.

The last general appropriation to the Swamp Land Board, was made by Act of 20th of March, 1856. Acts of 1856, p. 214, No. 99.

In 1858, the Legislature ordered back into the treasury, all funds in the hands of the Swamp Land Commissioners. See Act, approved 18th of March, 1858, p. 210.

Since this period, the Legislature has made special appropriations for particular works, but none for the work in question.

This suit was not commenced until the 8th of October, 1858, and hence the Legislature had not only withdrawn the fund from the control of the Commissioners, but the 94th Article of the Constitution had taken effect upon the appropriation of 1856. The Article declares, that no money shall be drawn from the treasury but in pursuance of a specific appropriation made by law, *nor shall any appropriation of money be made for a longer term than two years.*

There was, therefore, no error in the judgment of the lower court in refusing plaintiff's demand for want of an appropriation.

Judgment affirmed.

COLE, J., took no part in this case.

CITY OF NEW ORLEANS v. FASSMAN & YANCEY.

The profits realised from the use of a cotton press, drays and slaves, in carrying on the business of a cotton press, are not subject to taxation as "income," under the 3d and 4th sections of the Act of the Legislature of 1856, authorizing the city of New Orleans to tax real and personal property.

APPEAL from the Sixth District Court of New Orleans, *Howell, J.*

W. O. Denègre, for plaintiffs. *T. J. & A. G. Semmes*, for defendants and appellants.

COLK, J. This is a suit for taxes alleged to be due to the city of New Orleans.

The only part of the tax bill which is opposed in this court, is that which assesses the income of defendants.

There was judgment for the city, and defendants have appealed.

"It is admitted that the defendants have no other joint property than the lease of a cotton press, the slaves engaged in the business of compressing cotton, the machinery incident thereto, and the drays, carts, mules, and implements connected with that business; that they are not the owners of all of the real estate on which the cotton press is situated, but of a portion thereof, viz, one of the yards; that they have no income except what is derived from this business, and which is the income upon which the tax is based."

NEW ORLEANS
v.
FARMER.

The material question is, whether the revenues derivable from a cotton press are "income," within the meaning of the Act of 1856, "to authorize the corporation of the city of New Orleans, to tax real and personal property." Session Acts of 1856, p. 109.

This Act declares : That all real and personal property located within the corporate limits of the city of New Orleans, shall be liable to taxation, subject to the exemptions specified in this Act.

Sec. 2. That the term real property, as used in this Act, shall be construed to include land, slaves and buildings, machinery and structures of every kind, erected upon or affixed to the same.

Sec. 3. That the term personal property, as used in this Act, shall be construed to include all household furniture, silver plate, goods, capital, incomes, public stocks and stocks in corporations, moneyed or otherwise, and, generally, all property which is not real.

Sec. 4. That the term income, as used in this Act, shall be construed to include and be confined to all monies, salaries, wages, pay, commission, brokerage and fees received in compensation of services or labor rendered, and all revenues and dividends received upon stocks in money corporations not taxable under this Act.

We are of opinion that it was not the intention of the Legislature to tax real property under the term of land, slaves, &c., and then to tax under the term of incomes the profits realised from such land, slaves, &c.

It would be double taxation, first to tax property to the extent allowed by law, and then to tax the profits derived from such property.

The tax of three hundred dollars on income, but which is in reality a tax upon the revenues of the cotton press, cannot be allowed, because the compensation for compressing cotton is derived, not from the *personal* services of the owners of the press, in the sense of this statute, but from the use of the press, drays and slaves used in carrying on the business of a cotton press, which press, drays and slaves, have been already taxed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; and that the plaintiff recover from defendants eighty-two dollars* and fifty cents, with one per cent. per month interest thereon, from the thirteenth day of July, 1858, until paid, and costs of the lower court, with privilege on the property described in the tax receipts sued on, for payment of the same; and that plaintiff pay the costs of appeal.

THOMAS RIDGE v. CHARLES E. ALTER et al.

Where a defendant is sued as silent partner in a commercial firm, service of citation on the Clerk of the firm is not sufficient.

Where there is no proof of the authorization of an attorney to defend a suit, and such authorization is denied on oath by the defendant who was not legally cited, a judgment against the defendant will be annulled.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
J. N. Brickell, for plaintiff and appellant. *Durant & Hornor*, for defendant.

RIDGE
v.
ALTER

COLE, J. Plaintiff sues to annul a judgment on two grounds : first, because he was never cited ; and second, because the attorney who appeared for him and defended the suit, was not authorized by him. The injunction obtained by plaintiff against the execution of the judgment was dissolved, and he has appealed.

It appears that *Charles E. Alter*, in 1857, sued *José Salé* for a bill of groceries, and alleged that at the date of the sale, *José Salé* transacted a commercial business with *John Ridge*, as a silent partner, and was liable with *Salé* for the bill, and asked for judgment against both. *Alter* obtained judgment, but by consent it was set aside, and a new trial granted.

Alter then filed a supplemental petition, in which he alleged that *Thomas Ridge*, a brother of the said *John Ridge*, was also a partner with *Salé* at the time the articles in the bill were sold. There was judgment *in solido* against *Salé* and *Thomas Ridge*.

An execution having issued, it was arrested by the injunction sued out by *Thomas Ridge*, in the present case.

I. The return on the citation to *Thomas Ridge*, is as follows :

"Received, May 5th, 1857, and on the 6th day of the same month and year, served copy of citation and original, with supplemental petition, on *Mr. Thomas Ridge*, through his brother, *John Ridge*, and who accepting personal service for his brother, *Thomas Ridge*, and he being [***] at the time of service.

"WILLIAM ALBERT, Deputy Sheriff."

[Between "being" and "at" in the return, there is a clerical omission]

There is no proof that *John Ridge* was authorized to accept service for *Thomas Ridge*.

Thomas Ridge has annexed to his petition of injunction his oath, that he was never cited, and never authorized any attorney to defend him in the suit.

The service on *John Ridge*, considered as a Clerk, is not good, because *Thomas Ridge* is sued as a silent partner, and firms alone can be cited in that manner. C. P. 198 ; 1 An. 146.

II. *Mr. Elliot*, the attorney who filed the answer for *Thomas Ridge*, states, that *John Ridge* handed him the petition, and said it was at the request of his brother, *Thomas Ridge*, and Judge *Beecher* also informed him that *Thomas Ridge* wanted him (*Elliot*) to attend to the suit with him.

There is no proof that *Thomas Ridge* ever directly employed *Mr. Elliot*, and he has denied it under oath.

There is no doubt that *Mr. Elliot* considered himself justified, under the circumstances, in filing the answer, but this case shows the necessity of a personal authorization by the party, before an attorney appears for him.

As there is no legal proof of authorization of the attorney, and as the citation is void, the judgment must be reversed.

It is, therefore, ordered, adjudged and decreed, that the judgment be avoided and reversed, that the judgment of *Charles E. Alter* against plaintiff, signed in December, 1857, in the Sixth District Court of New Orleans, be decreed to be null and void ; and the Sheriff of the parish of Orleans, and said *C. E. Alter*, are perpetually enjoined from executing said judgment against *Thomas Ridge*. It is further ordered and decreed, that *C. E. Alter* pay the costs of both courts in the present suit.

C. H. DAVIS v. H. C. MILLAUDON, Agent.

An order of seizure and sale may be enjoined on the ground of a deficiency in the quantity of land sold, which would entitle the vendee to a diminution of the price.

A tender by the vendor of other lands to supply the deficiency in the quantity of land sold, is an admission of the deficiency, and such admission is not avoided by the declaration in the plea of tender, that the party does not thereby waive the benefit of his plea of the general issues.

A claim in *diminution of price* is not a demand in compensation or set off, in the legal sense of the term, and may be set up as a ground of defence by the vendee when sued for the price, without his being obliged to resort to a separate action.

The maxim of law "*quæ temporalia, etc.*" has survived the general repealing Act of 1828, and although the action *quantum minoris* be prescribed, the vendee, when sued for the price, may resist the payment on the ground of a claim to a diminution of the price.

A PPEAL from the District Court of the Parish of St. Bernard, *Foulhouze, J. Geo. S. Lacy* and *R. A. Upton*, for plaintiff and appellant. *P. A. Ducros, Jr.*, for defendant.

LAND, J. This is an injunction suit, to arrest the execution of an order of seizure and sale, sued out for the collection of a mortgage note given in part payment of the price of a plantation and slaves purchased by the plaintiff from one *Benjamin L. Millaudon*. The alleged grounds for the injunction are, the danger of eviction by reason of an outstanding title, and a deficiency in the quantity of the land sold, exceeding one-twentieth part, which diminishes, as alleged, the value of the estate in the sum of, at least, sixteen thousand dollars.

The first ground of injunction was decided recently by this court, in the case of the plaintiff, *Charles S. Davis v. Laurent Millaudon*, and adversely to his pretensions. It is, consequently, only necessary to consider the second alleged ground for the injunction.

The defendant, in his original answer, avers that the sale to the plaintiff was a sale *per aversionem*, in which the quantity of acres mentioned is of no importance, and pleads the prescription of one year to the plaintiff's demand for a diminution of the price. In a supplemental answer, the defendant pleads a peremptory exception to the plaintiff's petition, on the ground that his demand for a diminution of the price is an unliquidated claim, which cannot be pleaded in compensation of a debt evidenced by an act importing confession of judgment, nor can arrest a writ of seizure and sale thereon. He further pleads, (though denying the right of the plaintiff to call upon him for a diminution of the price, for the reasons set forth in his supplemental and original answers,) that he purchased, on the 19th of July last, some two hundred and fifty acres of land, in the rear of that portion of the plantation which lies on the right bank of the bayou, which he hereby tenders to said plaintiff, to be considered as forming a portion and parcel of his plantation.

This supplemental answer was filed on the 27th of September, 1858, and on the 7th of October following, the plaintiff made an application for a continuance, on the grounds of the absence of a material witness, and that further time was necessary to enable him to inquire into and examine the defences that he may have to the demand tendering new lands in satisfaction of his claim for diminution of price; and in his affidavit, deposes, that it is important for him to ascertain, 1st, whether the title to the land tendered is good and sufficient in law :

DAVE
v
MILLAUDON.

2dly, if the title be good, whether or not, the land called for by the same can be found; 3dly, the location of the same; and 4thly, its quality and character. He further deposes, that if time be granted to him, he can show upon the trial of this cause, that there is not a legal title; that the quantity of land covered by such title cannot be found; that its location is not such as would authorize the defendant, under any circumstances, to tender the same; and that it is continually under the waters of the gulf, marshy, and of but little value. The application for the continuance was refused, for the reason stated in the bill of exceptions, that "*the court considered that a sufficient legal ground for such continuance was not set forth in the affidavit.*"

In our opinion, the District Judge erred. If a vendor has the right to tender other lands in satisfaction of a vendee's demand for a reduction of price, in consequence of a deficiency in the quantity of land sold, the tender should be of lands of the same quality and value as those actually conveyed, and to which the vendor has in law a good and sufficient title. It cannot therefore be said, that the plaintiff's affidavit set forth no legal grounds for a continuance, because the matters set up in the affidavit were material and pertinent to the issue raised by the plea of tender of other lands. The plea of tender was an admission of a deficiency in the quantity of the land sold, and was inconsistent with the plea of the general issue; and this inconsistency was not avoided by the defendant's declaration, that he did not intend to waive the benefit of the latter plea. A tender in open court of the thing demanded, or its equivalent, is certainly an admission that the thing itself is due, and is consequently inconsistent with an averment, or plea, that the thing is not due. It has ever been held, that the plea of payment is inconsistent with a general denial, and a plea of tender cannot be less so.

On the trial of the cause, which took place on the same day, the plaintiff's counsel offered evidence to prove all the facts necessary to sustain his demand for a diminution of price, and the defendant, by his counsel, objected thereto, upon the grounds that the claim in diminution was not a liquidated demand, which could be set off against an act importing confession of judgment, or could arrest the execution of a writ of seizure and sale issued thereon. The court rejected the evidence, for the reason stated in the bill of exceptions "*that the plaintiff should resort to a separate action.*" The District Judge erred. The claim in diminution of price was not a demand in compensation, or set off, in the legal sense of the term. Compensation presupposes and admits the existence of a debt due. A claim in diminution of price is a denial of the vendor's right to recover the *whole amount* claimed on the ground of a failure of consideration, and is consequently of a very different nature. It has already been decided, that a vendee, when sued for the price by the vendor, may plead in his defence, by way of exception, that the consideration has failed, through a deficiency in the quantity, or through the redhibitory defects of the thing sold. *Thompson v. Milburn*, 1 N. S. 468; *Davenport v. Fortier*, 3 N. S. 695; *Bushnell v. Brown*, 4 N. S. 500. Upon the authority of these decisions, the plaintiff had the right, as vendee, when sued for the price by the vendor, who is the defendant in this action, to claim a diminution of the price, and was not bound to institute a separate action for that purpose.

The defendant's counsel, however, contends, that the claim in diminution of price was prescribed by the lapse of one year before the commencement of this suit by injunction, and is therefore extinguished. He further contends that the rule of the Roman law, *quæ temporalia sunt ad agendum, sunt ad excipiendum*

DAVIS
v.
MILLAUDON.

perpetua, has been repealed, and no longer forms a maxim in our jurisprudence. We find that it has been otherwise considered by our predecessors, and recognized as a maxim of law which survived the great repealing Act of 1828, and which they have declared applicable to a certain class of cases well defined in the opinion of Mr. Justice Slidell in the case of *Boeto v. Laine*, 3 An. 141. The vendor's right of action for the recovery of the price, and the vendee's right of action for diminution of price, arise out of the contract of sale of the plantation and slaves now in controversy, and the claim for diminution is, consequently, in the language of the commentators, *visceral*—necessarily attached to the vendor's action for the price, and inseparable from the contract of sale itself. We are therefore of the opinion, that the vendee's claim for diminution comes within the operation of the rule, *quæ temporalia*, and, that being sued for the price, he may avail himself, as a matter of defence, of a deficiency in the quantity of the land sold, though the action *quanti minoris* be prescribed. See 1 N. S. 468, 3 N. S. 695, 4 N. S. 500, 2 An. 546, 3 An. 141.

It is, therefore, ordered, adjudged and decreed, that the judgment be reversed, and the cause remanded to the lower court for further proceedings according to law, and that the defendant pay the costs of this appeal.

Note.—The pleadings and issues are different in this case from those in the case of the plaintiff against *Laurent Millaudon*, referred to in the foregoing opinion.

ALFRED KEARNEY & Co. v. ROBERT FENNER & Co.

Suit being brought against *R. F. and C. W.*, as composing the commercial firm of *R. F. & Co.*, and the petition and citation served on *R. F.* alone—*Held*: That the service of citation was sufficient as to both partners.

In a suit against the maker of a promissory note, in confirming a judgment by default, it is not necessary that the signature of the maker should be proved.

Where the name of one of the partners, who is sued on a note of the firm, does not appear either in the firm name or in the return of citation, the fact of his being a partner must be proved, to entitle the plaintiff to confirm a judgment by default against him.

APPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
G. L. Bright, for plaintiff. *M. M. Cohen and Lea & Marr*, for defendants and appellants.

BUCHANAN, J. This action was instituted upon five promissory notes, payable to the order of plaintiff, and signed "*R. Fenner & Co.*"

The petition alleges, that the firm of *R. Fenner & Co.* is a commercial partnership composed of *Robert Fenner* and *William Crawford*.

Citation issued to "*R. Fenner & Co.*," and was served upon *R. Fenner* in person.

Judgment by default was rendered and confirmed.

The only evidence offered to confirm the default was "the five notes sued upon in this case."

The judgment was against *Robert Fenner* and *William Crawford* in *solido*. They have separately appealed, and assign for error, that the return of citation was insufficient to justify the default; and that the evidence offered was insufficient to justify the final judgment.

KEARNEY
v.
FENNER.

We think the return of the citation served on *R. Fenner* in person justified the judgment by default. The Code of Practice, Art. 198, provides, that when a suit is brought against a commercial association trading under a title, or as a firm, service of citation is to be made *on any of the partners in person*, or upon their clerk or agent, at their place of business.

As to the confirmation of the default, Judge Rost being the organ of the court, it was decided in *Davis v. Davis*, 8 An. 91, that in a suit against the maker of a promissory note, in confirming judgment by default, the signature of the maker need not be proved.

It is argued that this decision has been overruled by the case of *Tillett v. Upton*, 12 An.; but, on examination, such does not appear to be the case. *Tillett v. Upton* was not a suit against the maker of the note, but against his administratrix. The Article 324 of the Code of Practice, which requires the express acknowledgement or denial of the signature by defendant, does not apply to such a case; for that Article speaks of actions upon obligations alleged to have been signed by the defendant in the action. And as to the case of *Davis v. Davis*, which was grounded upon the Article 324, it is not so much as mentioned in the decision of *Tillett v. Upton*.

The case of *Young v. Talbot*, 12 Rob. 518, quoted by Judge Voorhies in *Tillett v. Upton*, rather favors the doctrine of *Davis v. Davis*; for no objection is made therein to want of proof of signature of the maker of the note (defendant in the suit), but of that of the payee and endorser, the plaintiff being endorsee.

It is believed that the case of *Davis v. Davis* has been generally acted upon as a rule of practice in the courts of the first instance, ever since its publication in the Reports; of which, indeed, the present case furnishes an example. We have given full consideration to the objections urged against that decision of our predecessors, and do not find it necessary or expedient to disturb it.

We cannot, however, stretch the admission implied from the judgment by default, to the allegation contained in the petition, that the appellant, *William Crawford*, (whose name does not appear in the firm, nor in the return of citation,) was a member of the firm of *R. Fenner & Co.* This is a fact which should have been proved, under the circumstances, before entering up final judgment against him individually.

It is, therefore, adjudged and decreed, that the judgment appealed from be affirmed, as to the appellant; *Robert Fenner*; that it be reversed as to the appellant, *William Crawford*, and that there be judgment in favor of said *Crawford*, as in case of nonsuit; that the costs of the District Court be borne by defendant, *Fenner*, and those of appeal one-half by said *Fenner*, and one-half by plaintiff.

MERRICK, C. J., dissenting. I adhere to the decision of *Tillett v. Upton*, 12 An., which I understood as overruling the case of *Davis v. Davis*.

J. S. DAVID AND J. F. LIVAUDAIS v. MUNICIPALITY No. Two.*

A market, though destined to a public use, is not necessarily public property.

A dedication to public use is inchoate only, until after its acceptance, which acceptance may be shown by authentic act or the use of the property in the manner and for the object designated.

The designation for a public purpose of a space of ground upon a plan is not of itself evidence of an intention to dedicate, the essence of the dedication consisting in such case in the assent of the proprietor to the use designated.

APPEAL from the Second District Court of New Orleans, *Lea, J.*
Geo. Eustis, Jr., and A. Pitot, for plaintiffs. *R. Hunt, T. R. Wolf and J. Livingston*, for defendants and appellants.

BUCHANAN, J. This case is identical in principle with those of *Livaudais v. Municipality No. Two*, 16 La. 509; *Livaudais & David v. same*, 5 An. 8; *Municipality No. Two v. Palfrey*, 7 An.; *A. Xiques et al v. Bujac et al.*, 7 An.

For the reasons assigned by the Judge of the lower court, it is ordered, adjudged and decreed, that the judgment appealed from be affirmed, with costs in both courts.

OPINION OF THE DISTRICT JUDGE.

In this case, both parties trace their alleged title to a common source. The plaintiffs and intervenors claim to be declared the owners, and as such to be put in possession of a portion of ground on which the defendants have erected a market, situated at the head of Market Street, between St. James and Richard Streets. The defendants allege that the property claimed by the petitioners belongs to and is vested either in the defendants or in the public, and is under the administration of the defendants. That said property was dedicated to the public, to be used as a market under the regulations of the defendants. By a supplemental petition the plaintiffs ask, that in case the court should be of opinion that the Municipality have the right to hold said property as a market, that they be condemned to pay to petitioners the value thereof, with interest, &c. There is but one point on which this case can be distinguished from those in 5 An., p. 8. and 16 La., p. 509. The piece of ground in controversy was part of the land laid out in lots and squares on an original plan made by *B. Lafon* in 1807. It was marked on the plan with the word "marché" on the space designating the parcel of ground claimed in the petition. In the cases referred to it was held that the words "*Colisée*" and "*Eglise de l'Annonciation*" could not be construed as constituting a dedication to public use, as places of public worship and public amusement are invariably owned as private property, and the question now presented for solution is, whether at the time the plan was made, a market, situated on the spot in controversy, was or was not susceptible of private ownership. This is not the only question presented under the pleadings, but an affirmative decision on this point brings it clearly within the scope and application of the principles laid down in the cases above referred to. There is certainly nothing in the uses to which a market is applied, which is inconsistent with private ownership. It is

* This case was omitted in the Reports of 1855.

true, markets are public places, so are theatres and churches. The fact that property is used for purposes of public convenience or necessity does not divest the owner of his title, nor invest it in the public. The public hydrants are the property of a private corporation. The city is lighted by a private company. Until very recently, two of our municipal halls were owned by private individuals. The building in which the courts are held belongs to a private corporation, and it has been recently decided that even the Parish Jail is the exclusive property of the First Municipality, the other two municipalities paying rent therefor as lessees. If a jail, a courthouse, or a municipal hall be susceptible of private ownership, why may not a private individual own a market? If water and light may be supplied to the public by individuals for their private emolument, why may not food also? If I am not mistaken, this is actually done at present. The markets, though owned by the city, are farmed or leased out to individuals. The fact that the word "marché" is figured on the space where the ground in controversy is situated, does not then of itself constitute a dedication, so far as to operate as a divestiture of title. It is not necessarily public property. I do not wish to be understood as laying down the proposition, that a dedication of a piece of ground for any of the uses above mentioned may not be made by an individual, that is not the issue presented. The questions to be determined in this case are, 1st, whether any dedication was made, and 2d, whether a destination to such a use as a market necessarily operates as a divestiture of title. The Civil Code is silent, so far as my examination has extended, on the subject of a transfer of the title to *private property* by dedication, but it is expressly laid down in the old as well as the new Code, that "property can neither be acquired nor disposed of gratuitously, unless by donations *inter vivos* or *mortis causa* made in the forms established for one or the other of those acts." It is true that *Lafon's* plan is of an earlier date than either of the Codes, but it does not appear that the previous legislation differed in this respect from that adopted by the Codes. Perhaps, however, the validity of a transfer of private property by dedication ought not to be questioned after the well considered decision of the Supreme Court in the case of the *Municipality No. Two v. The Orleans Cotton Press*, and that in the case of *Livaudais v. Municipality No. Two*, 16 La. The court, in the first case alluded to, appears to have adopted the doctrine of the Supreme Court of the United States as explained in the case of the *City of Cincinnati v. White, lessee*, 6 Peter's Rep., that no particular form or ceremony is necessary in the dedication of land to public use, all that was necessary being the assent of the owner of the land and the fact of *its being used for the purposes intended* by the appropriation. Judge Martin, in his dissenting opinion in the case first quoted, says that the dedication required no other evidence than the plan and the use of those places by the public. The other Judges, though they differed from Judge Martin on other points, appear to have concurred in this definition of a dedication. It is evident that they regarded it as an agreement, though an implied one. The intention to *dedicate* was to be inferred from the plan designating what was to be used, and the assent given to the actual use of it for the purposes intended. In the case at bar, it may therefore be assumed, that, had the place in controversy been used by the public for the purpose designated therein, without dissent on the part of the original proprietors, this fact, taken in connection with the designation on the plan, would have constituted an effectual barrier to their present claim, but this does not appear to have been the case. On the one part, no attempt was made to use the property in question as

DAVID
V.
2d MUNICIPALITY.

DAVID
v.
THE MUNICIPALITY.

a market for more than forty years after the alleged dedication, and on the other, this first attempt thus to use it, so far from being assented to by the plaintiffs, was met by a protest which was promptly followed by litigation. Reciprocal assent is of the essence of every agreement. If the object for which the alleged dedication was made had been one which in its very nature excluded the idea of private ownership, as for a quai, port, street or public square, (though the parks in some of our cities are private property,) perhaps such designation might have been considered as evidence of an intention to give, which required no formal acceptance, though the decision in the case of *Livaudais v. Municipality No. Two*, 16 La., clearly indicates the opinion of the court, that where there is a dedication, it is inchoate only until the acceptance of the party for whose benefit the dedication was intended, the court probably considered the use of the property for the purpose designated as an acceptance.

The conclusions to which my examination of this copious topic has led me are: 1st, that a market, though destined to a public use, is not necessarily public property, and 2d, that a dedication to a public use is inchoate only until after its acceptance, which acceptance may be shown by authentic act, or by the use of it in the manner and for the object designated; 3d, that the designation for a public purpose of a space of ground upon a plan, is not of itself evidence of an intention to dedicate, the essence of the dedication consisting in such case in the assent of the proprietors to the use designated. I do not consider that the question of servitude is presented by the pleadings. It may be true, as the counsel for the plaintiffs have themselves suggested, that the purchasers of lots in reference to this plan may have acquired rights upon the property in controversy, and that the plaintiffs have renounced the right of appropriating the property for any other purpose than a market; but those rights, whatever they may be, cannot be acted on in a suit to which they are not parties. Whether a servitude has or has not been established, and if it has, how it is to be enforced; whether it has been lost by non-usage, misuser or prescription, are questions which cannot be determined in the present litigation, the question of title being the only one presented by the pleadings. The plaintiffs have asked in their amended petition, that the property be recognized as belonging to the petitioners and intervenors in full ownership, in the proportions claimed, with the privilege of using the same as a market for their private benefit and emolument. If they are the owners of the property, they are at liberty to make any use of it which is not in violation of the rights of others, or not in contravention of the municipal ordinances. Should they make any use of it in violation of either, it will be the right of the parties interested to seek redress by law. At present, I can see no necessity for the interference of the court; the judgment of the court should, in my opinion, recognize the petitioners as owners of the property claimed, without prejudice to the rights, if any they have, of the defendants, or any parties interested, to demand (after their rights thereto shall have been judicially ascertained) that the said property shall be occupied as a market, in such manner, and subject to such restrictions, as may be hereafter determined.

CITY OF NEW ORLEANS v. HEIRS OF GUILLOTTE.*

A market house is not a *locus publicus*.

The police of markets under the municipal administration is not inconsistent with their being the subjects of private ownership.

APPEAL from the Fifth District Court of New Orleans, *Augustin, J.*
J. Livingston, for plaintiff and appellant. *F. Buisson* and *R. N. Ogden*, for defendants.

BUCHANAN, J. The plaintiff and defendants are joint owners of the Magazine Street Market, at the corner of Magazine and St. Mary Streets, and of the ground upon which said market is situated, in certain proportions stated in the petition and answer filed in this cause. The plaintiffs are desirous of terminating this joint ownership by a partition, for which purpose they institute this action.

In their petition, they allege that the property cannot be divided in kind, and pray that it be sold at public auction, and the proceeds of sale divided between the parties in the proportion of their respective interests.

Experts appointed by the parties and by the court have reported that the property cannot be divided in kind.

The defendants object to a partition, on the ground that the property in question is *hors de commerce*, being destined to the public use; and in an amended answer allege, that a certain former judgment of the Third Judicial District Court, assigning the respective portions of the parties in this property, was in fact a final partition of the Magazine Street Market between them.

This latter position, which is a sort of plea of *res judicata*, is manifestly untenable. The judgment of the District Court referred to was the very opposite of a partition; for it established, instead of dissolving, a joint ownership, and regulated the administration of the joint property.

The plea that this property is out of commerce, and cannot be the object of a sale, appears to have prevailed with the court below, by whose judgment the plaintiffs are referred to an action of expropriation, under Art. 2604 and following of the Civil Code, as their proper remedy.

From this judgment plaintiffs have appealed; and their counsel has judiciously observed, in argument, that if it be true that the property is already dedicated to public use, the action of expropriation would be evidently unnecessary, and the provisions of the Code cited, inapplicable.

But we have not been able to concur in the views of this case which have brought the District Court to the conclusion that the present action cannot be maintained.

It appears to us erroneous to style the Magazine Street Market a *locus publicus*. Market houses are not included in the enumeration of *public things*, contained in Arts. 444, 445 and 446 of the Civil Code. A market house may very well be the subject of private ownership. In many cities butcher's meat, fish and vegetables are sold in shops, like any other commodity. Even in New Orleans, there are to be found market houses which belong to individuals. The po-

* This case was omitted in the Reports of 1856

nice of markets is, every where, an important part of the municipal administration, from their intimate connection with the public health. The first section of an Act to amend the Act to incorporate the city of New Orleans, approved March 14th, 1816, (Bullard & Curry, p. 101,) gave power to the Mayor and City Council "to establish one or more market places, and to determine the mode of inspection of all comestibles sold publicly, either in said market or markets, *or in other places* ; to regulate everything which relates to bakers, butchers, tavern and grocery shop keepers, and other persons keeping public houses, draymen, horse-drivers, water carriers, and slaves employed as day laborers." But from this general power of establishing markets and regulating butchers, it does not seem to follow that the city corporation must needs be the owner of all the market houses within its limits, any more than of all the bakeries and taverns, whose occupants are subjected to the same municipal supervision, or, in the language of the District Judge, "that the city alone could become the bidder and purchaser of the Magazine Street Market at a public sale, to effect the partition prayed for." The plaintiffs make no such pretension. It would be in fact glaringly inconsistent with the prayer of their petition, which is for a licitation ; and there can be no licitation without a competition of bidders. A licitation where there should be only one party privileged to bid, would be a mockery of the forms of law, and a fraud upon the rights of the defendants.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and that there be judgment of partition of the property described in the petition, by public sale to the highest bidder, after legal advertisements, and upon such terms as the parties shall agree ; or, in case they cannot agree, the terms to be fixed by the District Court according to law. It is further decreed, that the costs be equally divided between the parties, plaintiff and defendant, one-half to each, with the exception of the costs of this appeal, which are to be borne by defendants and appellees.

LIST OF CASES NOT REPORTED.

NEW ORLEANS.

Murphy v. Crafts.	Sturgess v. Lyons.
Price, Convers & Co. v. Merritt, Risley & Co.	Caldwell v. Prendegast.
Soulie v. Brown, Johnson & Co.	New Orleans v. Tobin.
State v. Judge Second District Court—	Lanauze v. His Creditors.
D'Hemecourt praying, &c.	Stewart v. Harper.
Lafaye v. Harris & Morgan.	Fluker v. Lyons.
Dolsen & Co. v. Brown & Son.	Carl v. Stevens.
Graham v. Egan.	Babington v. Bradley.
Boyd v. Davis.	Babington v. Wilder.
East Pasragoula Hotel v. West.	Primrose v. Lyons.
Coit v. Abbott.	Hardesty v. Dunn.
Leonard & Co. v. Jenkins & Co.	Succession of Hobgood.
Grice v. Matthews.	Rowland v. Doblings.
Jackson v. Maynard.	State v. Green.
Duford v. Gentland.	Philemon v. Barrow.
Desrayaux v. New Orleans.	Succession of Patterson.
Harley v. New Orleans.	Williams v. Conant.
Frost & Peirce v. Johnston.	Upton v. Walsh.
Love & Savage v. Voorhies.	Kemp v. Wilson.
Rennison v. Fisk.	Williams v. Oberry.
Beer a. His Creditors.	Carter v. Clinton R. R.
Goldsmith, Haber & Co. v. Hart.	Dunbar v. Sheriff.
Block & Gelbach v. Saloy.	Stephens v. Stephens.
Golding v. New Orleans.	Mahin v. LeBlanc.
Shepherd v. Sherman.	Currie v. E. H. Durell.
State v. Rouche.	Coolidge v. Twichell.
Frellsen, Stevenson & Co. v. Adams.	Woodlief v. Huling.
Succession of Comer.	King v. Neely.
Provosty v. Dumoulin.	Williams & Preston v. Tate.
State v. Judge of Ascension.	Morgan v. Merkel.
Ecrot v. New Orleans.	Claisac v. His Creditors.
Maddox v. Steamboat Laurel Hill.	Gernon v. Deverges.
Succession of John Walker.	Guibertrand v. Campbell.
Lagman v. Plaisance.	Rideaux v. Dury & Roche.
Heine v. Satterfield.	Bermudez et als. v. Durell et als.
Rensella v. New Orleans.	Field & Co. v. New Orleans Bone Black Company.
Williams v. Levasseur.	Person & Co. v. Wright, Williams & Co.
Perkins v. Shelton.	Surgi v. Calder.
Lange & Grave v. Klingender Bros.	Fisk v. Todd & Gandolfo.
Treche v. Vieknor.	Shultz, Hadden & Latting v. Belknap.
Folliet v. Graillhe.	Rousselet & Brien v. Rusk.
Dodeman v. Clement.	New Orleans v. Grabeau.
Toussaient v. Cambot.	New Orleans v. Errera.
Vivey v. Jourmillon.	New Orleans v. Miguel.
Andrews v. Beard.	New Orleans v. Mary.
Sutton v. Calhoun.	New Orleans v. Leufant.
Roberts v. Scott.	New Orleans v. Mullen.
Forest v. Miller.	New Orleans v. Neele.
Hensley v. Moore.	New Orleans v. Kuntz.
Priestly & Bein v. C. M. Fogg et als.	New Orleans v. Rivolet.
Metoyer v. Carreta.	New Orleans v. Otrand.
Thompson v. Provosty.	

New Orleans v. Wollox.
 New Orleans v. Pochelu.
 Castello v. Blasco.
 Walker v. Kimball.
 Succession of Cornelius.
 Atkinson, tutor, v. Dixon.
 Fernot v. Carretta.
 Gilbert v. Hollinger.
 Buchanon, Carroll & Co. v. Steamboat
 Young.
 Succession of Crozat.
 Hanald v. Frederickson.
 Lombard v. Steamboat Persian.
 State v. Wilson, (mand.)
 Smith v. Hull & Jones.
 Walker v. Woodruff.
 Lapene & Ferre v. Riche.
 18 cases Master & Wardens v. Steam-
 ships.
 Durand, Roquest & Co. v. Gilly.
 Maseca v. Musich.
 Elliott v. Grant.
 Salter v. Merchants' Ins. Co.
 Cox v. Bayou Sara Co.
 Todd v. Washburn.
 Rice v. Rice.
 Bienvenue v. Buisson.
 Sterry v. Hammett.
 Bettles v. State Treasurer.
 Zeigler v. State Treasurer.
 Hemerich v. State Treasurer.
 Zacharie v. Brewster.
 Jones v. Levee Commissioners.
 Therurer v. Duprat.
 Hedrick v. Kron.
 Edwards v. Daley.
 State v. Conner.
 Fulton v. Martin.
 Morton v. Wilde.
 Davidson v. Lacroix.
 McKenzie v. His Creditors.
 Burrows & Ostern v. Greenwood.
 Fairbanks v. Walker.
 same v. same.
 Layton v. White.
 Trioou v. Carondelet Canal.
 Desban v. Steel.
 Twitty v. Smith.
 Jacquet v. Oppenheim & Glorisky.
 Hannah v. Pipes.
 Nonjue v. Verges.
 Scott v. Fell & Co.
 Merritt v. Grant.
 Mana, McGregor & Co. v. Bojé & Co.
 Doherty v. Lauve & McCall.
 Pehn & Co. v. Harrison & Co.

Stephenson v. Rideau.
 Southern Bank v. Wood et als.
 New Orleans v. Dorteau.
 same v. same.
 Bell v. Turner.
 Bogg, Miltenberger & Co. v. Lissester
 & Kidd.
 Lamarque v. Beugnot.
 Delacroix v. New Orleans.
 Davis v. Steen & Bell.
 Musich v. Alter.
 Heirs of Gormley v. Golding.
 N. O. Ins. Co. v. Tio.
 Municipality, praying &c., v. New Or-
 leans.
 Oulliber v. Vignie.
 Durand, Doolie et als. v. J. de Fues-
 tes & Co.
 Techenev v. Guyot.
 Webre v. Webre.
 Kemp v. Wilson.
 Succession of Caldwell v. Toy.
 Adams & Buckingham v. McWhan.
 State v. Judge Sixth District Court—
 Hennen praying, &c.
 Watson v. Simpson
 State v. Judge Sixth District Court—
 Hickman praying, &c.
 Johnson v. Johnson.
 Weisse & Co. v. Hufty.
 Bell v. Carrollton Railroad.
 State Mutual Insurance Company v.
 Miller.
 Desarant v. LeBlanc
 Florance v. Simmons.
 New Orleans v. Southern Steamship
 Company.
 New Orleans v. Barriere Bros.
 Ivins v. Todd & Co.
 Bennett & Co. v. Bourke.
 Armstrong v. Jenkins.
 Doyle v. Succession of Thompson.
 same v. same.
 Payne v. Leflore.
 Cochran v. Coffey.
 Hanney v. Harman.
 Montagnet v. Cambot.
 Talamon v. Home and Citizens Ins-
 urance Company.
 James v. McLemore.
 State v. Dempsey.
 Potter v. Dazey.
 Ballouque v. New Orleans.
 Courneb v. De Jong.
 Harvey v. Driver, Pierces & Co.

MONROE.

Soery & Campbell v. J. Finale's es- tate.	Stephen Langford v. Henry Curtis.
George Cook v. Estate of James Wat- son.	W. S. Grayson v. A. W. Jones.
	John Bopp v. Isaac Murrell & Brother.
	Sarah F. Lester v. N. E. Wright.

John M. Crownvitch v. John Straughan.	Estate of Pamela Sloan, deceased, wife of R. Lassiter.
Pauline Pickett v. J. W. Vance.	Winnie et al. v. John Ray, Ex.
Harsabrauk v. N. P. Lacy.	Susan Drew et al. v. A. L. Shotwell.
Amos Clark v. J. W. Phillips, Sheriff, et al.	Wright, Allen & Co. v. Daniel Newton.

ALEXANDRIA.

Louisiana, f. w. c., v. H. A. Gordon.	A. Hale v. N. Sanders.
W. Leyster, tutor, v. C. A. Petrovic et al.	W. B. Lewis v. J. B. Sullivan.
State v. Heirs of W. R. Leckie.	E. C. Payne et al. v. Jabretz Tanner.
W. O. Winn v. W. W. Brown et al.	Samuel Fowler v. J. D. Mayeux et al.
	State v. C. S. Leckie.

OPELOUSAS.

Henry C. Wilson v. Theodule C. Carlin & Wife.	State v. John Nicholson and George Wilson.
Frances Ritter v. Josephine Castille, Adm., et al.	Jean Baptiste Derbes et als. v. Pierre P. Briant & wife.
Emilia Bessan et al. v. Marie Anathalie Breaux, widow, &c.	Henry G. Moss v. Leonzile Hartman and Augustin A. Tomlinson, her husband.
Gustave Harry v. Ozémé Constantin.	Charles Leblanc v. Mélanie Ludrique.
Susannah Ireland et al. v. Succession of Robert B. Brashear.	

I N D E X .

I N D E X .

INDEX.

ABSENTEE.

1. The appointment of a curator to the estate of an absentee is authorized by Articles 50, 52 and 53 C. C. *Wilson v. Smith*, 368.

See ATTACHMENT—*Story v. Jones*, 73.

ACTION.

1. The petitory action can only be maintained by one in whom the legal title is vested, or by his legal representative. *Caze v. Robertson*, 232.
2. Although no real action would lie in Louisiana for lands situated in Mississippi, yet a suit brought to recover the proceeds of those lands, from a defendant domiciliated in Louisiana, would fall within the jurisdiction of our courts. *Edwards v. Ballard*, 362.
3. Where a petitory action has been brought to recover land sold under an execution, defendants should offer in evidence the record and judgment in the suit under which the execution issued. *Delespaze v. Warner*, 413.
4. But where it is shown by the execution, and Sheriff's return, and the notices served, that the property in controversy has been sold, and the defendant put in possession as owner, and that a part of the price has been applied to the credit of plaintiff, he cannot bring a petitory action and ignore the existence of the sale, and treat the proceedings as having no existence; he must resort to an action of nullity to set aside the sale, if it be irregular or illegal. *Ibid.*
5. In an action for trespass, the defendant cannot put the plaintiff upon proof of title; possession alone is sufficient to support the action. *Gardiner v. Thibodeaux*, 732.
6. An action of jactitation cannot be maintained by a party who is not in possession. *Arrowsmith v. Durell*, 849.

See PRESCRIPTION—*Kemp v. Cornelius*, 301.
Edwards v. Ballard, 362.
Dugan v. Fulton, 413.

See SALE—*Scully v. Kearns*, 436.
McDonald v. Vaughan, 716.

See WILLS—*Deslondes v. New Orleans*, 552.

See MORTGAGE—*Saloy v. Chemadere*, 567.

See RES JUDICATA—*Shaffer v. Scuddy*, 575.

See PRACTICE—*Williams v. Hawthorn*, 615.

See JUDGMENT—*Tulioferri v. Steele*, 656.

See WARRANTY—*Kelly v. Wiseman*, 661.

See SUCCESSION—*Louaillier v. Castille*, 777.

See PARTNERSHIP—*White v. Jones*, 681.

ACCOUNT.

See PRESCRIPTION—*Byrne v. Prather*, 653.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADVANCES.

See PRIVILEGES—*Funkhouser v. Dutcher*, 494.
Buchanan v. Switzer, 496.

AFFIDAVIT.

See ATTACHMENT—*Reding v. Ridge*, 36.
Kleinwort v. Klingender, 96.
See ARREST—*Hanney v. Bochner*, 859.

AGENT AND AGENCY.

See PRINCIPAL AND AGENT.

APPEAL.

1. The failure of the appellant to file the transcript of appeal on the last judicial day, will not be excused on the ground of the Clerk's office being closed earlier than usual; in the absence of proof of the time of day when the attempt was made to file it, the presumption being that it was after business hours. *Buckley v. Lacroix*, 29.
2. An appeal will lie from an interlocutory order dissolving an injunction in accordance with the provisions of Articles 307 of the Code of Practice, when the facts show that such an order will work irreparable injury to the plaintiff in injunction. *White v. Cazenave*, 57.
3. Article 566 of the Code of Practice allows an appeal in all cases where an interlocutory order may work an irreparable injury. *Held*: That an order which necessarily compels a party, in order to protect his rights, to institute another suit for the same cause of action, is one from which an appeal will lie under this Article of the Code of Practice. *Ibid*.
4. When an appeal is taken from an *ex parte* order, under Article 307 of the Code of Practice, dissolving an injunction, the necessary consequence of maintaining the appeal is to reverse the order dissolving the injunction. *Ibid*.
5. Where an appeal has been taken by the defendant and warrantor, and the defendant alone files an appeal bond, it is presumed that the warrantor has abandoned his appeal, and in such a case the plaintiff cannot complain, as he has no judgment against the party called in warranty. *Wood v. Harrell*, 61.
6. Objections to the sufficiency of the security on the appeal bond, should be made in the court below. *Ibid*.
7. No judgment having been rendered in favor of the plaintiff against the warrantor, there can be no objection to the warrantor signing, as surety, the appeal bond given by defendant. *Ibid*.
8. The law does not make it absolutely necessary for the Clerk to affix the seal of the court, to his certificate attached to the transcript of the record. *Ibid*.
9. When the record does not show that the amount in dispute is over \$300, and the *hiatus* is not supplied by an affidavit, the appeal will be dismissed. *Succession of Broom*, 67.
10. Where the amount sued for was over three hundred dollars, but before judgment was rendered in the lower court, the plaintiff entered a *remittitur*,

APPEAL (*Continued*).

which reduced it to less than three hundred dollars—*Held*: That an appeal in such a case will be dismissed, it not being appealable in amount.

Wolf v. Munzenheimer, 114.

11. An interlocutory order upon a party to a suit, to produce on a given day and hour the books named, and file the same with the Clerk, is not such an order as will work an irreparable injury, and consequently, it cannot be appealed from.
Horton v. Thornhill, 142.
12. When the under-tutor having intervened in a suit against the tutor for a debt of the minor, prosecutes an appeal from a judgment against the tutor, the appeal will be dismissed if the tutor is not made a party to it.
Moodie v. Cambot, 153.
13. When the appeal is from a judgment in favor of the defendant, in a representative capacity, the appeal is defective and will be dismissed if the appeal bond is made in favor of the defendant without mentioning his representative capacity.
Clark v. Hébert, 183.
14. The appellee cannot bring up the appeal when the appeal was granted on motion, and the appellant filed no appeal bond, the appeal thus taken being incomplete without a bond.
Brand v. West, 187.
15. It is too late after the delay has expired for the return of an appeal, to file in the lower court a second appeal bond to supply omissions in the first.
Dugas v. Truzillo, 201.
16. The appeal will be dismissed by the court *ex officio*, when it appears that the judgment appealed from was rendered in a suit by attachment, and the record does not show that any property or credits of the defendant were attached.
Robinson v. Müller, 222.
17. A *suspensive* appeal does not lie from a judgment, removing from office the liquidator of the affairs of a partnership.
State v. Judge Second District Court, 240.
18. Where an appeal is taken by the defendant in a suit, brought by the city to recover a tax or license less than \$300 under a city ordinance, it is the duty of the defendant to bring up with the record the ordinance alleged to be illegal or unconstitutional, otherwise the case presents nothing for the decision of the court and the appeal will be dismissed.
New Orleans v. Boudro, 303.
19. An appeal will be dismissed when all the parties interested in maintaining the judgment appealed from are not made parties.
Cummings v. Erwin, 315.
20. An agreement by the parties to submit the report of experts and the whole matter in controversy, without argument to the court, does not deprive either party of their right of appeal from any judgment that may be rendered against them.
State v. Judge Fifth District Court, 323.
21. The appeal will be dismissed when it is made to appear, in the Supreme Court, that the appellant had voluntarily executed the judgment after taking his appeal.
White v. Ramsey, 329.
22. The State has the right to appeal, provided it is limited to the class of cases found in the precedent, to-wit: those where the indictment has been

- quashed before a trial, or held bad upon a demurrer; and where it purports to charge an offence punishable with death or imprisonment at hard labor.
State v. Ross, 364.
23. An appeal will not lie from an interlocutory decree overruling the exception that the petition discloses no ground of action.
Moore v. Gordon, 398.
24. An appeal will not be dismissed because the warrantor has not been made a party to the appeal, where the defendant has abandoned all right of appeal against his warrantor.
Scuddy v. Shaffer, 569.
25. On appeals in criminal cases, the court will take cognizance only of un-
mixed questions of law.
State v. Ward, 673.
26. In criminal cases the parties have not the right to require the Clerk to take down the evidence and certify it to the Supreme Court, and the court will not take notice of the facts thus taken down, although certified both by the Clerk and the Judge of the inferior court.
Ibid.
27. A question of fact, of which the appellate court cannot take jurisdiction, is necessarily involved in determining whether the prisoner had used due diligence in procuring the attendance of his witness.
Ibid.
28. An interlocutory order dismissing a call in warranty is one calculated to work an irreparable injury, and consequently, may be appealed from.
Young v. Chamberlin, 687.
29. Where a party as third opponent, claiming a privilege upon the proceeds of a sale over the seizing creditors, appeals from the judgment rendered against him, the appeal will be dismissed if all the seizing creditors are not made parties to it.
Taylor v. Calloway, 688.
30. Where the citation of appeal has been improperly served on the appellee's counsel, the appellee being a resident of the State, it is not a fault imputable to the appellant, for which the appeal may be dismissed.
Jones v. Capperton, 698.
31. Where the order of appeal has been obtained, the appeal bond given, and the transcript filed in due time, a defective service of citation may be remedied by a new service, although more than twelve months have elapsed since the judgment of the lower court was rendered.
Ibid.
32. The appellant will not be allowed to amend the appeal bond in the Supreme Court.
Crawford v. Alexander, 708.
33. He is not entitled to relief even when it is shown that the omissions in the bond were attributable to the Clerk of the court who filled up the blanks in the bond; in doing this, the Clerk will be regarded as not acting in his official capacity, but as the mere agent or scribe of the appellant.
Ibid.
34. Where the judgment appealed from was rendered against the defendant, both personally and in a representative character, and the appeal bond is given in the representative capacity *exclusively*, the appeal will be dismissed.
Ibid.
35. An appeal from a judgment rendered on a written consent signed by the attorneys of the parties to the suit, will be dismissed when it is not pretended that the action of the attorneys was fraudulent, or that they were not employed in the suit.
Lallande v. Jones, 714.

APPEAL (*Continued*).

36. The proper construction of Art. 593 C. P. is that the tutor of a minor, like every other person who is *sui juris*, can only appeal within the year which follows the signature of the judgment; but the minor whose interests are affected by a judgment, has a year after attaining the age of majority, in a case where no appeal has been previously taken, to deliberate whether he shall appeal from it or not. *Préjean v. Robin*, 788.
37. An appeal will lie from an interlocutory order on a party to deposit in court a sum of money, the right to which is in contestation between the other parties to the suit. *Succession of Thompson*, 810.

See PRACTICE—*Noland v. Bemis*, 49.

See SEIZURE AND SALE—*Lombas v. Robichaux*, 105.

See JUDGMENT—*Love v. McComas*, 201.

Taliaferro v. Steele, 656.

See CRIMINAL LAW—*State v. Kentford*, 214.

See SALE—*Woods v. Ventress*, 267.

See PRACTICE—*Shiff v. Carpratte*, 801.

See INJUNCTION—*Knabe v. Fernal*, 847.

See SUCCESSIONS—*Succession of Hughes*, 863.

ARREST.

1. The 9th section of the Act of 1855, repeals the Acts of 1840 and 1847, modifying the 212 Art. of the Code of Practice, relative to the arrest of debtors about to leave the State, but expressly declares that the Act is not intended to repeal the provisions of the C. P. on the subject. *Tallamon v. Cardenas*, 509.
2. The provision of the 3d section of the Act of 1855, that no non-resident shall be arrested in this State except he has absconded from his residence, must give way to the 212th Art. C. P. in the case of a foreign debtor about permanently leaving the State. *Ibid.*
3. It is not necessary to state in the affidavit for a writ of arrest, where the defendant resides or has his domicile. *Hanney v. Boehner*, 859.
4. If the case comes within the exception in favor of non-residents, the defendant may plead the exception, and in proof of it, the proceeding in arrest will be set aside, if it was not alleged in the affidavit that the defendant had absconded from his residence. *Ibid.*

ASSESSMENT.

See TAXES, &c.

ATTACHMENT.

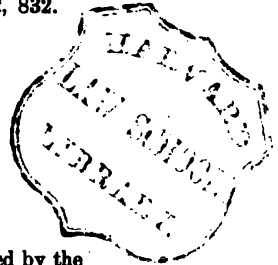
1. An affidavit to obtain an attachment, that the plaintiff really believes and has just grounds to apprehend that the defendant *may depart* from the State, &c., is insufficient. The affidavit must be positive as required by Art. 242 of the Code of Practice. *Reding v. Ridge*, 36.
2. A creditor whose debt has been secured by a conveyance of property to a trustee with authority to sell, and pay the debt, cannot claim such property as owner; and when attached, cannot set aside the attachment, upon giving bond, and take possession of it during the pendency of the litigation. *Hughes v. Klingender*, 52.

3. Such a conveyance would only give him the right to enforce the execution of the trust, and make him a creditor with a privilege. *Ibid.*
4. Where plaintiff sues out an attachment, and a third party intervenes claiming the goods attached as vendor, having the right of stoppage *in transitu*, and bonds the property seized—*Held*: That if he fails in his intervention, although his bond may not be made in conformity to law, he and his surety are nevertheless bound to satisfy any judgment that may be obtained against the defendant. *Emanuel v. Mann*, 53.
5. In such a case, the return of *nulla bona* upon an execution issued against the defendant, is sufficient to render the surety upon the bond of the intervenor liable. *Ibid.*
6. A judgment by default is properly rendered against the defendant in an attachment suit, where the curator *ad hoc*, after exceptions filed by him have been overruled, fails to file an answer. *Story v. Jones*, 73.
7. The fact that no answer was filed by the curator *ad hoc*, will not vitiate the subsequent proceedings, and the final judgment rendered on such default cannot be annulled upon the same allegations that were passed upon by the exceptions filed by the curator *ad hoc*, when more than two years had elapsed from the rendition of the judgment. *Ibid.*
8. When it appears that there was sufficient time for the curator *ad hoc* to have corresponded with the absentee, if he was able to ascertain his post-office, it will be presumed that he did his duty in this respect. *Ibid.*
9. An affidavit for an attachment sued out upon a debt not due is defective, if it does not state that the debtor is about to remove his property out of the State before the debt becomes due. *Kleinwort v. Klingender*, 96.
10. The interest of a non-resident in the property of a foreign commercial firm, may be attached for a debt due to a citizen of this State. *Frost v. White*, 140.
11. When parties intervene, and bond property attached, they are estopped from denying the fact that there is any property attached, having by the act of giving bond judicially admitted it. *Ibid.*
12. Accommodation acceptors are not creditors of the drawer of a draft accepted by them, until after it has matured, and they have been obliged to pay it, and an attachment issued by them before maturity, is not rendered valid by subsequent payment of the draft, which makes them creditors of the drawer. *Todd v. Shouse*, 426.
13. An attachment must stand or fall according to the state of facts existing at the date of its issuing, and cannot be cured by a subsequent event. *Ibid.*
14. Where the Federal Court was resorted to on a false allegation of the citizenship of the parties, in order to obtain possession of property by attachment, and the proceedings were then dismissed and simultaneously process of attachment sued out from a State Court, on the affidavit that the defendant in the attachment, who was represented in the Federal Court to be a citizen of Louisiana, was a non-resident—*Held*: That the allegation of the non-residence of the defendant being at direct variance with the allegation previously made by the same party in the Federal Court, the attachment could not be maintained. *Gilbert v. Hollinger*, 441.

ATTACHMENT (*Continued*).

15. An attachment will not lie against the property of a succession in this State; the creditor is bound to provoke an administration of the estate in pursuance of law, to collect his debt.
Cheatham v. Carrington, 696.
16. A valid attachment of an accepted draft filed in a suit may be made, by citing as garnishee the Clerk of the court in whose custody the draft is, and proving by his answers to interrogatories his possession of the draft.
Ealer v. McAllister, 821.
17. It is too late after an answer to the merits, to move to set aside an attachment, on the ground of the insufficiency of the attachment bond, when it is not alleged that the surety had become insolvent since signing the bond.
Ibid.
18. A judgment creditor has no right to proceed against the property of his debtor by process of attachment.
Frellsen v. Stewart, 832.

See JUDGMENT—*Love v. McComas*, 201.
 See APPEAL—*Robinson v. Miller*, 222.
 See PARTNERSHIP—*Key v. Box*, 497.
 See PRACTICE—*Wright v. White*, 583.
Shiff v. Carprelle, 801.
 See CONFLICT OF LAWS—*Hughes v. Klingender*, 845.



ATTORNEYS AT LAW.

1. The warrantor is not liable for the fees of the attorney employed by the party evicted.
Heirs of Sarpy v. City of New Orleans, 311.
2. Attorney's fees cannot be recovered as either costs of the suit or as damages, under Art. 2482 of the Civil Code.
Ibid.
3. Where, in an act of mortgage, it was stipulated that, in the event of the note not being paid at maturity, the attorney's fees for collection should be paid by the debtor, but it was shown that the suit for the collection of the note was unnecessary—*Held*: That the fees could not be secured by the creditor.
Alexandrie v. Saloy, 327.

See JUDGMENT—*Marvel v. Manouvrier*, 3.
 See SEIZURE AND SALE—*Simpson v. Lombas*, 103.
 See APPEAL—*Lallande v. Jones*, 714.
 See EVIDENCE—*Succession of Grant*, 795.
 See WARRANTY—*Late v. Armorer*, 826.
 See SUCCESSION—*Succession of Hughes*, 863.

AUCTIONEER.

See SALE—*Schwartz v. Flatboats*, 243.

AUTHENTICATION OF RECORD.

1. A record of judicial proceedings in another State, is sufficiently authenticated when certified to by a Judge, before whom, it appears from the record itself, all the proceedings in the case were had, and who states in the certificate that he is one of the Judges of the court, and that all the Judges of said court are equal in authority, and each one is authorized to sign such a certificate.
Orman v. Neville, 392.

BANKS AND BANKING.

1. The property banks in Louisiana furnish an exception to the rule, that the creditor who holds under two mortgages of unequal rank on the same property, and who has caused the property to be sold to satisfy his junior mortgage, cannot be allowed to sell it a second time to satisfy his senior mortgage. The property mortgaged for the subscription to the stock of the bank is liable in the hands of a third possessor, although it has been previously sold at the instance of the bank, to enforce the payment of the stock loan secured by the same mortgage. *Haynes v. Harbour*, 237.
2. A judicial sale to enforce a mortgage for the security of a stock loan by a bank, does not release the mortgage for the security of the subscription of stock. *Haynes v. Pipes*, 248.

See BILLS AND NOTES—*Vanlibber v. Bank of Louisiana*, 481.

BILL OF EXCEPTIONS.

1. A statement by the Clerk, in his minutes of the testimony taken on the trial, that certain evidence was objected to, does not dispense with the necessity of a bill of exceptions to the reception of the evidence. *Graugnard v. Lombard*, 234.
2. Where the counsel in a cause have not argued points made in their bills of exception, they will be considered as waived.

Williams v. Bridge, 721.

See SUPREME COURT—*Murphy v. Simonds*, 322.

See JURY AND JURORS—*State v. Banger*, 461.

See PRACTICE—*Davis v. Millendon*, 808.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The notary who protested a bill of exchange certified that he went to the office of the acceptors of the bill, in order to demand payment of it, and found the office shut, and, on enquiry, could not find the acceptors nor any one who could pay the bill.—*Held*: That it will be presumed in the absence of proof to the contrary, that the notary had the draft with him, and that he went to make the demand within the usual office hours. *Bank of Louisiana v. Satterfield*, 80.
2. A notice sent to the Post-Office where an endorser usually receives his letters, at the time the protest is made, is sufficient, although there be another Post-Office nearer his residence, at which he has not been in the habit of receiving his letters. *Grieff v. McDaniel*, 160.
3. It cannot affect the negotiability of a note, that its consideration is to be realized in future, or that from some contingency it may never be realized. *Sadler v. White*, 177.
4. If the consideration of the note had not failed at the time of its transfer, the maker cannot set up as a defence, that the holder knew that there might be offsets against it. *Ibid.*
5. The possession by the drawee of a draft drawn by a planter upon his merchant or factor, in favor of a third person, is *prima facie* proof of the draft having been paid by the drawee. *Succession of Penny*, 194.
6. Where a negotiable note was made payable at the office of a mercantile firm in New Orleans, and a remittance made by the maker to such firm on

BILLS OF EXCHANGE AND PROMISSORY NOTES (*Continued*).

account of the note—*Held*: That the remittance was not a valid payment of the note, the firm at whose office the note was payable not being the agents of the holder. *Rowland v. Levy*, 223.

7. Where a note bears interest from maturity, the interest begins to run from the day of payment specified, without allowing for days of grace.

Weems v. Ventress, 267.

8. A waiver of protest by an endorser is not a waiver of the notice of non-payment.

Ball v. Greaud, 305.

9. An accommodation endorser is entitled to notice, as any other endorser.

Ibid.

10. Where a promissory note has been transferred by a verbal contract, without the endorsement of the payee, such verbal transfer cannot have the effect of an endorsement and give the paper a character of negotiability.

Scott v. McDougall, 309.

11. Bills of exchange drawn in a foreign country, and payable in another foreign country, although drawn against a shipment made to the city of New Orleans, are governed by the laws of the country where they are drawn.

Kuenzi v. Elvers, 391.

12. In the absence of proof in a suit brought upon such bills here which have been protested for non-acceptance and payment, the laws of the country where such bills were drawn with regard to bills drawn there upon other foreign countries, must be presumed to be the same as our own, and ten per cent. damages will be allowed.

Ibid.

13. The acceptor of a bill has no right to inquire into the consideration between the drawer and payee, and between the latter and a subsequent endorsee.

Smith v. Adams, 409.

14. Not even accommodation acceptors, and that to the knowledge of payee, have a right to plead in compensation or reconvention a debt due by payee to the drawer of a draft.

Ibid.

15. In a suit brought against the drawer of a bill of exchange, it is not necessary, to constitute a waiver of want of notice, that an express promise be made to pay the bill absolutely,—it is sufficient, if by reasonable intentment the language imports or implies a promise to pay it; as a promise to pay if the costs are thrown out.

Zacharie v. Kirk, 433.

16. The holder of a note made payable to the maker's own order, by him endorsed, and secured by a notarial and authentic act of mortgage, may recover without any authentic evidence of transfer further than that contained in the act itself.

Rice v. Davis, 435.

17. Checks are assimilated to bills of exchange, and the same rules govern both with regard to the necessity of demand, protest, and notice of protest.

Succession of Kercheval, 457.

18. The acceptance of a bill of exchange admits the genuineness of the drawer's signature, and where an acceptor has paid to a bona fide holder of a forged draft or bill, having no notice of the forgery, he cannot recover back the money paid.

McKleroy v. Bank of Kentucky, 458.

19. But where a party becomes the holder of such a draft before it has been accepted, and when the loss had already attached, it was accepted, and

BILLS OF EXCHANGE AND PROMISSORY NOTES (*Continued*).

paid, and the acceptors, immediately upon ascertaining the fact of the forgery, gave notice of this fact to the holders—*Held*: That such a case is an exception to the general rule, and the acceptors are not estopped from proving the forgery and recovering the money they had paid through error. *Ibid*.

20. A bank is liable to the payees of a check made payable to their order, when the check is paid on a forged endorsement made by the collector of the payees, who receives the check in payment of a bill of merchandise entrusted to him for collection by his employers.

Vanbibber v. Bank of Louisiana, 481.

- H 21. Where at the maturity of a draft, the firm on which it was drawn in the city of New Orleans had no place of business, and could not be found there, and had then ceased to exist as a firm—*Held*: That a protest was unnecessary to bind the drawer. *Helme v. Middleton*, 484.

22. When the plaintiff is the payee of the note sued on, he may strike out or not his special endorsement of the note, and is not bound to show a transfer back to him of the note. *Cooper v. Cooper*, 665.

23. Where the knowledge of the failure of the consideration of a note is brought home to the agent of the party to whom the note is transferred in settlement of a debt due the principal by the payee, at the time of the transfer, it will be considered notice to the principal.

Cummings v. Harsabrauch, 711.

24. A judgment by default taken in a suit on a note, by a party claiming the ownership of it by the blank endorsement of the payee, does not relieve the plaintiff from the necessity of proving the endorsement.

Collins v. McDonald, 735.

25. In a suit against the maker of a promissory note, in confirming a judgment by default, it is not necessary that the signature of the maker should be proved.

Kearney v. Fenner. 870.

See HUSBAND AND WIFE—*Raiford v. Wood*, 116.

Lee v. Cameron, 700.

See EVIDENCE—*Price v. Emerson*, 141.

See OFFICER—*Emerling v. Graham*, 389.

See ATTACHMENT—*Todd v. Shouse*, 426.

Ealer v. McAllister, 821.

See PRINCIPAL AND AGENT—*Parlange v. Faurds*, 444.

See PLEDGE—*Dix v. Tully*, 456.

See PARTNERSHIP—*Bogreau v. Guéringer*, 478.

See NOVATION—*Helme v. Middleton*, 484.

See MORTGAGE—*Bowman v. McKleroy*, 587.

See PRINCIPAL AND SURETY—*Sheldon v. Reynolds*, 692.

See SEIZURE AND SALE—*Lassiter v. Bussy*, 690.

See EVIDENCE—*Andrew v. Keenan*, 706.

BONDS.

1. Where the condition of the bond in a criminal case was that the accused "should personally be and appear before the District Court at its next term to answer certain charges brought against him, and should not depart without the leave of the court until the final trial and conviction or acquittal of the accused, the responsibility of the security on the bond is at an end when a verdict of guilty is found against his principal.

State v. Wilson, 446.

BONDS (*Continued*).

2. The accused being then present in court, is, after the conviction, in the custody of the Sheriff, and the security cannot be made liable on such a bond because the accused afterwards made his escape. *Ibid.*
3. Where the defendant was indicted for *an assault with an attempt to commit a rape*, and after having pleaded to the indictment, was released upon a bond, in which he and his securities bound themselves that he should appear and answer to the charge of *rape*—*Held*: That such a condition, under the circumstances of this case, vitiated the bond. *State v. Forno*, 450.
4. When a bail bond recites the finding of a Grand Jury, the parties to it are estopped from denying its existence or contents.
Taliaferro v. Steele, 656.
5. If the bond, in specifying the charge in the indictment, does not follow the words used in the statute and the indictment, and the warrant of arrest is not signed by the Clerk of the court, they are objections patent upon the face of the record, and when in such a case judgment is rendered on the bond, the remedy is by appeal, and not by an action of nullity. *Ibid.*
6. When a judgment of forfeiture has been rendered on a bail bond, in which there is no mention of any offence for which the principal was answerable, and it does not appear from the record that there was any indictment against him, the judgment will be reversed. *State v. Derosier*, 736.
7. Where the facts show that the Sheriff was authorized by the committing magistrate to take the bond of an accused, and the sureties on the bond were approved by him, and the bond is clothed with the formalities required by law, the sureties on it will be bound, on the failure of the principal to appear. *State v. Badon*, 783.
8. In calling upon the sureties on a bail bond to produce in court the body of the principal, the words "*instantly*" and "*in open court*" are not sacramental terms; it is sufficient when the accused has failed to appear, after having been called at the courthouse door, to call upon his sureties.

*Ibid.*See PRESCRIPTION—*Union Bank v. Bradford*, 159.See APPEAL—*Dugas v. Truxillo*, 201.See JUDGMENT—*Love v. McComas*, 201.See PRACTICE—*State v. Fuller*, 726.See SHERIFF—*Succession of David*, 730.

BOUNDARY.

1. Plaintiff and defendant purchased on the same day contiguous lots of ground, from the same vendor, with valuable improvements thereon, the buildings on the one lot being divided from the buildings on the other lot by a wall in common; both acknowledged possession of the lots, &c., thus sold; and both acts of sale referred to the same plan for limits. In a contest of boundary between plaintiff and defendant, a survey was ordered, which showed that the plan referred to was erroneous, and that plaintiff, to get the quantity of land called for in his title, made in accordance with this erroneous plan, would encroach upon the improvements of defendant.—*Held*: That as the buildings designated in the act of sale appear to constitute by far the most valuable part of the thing sold, they must control an alleged measure of invisible lines falsely stated in the plan referred to, by a careless or incompetent surveyor. *Riddell v. Jackson*, 135.

BOUNDARY (*Continued*).

2. In an action of boundary, the costs should be equally divided between the parties, unless there is proof of a demand on one side, and refusal on the other, to settle the boundary amicably. *Tircuit v. Pelanne*, 215.
3. In a contest of boundary between two parties who have purchased adjoining tracts from a common vendor, the line which their vendor had caused to be run as the dividing line between the two tracts before he sold them, will be recognized as the dividing line between the two parties deriving title from him. *Lebeau v. Bergeron*, 489.
4. Under such circumstances, if either party has not the quantity of land called for by his title, he must seek it from his vendor, and not from the proprietor of the adjoining tract, who does not claim or possess beyond the line established by their common vendor. *Ibid.*
5. In such a case, the plat of a survey, and the *procès verbal* of a parish surveyor, are admissible in evidence after the death of the surveyor, to show that the line was run by him at the request of the common vendor, and that he considered it the boundary of the two tracts which had been divided by him, and also to show that the parties bought the land in accordance with the lines established by the survey, and that the defendant took possession and cultivated his tract according to it. *Ibid.*
6. In an action of boundary, a division line which has been long established by surveyor's marks, a canal and fence, and under which both parties bought, and which is referred to in the act of sale, will be taken as the true line, in preference to a new one, which gives to one of the parties a larger boundary. *Ibid.*

See RES JUDICATA—*White v. Purnell*, 232.

BROKER.

See PLEDGE—*Dix v. Tully*, 456.

See PRINCIPAL AND AGENT—*Barrière v. Psychaud*, 370.
Parlange v. Faures, 444

CASES AFFIRMED, OVERRULED, &c.

1. The decision in the case of *Yeatman v. Crandell*, 11 An. 220, re-affirmed. *Wallace v. Shelton*, 498.
2. Decision in *Harper v. Stanbrough*, 2 An., 377, re-affirmed. *Wailes v. Daniell*, 578.
3. The decision in the case of the *City of New Orleans v. E. J. Hart & Co.*, ante p. 803, affirmed. *New Orleans v. Crescent*, 804.
4. The decision in the case of the *City of New Orleans v. Poutz*, ante p. 853, affirmed. *New Orleans v. Locke*, 854.

See PARTNERSHIP—*Pittman v. Robicheau*, 108.

See EVIDENCE—*Edwards v. Daley*, 384.

See CONSTITUTIONAL LAW—*New Orleans v. Poutz*, 858.

CLERKS OF COURT.

1. Where it was alleged that the Clerk retiring from office had forfeited his fees by failing to file an explicit fee bill within the term prescribed by the statute—*Held*: That the allegation, although of a negative character, must be proved. *Barrow v. Robicheaux*, 207.



COMMON CARRIERS (*Continued*).

they failed to do this, but delivered it to another house, the burden of proof rests on them to show that they made this delivery for the account of the shippers. *Gilkinson v. Steamboat Scotland*, 417.

7. Where goods are delivered into the possession of a common carrier, it is for him to show that he used due care for their preservation, for the shipper is not supposed to be present during their transportation, and the goods are in the custody of the owners of the vessel and their agents.

Tardos v. Ship Toulon, 429.

8. Article 3204 of the Civil Code gives a privilege on the ship for damages due to freighters for the failure in delivery of goods which they have shipped, or for the reimbursement of damages sustained by goods through the fault of the captain or crew. *Ibid*.

9. The captain and owners of a vessel are liable for the acts of the stevedores employed by them to load their vessels.

Rochereau v. Bark Hausa, 431.

10. Where the master of a boat contracts a debt on account of the boat, the creditor has a right to sue either him or the owners of the boat, or both simultaneously. *Zacharie v. Kirk*, 433.

11. In order to relieve the owners of vessels from responsibility, there must be a delivery on the wharf to some person authorized to receive the goods, or some act must be done which is an equivalent to a delivery.

Sleade v. Payne, 453.

12. In order to constitute a delivery, there must be a notice given to the consignee, and a reasonable time given him to make the usual and necessary preparations to receive the goods. *Ibid*.

13. The manner of delivering the goods, and consequently the period at which the responsibility of the master and owners will cease, depend upon the customs of particular places, and the usage of particular trades. *Ibid*.

14. When goods shipped on freight are damaged by water, so as to be valueless and unsalable, the shipper is not bound to send them to auction to be sold, as a prerequisite to the right of action.

Elkin v. Steamship Co., 647.

15. Either party has a right to require, in such case, a sale by auction, and the expenses will form part of the costs. *Ibid*.

See DAMAGES—*Porée v. Cannon*, 501.

See PRESCRIPTION—*Pilkin v. Rousseau*, 511.

COMMUNITY.

1. Where the widow has caused an inventory to be taken of her deceased husband's estate, she has the privilege of renouncing the community, as long as the creditors have taken no steps to compel her to accept or renounce.

Succession of Richardson, 1.

2. She cannot be charged as partner in the community as long as she has the right to renounce. *Ibid*.

COMMUNITY (*Continued*).

3. The Act of 1844, which gives to the survivor the usufruct of the community property, does not dispense the party who claims the benefit of its provisions from having an inventory taken.

Saloy v. Cheznaidre, 567.

4. A widow in community who, before she has qualified as administratrix, or tutrix, stipulates in writing for the extension of a debt, and makes payments upon it, is presumed to have accepted the community, and her subsequent renunciation of it, on her qualifying as tutrix and administratrix, will not avail her in a suit brought upon the debt which she had acknowledged, to hold her liable for it as partner in the community. *Ibid*.

5. The doctrine of the case of *Downs v. Morrison*, 13 An. 379. in relation to the money of the wife received by the husband during the marriage, which constitutes a charge against the community, is applicable to the share of the husband, who, in the partition of the community, is entitled to a credit for his separate funds applied to the use of the community.

Coons v. Stringer, 726.

6. The fees of counsel employed by the wife to prosecute a suit for a divorce and a partition of the community property, must be paid by her out of her separate estate; the community cannot be held liable for them.

Tucker v. Carlin, 734.

7. The community cannot be allowed more than the actual cost of improvements made on the separate estate of one of the spouses, during the existence of the marriage, although the property had increased in value during its existence.

Succession of McClelland, 762.

8. One partner in the community will not be permitted to question the title of the other partner to property possessed by such partner prior to the existence of the community.

Ibid.

See SUCCESSIONS—*Cuillé v. Gassen*, 5.

See USUFRUCT—*Succession of Cardona*, 366.

See HUSBAND AND WIFE—*Jaffron v. Bordelon*, 618.

Johnston v. Pike, 781.

Morales v. Marigny, 855.

See SALE—*Winn v. Brown*, 642.

COMPENSATION.

See JUDGMENT—*Hersford v. Babin*, 838.

See PARTNERSHIP—*Key v. Baz*, 497.

CONFLICT OF LAWS.

1. A *cessio bonorum* in this State is not a peremptory bar to a suit upon a judgment rendered contradictorily with the ceding debtor in another State after the cession has been accepted here, even though the debt upon which the foreign judgment was obtained was put upon the debtor's bilan.

Scott v. Bogart, 261.

2. In those States where the common law prevails, when a commercial firm is sued, it is necessary that process should be served on each member of the firm, and effect will not be given in our courts to a judgment there rendered against one of the members who was not served with process and made no appearance in the suit.

Ibid.

3. An assignment of a vessel on the high seas in trust for the payment of particular creditors, by preference, made in another State, under whose laws it is valid between the parties, all of whom reside in that State, will protect such vessels, when they arrive in a port in this State, from attachment here, at the suit of a creditor of the assignor, whose debt was payable in the State where the assignment was made.

Southern Bank v. Wood, 554.

4. The validity of the assignment must be determined by the laws of the State where it is made. *Ibid.*
5. It is necessary, to give validity to a deed of gift made in another State, but designed to have effect in Louisiana, that it should be clothed with the formalities required by our law, and its effect will also be governed by the laws of Louisiana. *Tillman v. Mosely*, 710.
6. The comity of nations extends only to enforce obligations, contracts and rights under those provisions of law of other countries which are analogous or similar to those of the State where the litigation arises.

Hughes v. Klingender, 845.

7. A contract executed in England, by which a ship was transferred to a trustee to secure the rights of a third person, the vendor retaining possession of the ship, cannot be enforced in this State to defeat rights already acquired by an attachment under our laws. *Ibid.*

See SLAVES—*Brown v. Baby*, 41.

See PRESCRIPTION—*Walworth v. Routh*, 205.

See WILLS—*Hughes v. Hughes*, 85.

See BILLS AND NOTES—*Kucusi v. Elvers*, 391.

See MORTGAGE—*Atkinson v. Rogers*, 633.

See HUSBAND AND WIFE—*Eager v. Brown*, 684.

Morales v. Marigny, 855.

See MORTGAGE—*Bowman v. McKleroy*, 687.

CONSTITUTIONAL LAW.

1. When the title of an Act is simple, all those sections which are covered by it fulfill the requirements of Article 115 of the Constitution; and only those portions are held to be void for unconstitutionality, which are not covered by the title. *Williams v. Payson*, 7.
2. The 11th section of the Act of the Legislature of 1855, which provides that whenever the District Attorney shall not attend, the Judge shall have power to appoint an attorney to prosecute on behalf of the State, (*pro tempore*), is not a violation of Art. 83 of the Constitution of 1852, which requires that the District Attorneys shall be elected by the people.

State v. Boudreaux, 88.

3. The 8th section of the Constitution of the United States, which declares that Congress shall have power to regulate commerce, does not prevent the exercise of such power by the States, as far as is necessary for the police regulations of their domestic commerce, in regard to which Congress has not deemed it expedient to make any regulations.

Port Wardens v. Ship Martha J. Ward, 289.

4. The Act of the Legislature of 1855, relative to the Board of Master and Wardens, which provides for the payment of services actually rendered or

CONSTITUTIONAL LAW (*Continued*).

the tender of such services, is not a violation of the clause of the Constitution of the United States which gives to Congress the power of regulating commerce. *Ibid.*

5. The fees allowed to the Master and Wardens are in no sense imposts or duties on imports or exports. *Ibid.*
6. The 129th Article of the Constitution, which requires that the laws of this State shall be promulgated in the English and French languages, is not violated by section second of the Act of the Legislature of March 16th, 1859, entitled "An Act to change and regulate the terms of the District Courts in the Eighth Judicial District," which declares that the Act shall take effect from and after its passage.
State v. Judge Eighth Judicial District, 486.
7. There is no prohibition in the Constitution against the repeal of laws, in any form, in which the Legislature can give a clear expression of its will. *Ibid.*
8. An assessment for levee purposes is not a tax within the meaning of Art. 123 of the Constitution. *Wallace v. Shelton, 498.*
9. An Act of the Legislature authorizing the assessment of an annual tax on alluvial lands, "specifically upon each and every acre," for the purpose of building or making and repairing levees, is not in violation of the Constitution. *Ibid.*
10. The provision of the Act of 1855, organizing a Board of Port Wardens for the port of New Orleans, which allows such Port Wardens to demand from each vessel arriving from sea the sum of five dollars, *whether they be called upon to perform any services or not*, is not a charge imposed as a duty, without regard to a corresponding and equivalent benefit, and is not, therefore, unconstitutional. *Port Wardens v. Ship C. Morgan, 595.*
11. Art. 106 of the State Constitution, which declares that "*the press shall be free*," does not exempt capital invested in a newspaper from taxation. *New Orleans v. Crescent, 804.*
12. The principle enunciated in the case of *Municipality No. 1 v. Wheeler & Blake, 10 An. 745*, to the effect, that an *ex post facto* law which does not relate to crimes and offences, and does not impair the obligations of contracts, nor divest vested rights, is not unconstitutional, reaffirmed.

New Orleans v. Poutz, 853.

See PILOTS—*Williams v. Payson, 7.*

See NEW ORLEANS—*New Orleans v. Costello, 37.*

Merriam v. New Orleans, 318.

Hietland v. New Orleans, 330.

See TAXES, &c., AND JUDGMENT—*Selby v. Levee Commissioners, 434.*

See CRIMINAL LAW—*State v. Peter, 521.*

See SLAVES—*Deshotels v. Solteau, 745.*

CONSTRUCTION, RULES OF.

1. Where two legislative Acts are approved on the same day, the rule of construction applicable to different sections of the same law will apply; the minute and particular provisions of one Act prescribing the salary of the Register of Voters in the city of New Orleans, are not repealed by a general grant of power in the other Act to the Common Council in relation to all city salaries. *St. Martin v. Orleans, 113.*

1. Where one who has employed another for a limited time at a salary, discharges the employee before the expiration of the time, for a good cause, he is responsible to his employee for his services up to the time of the discharge. *Kessee v. Mayfield*, 90.
2. Mere insolvency is not sufficient to render a debt due, which, by its terms, is payable at a future day. *Kleinwort v. Klingender*, 96.
3. An actual surrender, either voluntary or forced, is required to annihilate the term fixed by the contract for the payment of a debt. *Ibid.*
4. An agreement was entered into by several commercial firms, by which they bound themselves for the term of three months, not to sell any India cotton bagging, except with the consent of the majority of them—*Held*: That it was a combination to enhance the price of the article, which is in restraint of trade and contrary to public order, and that the agreement could not be enforced in a court of justice.
India Bagging Association v. Kock, 168.
5. Where plaintiff received warrants for money due him on a contract, without objecting, or taking them under protest that they were not for the whole sum due, his endorsing the warrants will preclude his claiming afterwards that they were not drawn for a sufficient amount.
King v. New Orleans, 389.
6. A resolutive condition is implied in all commutative contracts, to take effect in case either of the parties do not comply with their engagements.
Dubois v. Xiques, 427.
7. The dissolution of the contract for non-compliance with its obligations, may be demanded by suit or by exception. *Ibid.*
8. A party is concluded by the first bill which he presents for work done under a contract. Without showing error he cannot be permitted to recover the items added to that bill since it was rendered.
Nicholson v. Pelanne, 508.
9. A conveyed to B a house and lot for the sum of \$5,500, which the purchaser obliged himself to pay to the seller in one year from the date of the contract, with the express agreement, however, that the purchaser, his heirs or assigns, should have the right to prolong the payment of the sum of \$5,500, indefinitely and at their will, on paying the vendor or his heirs or assigns, interest annually in advance, at the rate of seven per cent. per annum—*Held*: That such a contract is not a contract of sale, but one of "rent of lands," *rente foncière ou bail à rente*.
Sainet v. Duchamp, 539.
10. Where one renders services for continuous years to another on his promise to provide in his will for the party rendering such services, and he dies without making such provision, an action may be maintained for the value of the services.
Nimmo v. Walker, 581.
11. The promises in such a case having reference to the period of the promisor's death, prescription is suspended until that time. *Ibid.*
12. Where a promise to sell to two persons jointly, contains the stipulation that such purchasers are to furnish a reliable city acceptance by a certain time, or the contract shall be null and void, the tender of the accepted draft of one of the purchasers is not a performance of the stipulation.
Satterfield v. Keller, 606.

CONTRACTS (*Continued*).

13. A party seeking to compel the specific performance of a contract of promise to sell, must himself show a specific compliance with his own obligations.
Ibid.
14. When the obligation is conditional, the party to whom it is transferred by endorsement before maturity, is bound to prove the performance of the condition before he can recover on it. *Drawn v. Cherry*, 694.
15. When a solidary co-debtor pays in discharge of the whole debt less than the whole amount of the debt, he cannot claim from his co-debtor reimbursement of his portion of the whole debt, but only of the amount paid.
Fuselier v. Babineau, 764.
16. Any convention to the contrary between the creditor and the co-debtor making the payment, produces no effect upon the rights of the co-debtor, who was not a party to such convention. *Ibid.*
17. A party who has bound himself by a written contract to perform certain services for another, may sue for his services on a *quantum meruit*, where the contract has been violated and virtually annulled by the act of the other party.
Brown v. Bark Laura Snorr, 848.

See DAMAGES—*Thompson v. Howes*, 46.

Gauthier v. Green, 788.

See CONFLICT OF LAWS—*Hughes v. Klingender*, 846.

CORPORATIONS.

1. A municipal corporation is not liable for damage done to private property, unless the act which caused the damage was done without the authority of law, or being authorized by law, was improperly or wantonly executed.
Bennett v. New Orleans, 120.
2. Where a municipal corporation was sued for an act of omission or nonfeasance, in not repairing a draining machine erected for public utility, by which neglect plaintiff's premises were overflowed, and his property damaged—*Held*: That as the act complained of involved the disbursement of the corporate revenues, it was a matter of discretion with the corporate authorities, and that if plaintiff was damaged, it was *damnum absque injuria*, and he was consequently without sufficient cause of action. *Held*, also: That a corporation in such a case may avail itself of this exemption from suit, under the plea of the general issue. *Ibid.*
3. Where a public square is bounded on one side by private property, the owner cannot require that the town authorities, when the square is enclosed, should leave a space for a public way between the enclosure and the line of his property.
Leftwich v. Town of Plaquemine, 152.
4. The qualifications of the members of the City Council cannot be inquired into in a suit to enforce a contract made by the Mayor, under a resolution of that body authorizing it. *Schwartz v. Flatboats*, 243.
5. An ordinance of the City Council, ordering a blacksmith's shop to be closed as a nuisance, is authorized by law, and may be carried into effect by an injunction restraining the owner from continuing it.
New Orleans v. Lambert, 247.

CORPORATIONS (*Continued*).

6. The power of the municipal corporation to make contracts for the pavement of streets at the expense partially of proprietors, is clear.
Municipality No. 2 v. Guilloite, 297.
7. In the absence of proof of fraud, the acceptance by the corporation of work which it was authorized to contract for, is *prima facie* evidence against the defendant, so far as relates to its completion and the manner in which it was done.
Ibid.
8. The provision in the 16th section of the Act incorporating the Vicksburg, Shreveport and Texas Railroad Company, to the effect "*that no transfer of stock shall exempt the party transferring it from the obligation of paying installments afterwards called for, until fifty per cent. on each share shall have been paid,*" exempts from liability to the company only those who have transferred their share of stock after the payment of fifty per cent. on each share, *before* the installments have matured, and payment has been demanded.
Vicksburg, Shreveport and Texas Railroad Company v. McKeen, 724.
9. Courts of justice cannot regard the the wishes of the majority of the members of a corporation, unless expressed in a valid form, in conformity with the bye-laws and charter.
German Evn. Con. v. Pressler, 799.
10. Where church membership is a necessary qualification of the trustees who are to manage the affairs of the corporation, a trustee who withdraws himself from the church and joins a church of another denomination, which latter church prohibits a connection by its members with the former, such trustee will be considered as having abandoned his office of trustee, and as having no further interest in the property of the church he has left.
Ross v. Crockett, 811.
11. A majority of the Board of Trustees cannot undertake to act in their individual names for the board itself, and no act can be done affecting the ownership of property, except by a resolution of the board when regularly constituted and sitting in consultation.
Ibid.
12. Where the liability of a stockholder in an incorporated company, on a mortgage given to secure his subscription to the capital stock, depends on a future contingency, prescription will not begin to run until the contingency has happened, which was to make the payment of the subscription demandable.
Liquidator of Clinton and Port Hudson R. R. Co. v. Eason, 816.
13. Where property encumbered with a mortgage to secure the subscription of a shareholder to the capital stock of a corporation, is sold with shares of stock, for a certain price, and without guaranty against the mortgage, the purchaser is liable to the original stockholder who, when called on for payment of the subscription, may call in warranty his vendee, although there had never been any transfer of the stock on the books of the company.
Ibid.
14. An obligation signed by the members of a stock company to pay a certain amount proportionate to the stock of each, is not a joint, but a several obligation.
Green v. Relf, 828.

CORPORATIONS (*Continued*).

15. Where a majority of the stockholders have, by the charter, the right to order the winding up and liquidation of the affairs of the company, and a majority of them sign an obligation to pay their proportion of the outstanding debts, they cannot be released from the obligation on the ground that it was not binding upon any of the stockholders until all had signed.

Ibid.

See *ESTOPPEL*—*Pochels v. Kemper*, 308.

See *NEW ORLEANS*—*Inhabitants v. New Orleans*, 452.

CORPORATIONS, INSOLVENT.

See *SALE, JUDICIAL*—*Hyde v. Mississippi Sound Company*, 492.

COSTS.

1. The Act of 1857 having provided that "all the criminal expenses incurred in the different parishes of this State, by arrests, confinement, and prosecution of persons accused of crime, their removal to prison, the pay of witnesses, and all other expenses attending criminal prosecutions, except the pay of jurors, shall be paid by the State, upon the certificate of the Clerk and the presiding Judge of the several courts of this State," the duties of the Auditor relative to accounts for such expenses thus certified, are ministerial and imperative, and he must issue his warrant on the Treasurer therefor. It would be otherwise, if the certificate of the Clerk and Judge should show upon its face that it was not drawn in accordance with the law, as, for instance, if it purported to be for fees in civil suits.

Parker v. Robertson, 249.

2. The 15th section of the Act of 1855, which gives the Sheriffs \$100 per annum for their fees in criminal cases, did not intend this sum as their sole compensation. There are many services rendered by Sheriffs, which are not provided for in the fee bill.

Ibid.

3. The party convicted in a criminal case must be condemned to pay the costs, and after the return of *nulla bona*, or after the Clerk and Judge are satisfied by sufficient evidence that the convict has no property, then the State becomes responsible for the costs.

Ibid.

4. When a survey is ordered, the costs of making it must be taxed with those of the suit, and paid by the party cast in the action.

Williams v. Close, 737.

See *BOUNDARY*—*Trevitt v. Pelanne*, 215.

See *WARRANTY*—*Underwood v. Lacapère*, 276.

See *ATTORNEY AT LAW*—*Bacus v. Klein*, 407.

COURTS.

1. The Judges of the courts in New Orleans are vested with full power to regulate the police of their courts, and to prevent a disturbance of the administration of justice.
2. Where a rule was taken on the opposite party to have the expense of making a "*plan*" taxed as costs, and the defendant did not except to the form of proceeding, but answered to the merits, and testimony was taken without objection, it was the duty of the Judge to decide upon the merits of the controversy; and that which ought to have been pleaded as an exception in the court below cannot be assigned as error on the appeal. Although the amount allowed was a large one, there being no witness who

New Orleans v. Bell, 214.

estimated the value of the work at less than the amount allowed by the Judge, he could not have fixed upon a smaller amount, without acting arbitrarily and disregarding the testimony. *Surgi v. Roselius*, 263.

CRIMINAL LAW.

1. Where in a criminal case the Judge *a quo* refused an application for a new trial, based on the ground of newly discovered testimony and the failure of the Sheriff to summon witnesses, stating that he disbelieved the affidavit of the accused—*Held*: That the refusal to grant a new trial could not on appeal be assigned as error. *State v. Rolland*, 40.
2. An endorsement or memorandum of the Clerk upon the indictment is not properly a part of the record. *Ibid.*
3. The refusal of the Judge of the Criminal Court to grant a continuance on the affidavit of the accused, which the Judge did not believe to be true, cannot be assigned as error of law on appeal. *State v. Lindsey*, 42.
4. After the jury list had been called over in the presence of the accused and his counsel, and five jurors had been sworn, and four peremptory challenges had been made by the prisoner, his counsel moved for a continuance, on the ground that various jurors in the list were not in attendance, nor within the jurisdiction of the court, and were not liable to jury service, and that some of them had been excused previous to the list being served on the prisoner—*Held*: That the accused must be considered as having waived any objection he may have had to the panel, and that it was too late to move for a continuance. *Ibid.*
5. The arrival of a vessel at New Orleans, after refusing to obey the orders to remain in quarantine at the Quarantine Station, in the parish of Plaquemines, is an offence committed in the parish of Orleans, and triable in the First District Court of New Orleans. Session Act's 1855, p. 316, § 6. *State v. Patterson*, 46.
6. The proclamation of the Governor is the only evidence admissible to prove that the port of departure of the vessel was an infected place; but, being matter of evidence, it need not be set forth in the information. *Ibid.*
7. The District Attorney is not bound, under the 15th section of the Act of 1855 "relative to criminal proceedings," to enter a *nolle prosequi* in a case of assault and battery which has been compromised, the section not being imperative, but merely permissive. *State v. Hunter*, 71.
8. Objections to an indictment for formal defects, apparent on the face of it, must be taken by demurrer, or motion to quash the indictment, before the jury are sworn, and cannot be made afterwards. *State v. Boudreaux*, 88.
9. The State has no right of appeal from a judgment sustaining a motion in arrest of judgment in a case where the offence is punishable with fine only. *State v. Rentiford*, 214.
10. Where a gun was taken by the accused in another State, its sale in this State might be proof, not of a larceny here, but that the original taking was felonious. Its sale here would not be in violation of any law of this State; and a party cannot be tried here for a crime committed in another State. *State v. Reonnals*, 278.

CRIMINAL LAW (*Continued*).

11. On an indictment for embezzlement, the jury cannot find the accused guilty of a breach of trust. *Ibid.*
12. Where the jury have written their verdict upon the indictment, but it is recorded differently, the verdict as written by them shows what was their meaning and intention. *Ibid.*
13. Prosecutions must be by indictment or information; and the State has the right to choose either mode, but cannot prosecute by both at the same time. *State v. Ross*, 364.
14. After prosecuting under an indictment which has been ignored, the State is not barred, in new proceedings, from selecting indictment or information, as provided by the Constitution. *Ibid.*
15. Under the 11th section of the Act of 1806, which embraces every species of criminal homicide known at common law, and the subsequent legislation on the subject, a slave may be found guilty of manslaughter. *State v. Jack*, 385.
16. The Act of 1857 notices only the crime of willful murder committed by a slave, but is silent as to any other species of homicide. It cannot, however, be supposed, that it was intended to do away with the prosecution of criminal homicides short of willful murder. *Ibid.*
17. The 35th section of the Act of 1857 provides, "That in all cases where a slave is charged with a crime punishable with death, or imprisonment at hard labor for life, the jury shall have a discretionary power to commute the penalty and inflict a lesser punishment." *Ibid.*
18. Section 29th, Act of 1857, declares that, "Whenever the punishment is left by law to the discretion of the court, it shall in no case extend to the privation of life or limb. *Ibid.*
19. Article 78 of the Constitution of 1852 vests Justices of the Peace "with such criminal jurisdiction as shall be provided by law." *State v. Peter*, 521.
20. According to sections 21, 22, 26, 27 and 28 of the Act of 19th March, 1857, relative to the trial of slaves accused of capital offences, Justices of the Peace act, in the trial of slaves, not only as jurors, but also in an official capacity, and cannot be excluded from the trial of a slave, because they have presided and taken part in a previous trial of the same slave, for the same offence. *Ibid.*
21. Before a confession is allowed to go to the jury, the witness to whom it was made should be interrogated as to whether it was voluntary. *Ibid.*
22. If he testifies that the confession was voluntary, then the counsel for the accused may impeach his testimony by his former statement to the contrary. *Ibid.*
23. Although the laws relative to the organization of the tribunals for the trial of slaves, in the country parishes, do not contemplate that the presiding Justices of the Peace should charge the jury on points of law, yet it would not be illegal if they thought proper so to charge them. *Ibid.*
24. In a case of rape, the evidence of witnesses to prove the details of the complaint made by the prosecutrix against the accused, immediately after the

CRIMINAL LAW (*Continued*).

- commission of the offence, is admissible as part of the transaction, and not as proof of the truth of the statements. *Ibid.*
25. Slaves are prosecuted as persons, and their right to have all the testimony that may establish their innocence, is superior to the principle which would exclude their owners, on the ground of interest, and their testimony ought to be received, subject to the credibility which the jury may attach to it. *Ibid.*
26. The Article of the Constitution which requires prosecutions to be by indictment or information, does not prevent the Legislature from prescribing the forms of such instruments. *State v. Mullen*, 570.
27. The definition of the offence of murder, as known under the common law of England, is the true definition of the crime of willful murder, the punishment of which is provided for by the first section of the Act of the Legislature of 1855, relative to crimes and offences. *Ibid.*
28. If *A* threatens to take the life of *B*, or to do him great bodily harm, and *B*, being informed of the threat, arms himself for the true and sole purpose of self protection, and the parties subsequently meet without design, and *A* draws a deadly weapon and approaches *B* with the apparent intention to assault him with it, and *B* believes that he is in danger of his life or great bodily harm, and has no way of avoiding his adversary, advances upon him and kills him, the killing is justifiable in self defence. *Ibid.*
29. But if *A* threatens *B* with personal violence, and the threat is communicated to *B*, and *B* thereupon arms himself with a deadly weapon, and meeting *A*, kills him, while *A* is not making any hostile demonstration against *B*, the killing is willful, deliberate, malicious, and is murder. *Ibid.*
30. Voluntary drunkenness, when no provocation has been given, furnishes no excuse for the act of killing another. *Ibid.*
31. It is sufficient, in an indictment for an attempt to carry a slave by land out of the State, to describe the slave as being "a negro man, slave for life," and giving the name of his master, when the name of the slave is not known, to the District Attorney or to the Grand Jury. *State v. Adams*, 620.
32. The Act of 1816, making it a crime to carry, or attempt to carry a slave by land out of this State, is not repealed by the general repealing clause of the Act of 1855, relative to crimes and offences, nor by the same clause in the Act of 1857, relative to slaves. *Ibid.*
33. The general repealing clauses of these Acts do not repeal the former statutes denouncing crimes and offences, upon which the Acts are silent. *Ibid.*
34. Where a slave was prosecuted under the Act of 1857, "relative to slaves," for having struck a white man, so as to cause the shedding of blood, and the jury acquitted him of any capital offence, but sentenced him to receive corporal punishment—*Held*: That the accused, in such a case, is not debarred the right of appeal; and that Art. 62 of the Constitution of this State, which grants the right of appeal in all criminal cases, where the offence charged is punishable with death, or imprisonment at hard labor, does not make that right depend upon the nature of the verdict, or the

CRIMINAL LAW (*Continued*).

punishment that may be inflicted by the jury, but upon the nature and punishment of the offence charged, as fixed by law.

State v. Charles, 649.

35. Section 28th of the Act of 1857, relative to slaves, empowers the court to inflict corporal punishment only when the accused has not been *convicted* or *acquitted* of an offence punishable with death, and where a slave has been acquitted by the court of any capital offence, corporal punishment cannot be inflicted on him. *Ibid.*

36. The objection, that the defendant did not have a copy of the venire and indictment served upon him two entire days before his trial, must be urged before going to trial; it can have no effect when the defendant seeks to avail himself of it after the verdict has been rendered.

State v. Fuller, 667.

37. The general repealing clause of the Act of 1855, relative to crimes and offences, does not repeal the former statutes denouncing crimes and offences, upon which the Act is silent. *Ibid.*

38. It is in the discretion of the District Judge to determine whether or not a case should be postponed or continued on account of the ill health of the prisoner. *State v. Ward*, 673.

39. Slaves are regarded in our law, both as property and persons, and the 9th section of the Act of 1855, relative to crimes and offences, which punishes an assault upon a person by "willfully shooting at him," &c., applies to an assault upon a slave, as well as a free person. *State v. Davis*, 678.

40. The Act of 1819, making it a crime to harbor and conceal a runaway slave, is not repealed by the repealing clause of the Act of 1855, relative to crimes and offences. *State v. Fuller*, 720.

41. In a criminal case, it is within the discretion of the District Judge to grant a continuance on the affidavit of the accused, of the absence of a material witness, who is a non-resident and not subject to the process of law, but the appellate court cannot interfere with the exercise of that discretion.

State v. Nicholson, 785.

42. Where the offence charged in the indictment was in the words of the statute, uttering and giving in payment a forged and counterfeit bank note, *knowing the same to be forged and counterfeited*, and in the indictment the words "*knowing the same to be forged and counterfeited*," were omitted—*Held*: That the defect was not remedied by the charge in the indictment, that the counterfeit bill was uttered and given in payment with an "intent to defraud." *Ibid.*

43. The statute of 1855, requiring that *formal objections* to an indictment shall be taken before the jury are sworn, and not afterwards, does not apply to matters of substance essential to the very existence of the offence, and on such objections as formerly, the judgment may be arrested. *Ibid.*

44. By section 6th of the "Act to regulate the mode of procedure in criminal prosecutions," approved March 14th, 1855, the State is only relieved from the necessity of alleging and proving an intent to defraud some particular person, but is still required to allege an offence in other respects, corresponding with the statute which creates it. *Ibid.*

CRIMINAL LAW (*Continued*).

45. When the sentence against the prisoner exceeds the maximum of imprisonment under the statute, the case will be remanded with instructions to the District Judge to pronounce judgment upon the verdict according to law.
Ibid.
46. The mere belief of a person, that an assault is made upon him under circumstances denoting an intention to take his life, or to do him great bodily harm, will not justify taking the life of the person making the assault; there must have been a reasonable ground for such apprehension to render the killing justifiable homicide.
State v. Swift, 827.

See SUPREME COURT—*State v. Haase*, 79.

See APPEAL—*State v. Ross*, 364.

State v. Ward, 673.

See JURY AND JURORS—*State v. Bunger*, 461.

See EVIDENCE—*State v. Maitreanne*, 830.

CURATOR.

See PARTITION—*Shaffel v. Jackson*, 154.

See EXECUTORS AND ADMINISTRATORS—*Succession of Rice*, 317.

See SUCCESSIONS—*Surgt v. Calder*, 336.

See ABSENTEE—*Wilson v. Smith*, 368.

DAMAGES.

1. Proof of possession as owner is sufficient to maintain an action of damages for injury done to a slave.
McCutcheon v. Angelo, 34.
2. When a party is sued for damages, resulting from a breach of contract in failing to deliver, as he had contracted to do, a specific number of molasses barrels—*Held*: That the market price of barrels at the time of the breach of the contract, and not exceptional sales, is the proper criterion for the estimation of damages.
Thompson v. Howes, 45.
3. In an action against the city corporation to recover damages for injury done by a mob, when the defence pleaded was a general denial—*Held*: That under the pleadings the city might prove in mitigation of damages that the plaintiffs had exposed their property in the public market, in violation of an ordinance of the city requiring the markets to be closed at the hour when the injury was done, but that such evidence could not be received as a complete bar to the action.
Fortunich v. New Orleans, 115.
4. The violation of a right to the use of property is sufficient to maintain an action without proving damages.
Dudley v. Tilton, 283.
5. In a suit brought against the captain and owners of a steamboat, to recover damages for loss or injury arising from the bursting of the boiler, the Act of Congress approved July 7th, 1838, entitled, "An Act to provide for the better security of the lives of passengers on board of vessels propelled, in whole or in part, by steam," should govern, and not Article 2999 of the Civil Code.
Porée v. Cannon, 501.
6. The 13th section of that Act, in such an action, throws the burden of proof upon the captain and owners of steamboats to show, that the explosion was not the result of negligence on their part, or those employed by them.

Ibid.

7. In an action for damages on account of slanderous words, malice is an essential fact, and should always be proved. *Harry v. Constantin*, 782.
8. The general rule for the measure of damages for the inexecution of a contract, by Article 1928 of the Civil Code, is the loss suffered or the profit of which the obligee has been deprived. *Gauthier v. Green*, 788.
9. To exempt the proprietor and undertaker from the charge of negligence and liability for damages caused by the falling of the wall of a house in course of demolition, the notice of danger required by law to be given in such cases must be of such a character as to put the party injured in fault. *Jackson v. Schmidt*, 806.
10. When it is contended that a *barricade* had been erected, it must be shown that it was an actual obstruction to passage, in order to constitute sufficient notice or warning of the impending danger, and thereby exonerate the proprietor from responsibility in case any one is injured by the falling of the wall, or any part of the materials composing it. *Ibid.*
11. When in such a case the proprietor, through an error of judgment, had not given *sufficient* notice, vindictive damages should not be allowed. *Ibid.*

See EXECUTION—*Mock v. Kennedy*, 32.

See PRACTICE—*Nicholson v. Desobry*, 81.

See LEVEES AND ROADS—*Inge v. Police Jury*, 117.

See CORPORATIONS—*Bennett v. New Orleans*, 120.

See FERRIES—*Chiapella v. Brown*, 189.

See BILLS AND NOTES—*Kuenzi v. Elvers*, 391.

See INJUNCTION—*Perry v. Kearney*, 400.

Williams v. Close, 737.

Neece v. Voorhies, 738.

See EVIDENCE—*Rayne v. Taylor*, 406.

See COMMON CARRIER—*Turdos v. Toulon*, 429.

DONATION.

1. The donee is a universal one in the sense of Article 1539 of the Civil Code when the donor has given to him all his property, reserving only enough to himself for subsistence. *Porche v. Moore*, 241.
2. The specification of each particular thing given, in the act of donation, does not change the character of the donation so as to avoid the obligation, on the part of the donee, of paying the debts of the donor. *Ibid.*
3. Where *A*, assuming to be the agent of *B*, buys a tract of land in the name of *B*, for whose benefit he pays the price, thereby intending to make a donation to *B*, he cannot afterwards defeat the title of *B*, by executing an act revoking the donation for want of acceptance of it by *B*. *Giannoni v. Gunny*, 632.
4. An instrument of writing conveying a title to slaves in which the grantor uses the expressions, "*give and bequeath*," when followed by a delivery of the property, will be considered a donation *inter vivos*. *Crawford v. Puckett*, 639.
5. Where a father, in the State of Arkansas, made a donation of slaves to "*the heirs of his son*," the son then living and receiving the property—*Held*: That it was a valid donation to the minor child of the son, then in existence, who, as presumptive heir, received the benefit

DONATION (*Continued*).

of the donation, and that *his* father, acting merely in a fiduciary capacity, could not alienate the property to the prejudice of the rights of his minor child. *Ibid.*

6. In a common law State where slaves are personal property, a gift by parol, followed by delivery, confers a valid title. *Ibid.*
7. A donation under our laws is not valid, when the usufruct of the property donated is reserved to the donor. *Tillman v. Mosely*, 710.

See WILLS—*Barbet v. Rath*, 381.

ELECTIONS.

1. In a suit contesting an election on account of violence used in keeping voters from the polls, it should be alleged that there was a sufficient number prevented from voting to have varied the result; and the absence of such material allegations is fatal to the suit. *State v. Mason*, 505.

EMANCIPATION.

See SLAVES—*Jamison v. Bridge*, 31.

Brown v. Raby, 41.

Pauline v. Hubert, 161.

Deshotele v. Soileau, 745.

See SUCCESSIONS—*Lewis v. Williams*, 625.

See MINORS—*Boyd v. Frantom*, 691.

See SLAVES and WILLS—*Price v. Ray*, 697.

ESTOPPEL.

1. A party who being himself the owner of property, points it out to be seized in execution for the debt of another, will be estopped from denying the title of the defendant in execution. *Amonett v. Young*, 175.
2. A party who bids for land at a public land sale, is estopped from denying the validity of the sale on the ground that it was land liable to private entry, which he had unsuccessfully applied to the Register and Receiver of the Land Office to enter. *Hulse v. Dorsey*, 302.
3. Where a party has sued and obtained judgment against a company, as a corporation, he is estopped from afterwards denying its corporate capacity. *Pochetu v. Kemper*, 308.
4. A party who permits property in his possession to be seized under execution and sold as the property of another, without objection on his part, and at the sale purchases the property, does acts inconsistent with the idea of ownership on his part, and which generally have the force and effect of an estoppel. *Smith v. Taylor*, 663.

See BILLS and NOTES—*McKerroy v. Bank of Kentucky*, 458.

See BONDS—*Tuliaferro v. Steele*, 656.

See HUSBAND and WIFE—*Bisland v. Procosty*, 169.

See FERRIES—*Chiapella v. Brown*, 189.

See ATTACHMENT—*Frost v. White*, 140.

EVICTION.

1. The party evicted from real estate, cannot recover the difference between the costs of the improvements made by him, and the enhanced value of the soil. *Sarpy v. New Orleans*, 311.

EVICTION (*Continued*).

2. To maintain an action for the rescission of a sale of property of which the vendee is in possession, it is necessary there should have been an offer to return the property, made previous to the institution of the suit.

Matta v. Henderson, 473.

3. There must be an express allegation that the vendor has been disquieted in his possession, or has just reason to fear that he will be disquieted, to entitle the vendee to demand that security be given by the vendor against eviction.

Ibid.

See ATTORNEY AT LAW—*Sarpy v. New Orleans*, 311.

See WARRANTY—*Vienne v. Harris*, 382.

See SALE—*Dyson v. Phelps*, 722.

EVIDENCE.

1. The private memoranda or projets of an agreement, unsigned and retained by the writer of them are not evidence of a contract obligatory upon him or his representatives, unless corroborated by other testimony.

Price v. Mathews, 11.

2. Parol evidence is inadmissible to show that a slave was received by the husband, in lieu of money due his wife from her father's estate.

Wood v. Harrel, 61.

3. The American State papers published by order of Congress are admissible as evidence. The copies which they contain of legislative and executive documents, are as good evidence as the originals are from which they are copied.

Dutillet v. Blanchard, 97.

4. A party claiming title to a promissory note under an order and sale made in the proceedings in bankruptcy, is not bound to produce in evidence a transcript of all the proceedings.

Price v. Emerson, 141.

5. It must now be considered settled, that effect will be given to parol proof of the sale of real estate, if it is received without objection.

Pauline v. Hubert, 161.

6. The title to slaves may be proved by parol when it is shown that, by the laws of the State where the facts testified to took place, and where the slaves then were, they could be transferred by verbal sale and delivery.

King v. Neely, 165.

7. Duly authenticated copies of documents from the State Land Office are admissible as evidence.

Franklin v. Woodland, 188.

8. In matters of conflicting settlements upon public lands, the acts and conversations of parties are admissible in evidence, the objection going to their effect.

Ibid.

9. The name of the vendee in the body of the act of sale was omitted, the notary and one of the witnesses to the act were offered to prove that *H. T. W.*, whose name was subscribed together with that of the vendor to the act, was the purchaser—*Held*: That the omission could be supplied by such parol evidence.

Beauvais v. Wall, 199.

10. Where it was proved that the original of an act of transfer and assignment had been deposited in the General Land Office—*Held*: That the registry of it in a book in the Recorder's office, with the certificate of the Parish

EVIDENCE (*Continued*).

Judge appended, was competent evidence of the transfer and of its registry. *Ibid.*

11. Where it is impossible for a party to produce an original, which is on file in the Land Office as a part of the archives of the Government, a copy is admissible in evidence. *Ibid.*
12. The evidence of a single witness to establish acknowledgements of indebtedness on the part of a deceased person, is held to be the weakest species of evidence known to the law, and will be received with disfavor. Such evidence held in this case to be insufficient to defeat the plea of prescription. *Bringier v. Gordon*, 274.
13. The enrollment of a steamboat is a record, of which the collector of customs is the custodian, under the Acts of Congress, and a copy thereof, duly certified by the collector, is competent evidence; so is such a copy of the act of sale recorded under the Act of Congress of 1850. *Sampson v. Noble*, 347.
14. A lease made by a third party and defendant, is properly rejected when offered in evidence in a suit, as between a plaintiff and a party to the lease and defendant. And so is testimony tending to prove facts not alleged. *Cohn v. Levy*, 355.
15. On an allegation of a written lease, no evidence can be offered to prove one by parol. *Ibid.*
16. In a question of location, the only authorized evidence is a survey made by proper authority. *Edwards v. Ballard*, 362.
17. The decision in the case of *Gray v. Trafton*, 12 M. 702, reaffirmed—to the effect that an order given on an attorney at law for the amount of a claim placed in his hands for collection, is sufficient evidence of a transfer. *Edwards v. Daley*, 384.
18. Where an administrator contests the consideration of such an order, the burden of proof is certainly upon him to establish want of consideration. *Ibid.*
19. Alterations in a warehouse receipt after its delivery, are presumptive evidence of fraud; and the authenticity and importance usually attached by the law to those instruments made in good faith, do not attach to such an instrument. *Martin v. His Creditors*, 393.
20. The *bona fide* possession of a warehouse receipt is legal evidence of possession and where different parties are in possession of such receipts, the earliest must prevail. *Ibid.*
21. Where a pass-book has been kept by a party with a merchant, although every entry of items bought has been made by the merchant or his Clerk, yet the book is the property of such party, who is presumed to have examined it, and if he has made no objection to its contents, may be compelled to produce the same, and it may be offered in evidence against him. *Succession of McLaughlin*, 398.
22. The record of a suit brought by attachment against a supposed owner, in which the thing seized was released upon bond by such supposed owner, is not admissible as evidence of real ownership in an action between other

EVIDENCE (*Continued*).

parties, where the question relates to title—but a judgment changing the ownership of the property would be admissible, in the same manner as a private writing, although the plaintiff in the suit pending had no connection with the former action. *Snapp v. Porterfield*, 405.

23. In an action of damages for libel and slander, the truth of the words written or spoken, may be given in evidence as a defence to the action under such a plea. *Rayne v. Taylor*, 406.
24. Where a slave is sold with full guaranty, evidence is inadmissible which would contradict the written act of sale by showing that the slave was not warranted against a particular vice. *Jackson v. Hays*, 577.
25. But to rebut the allegation of fraud and concealment, parol evidence may be received to show that at the time the sale was about to be passed the vendor had stated to the vendee that the slave had once run away from him. *Ibid.*
26. The copy of an act under private signature does not prove the genuineness of the original, although admitted to record on the affidavit of a subscribing witness. *Reynolds v. Stille*, 599.
27. Where a commission to take testimony is specially directed by name to a person in another parish, his authority to administer oaths will be presumed. *Rembert v. Whitworth*, 608.
28. In a suit by the administrator of an estate to recover property sold by the intestate, parol proof is inadmissible to show that the sale by authentic act was simulated, unless the sale is alleged to have been made in fraud of creditors. *West v. Hickman*, 610.
29. When it is apparent that a party intended to offer in evidence a paper, or document, but failed to do so through inadvertence, or mistake, and the document is copied in the transcript of the record, the Supreme Court will consider and give effect to the evidence, as if it had been formerly introduced, if it is admissible. *Powell v. Hopson*, 666.
30. In a suit on an account, a special denial by defendant of the correctness of the charges for interest, discount and commissions, is restrictive of the general denial, and proof that no other objection was made to the account when presented, when thus corroborated, will suffice. *White v. Jones*, 681.
31. When the defendant offers in evidence the credit side of an account copied from the merchant's books, the whole account must be taken together, but the defendant is not excluded from showing the incorrectness of particular items of debit. *Ibid.*
32. The evidence of one witness, without corroborating circumstances, is not sufficient to establish an item in account of over \$500, for amount of a draft paid by the merchant, which is alleged to be lost or mislaid. *Andrew v. Keenan*, 705.
33. Articles 2258 and 2259 C. C., in regard to lost instruments, do not apply to an action for reimbursement of money paid by a merchant upon an accommodation acceptance, when the draft is lost or mislaid. *Ibid.*

EVIDENCE (*Continued*).

34. A party is not concluded by his declaration of residence in an act of conveyance, and evidence is admissible to contradict the recital, when the domicile is not one of the causes of the contract.
Tillman v. Mosely, 710.
35. A party may give in evidence the answers of his adversary to interrogatories on facts and articles, although such answers were made in a different suit between them from the one on trial. *Alford v. Hughes*, 727.
36. The failure of the Clerk to endorse a document as filed, which was offered in evidence, is of no consequence when the document is actually filed in the records, and is contained in the statement of facts.
State v. Badon, 783.
37. An attorney at law is a competent witness in a case in which he is employed, and his testimony can only be excluded on legal grounds; the relations which exists between him and his client go to the effect and not to the admissibility of his testimony. *Succession of Grant*, 795.
38. A copy of several consecutive sections of an Act of another State, taken from a digest of general statutes, and certified to be a true copy by the Secretary of State, should be received as *prima facie* evidence of the whole law of the State upon the subject treated of in the sections.
Ibid.
39. The capacity and signature of a Justice of the Peace who has taken a deposition under commission in another State, must be established by the certificate of the Governor under the great seal of the State. *Ibid.*
40. The registry of an act under private signature, does not make proof of its execution by the parties to it. *Ibid.*
41. The written or verbal statements of a prosecutor, are considered as merely hearsay evidence, and not admissible, except to rebut his declarations on the witness stand, or when received after his death in a case of homicide, as dying declarations. *State v. Maitremme*, 830.

See PRESCRIPTION—*Saunders v. Carroll*, 27.

Union Bank v. Bradford, 159.

See CRIMINAL LAW—*State v. Patterson*, 46.

State v. Peter, 521.

See BILLS AND NOTES—*Bank of Louisiana v. Satterfield*, 80.

Grieff v. McDaniel, 160.

Rice v. Davis, 435.

Succession of Penny, 194.

See DAMAGES—*Fortunich v. New Orleans*, 115.

See CORPORATIONS—*Municipality No. 2 v. Guillotte*, 297.

See INN-KEEPERS—*Pope v. Hall*, 324.

See SUCCESSIONS—*Wilson v. Smith*, 368.

See ACTION—*Delespaze v. Warner*, 413.

See REDDITION—*Gaiennie v. Freret*, 488.

See BOUNDARY—*Lebeau v. Bergeron*, 489.

See SUPREME COURT—*State v. Bennett*, 651.

See PUBLIC LANDS—*Leblanc v. Ludrique*, 772.

See WARRANTY—*Late v. Armorer*, 826.

See PRACTICE—*Arrousmith v. Durell*, 849.

EXECUTION.

1. Where an officer in executing a writ of *fiery facias* against the husband seizes property which he has *good reasons to know* is the separate property of the wife, he is responsible to her in damages for such illegal seizure.
Mock v. Kennedy, 32.
2. Where the plaintiff has recovered a judgment, the proceeding to render his property liable in execution for costs, is statutory, and the forms of the statute must be strictly pursued, under pain of nullity.
Bantz v. Price, 191.
3. The Art. C. P. (as amended) which requires a delay of ten days before an execution shall issue, in the first district, is in the interest of the defendant and for the purpose of protecting his right to a suspensive appeal. C. P. 624; Acts 1853, p. 40. This right he may at any time waive, and a valid execution may issue immediately. C. P. 567. If he suffers the delay for a suspensive appeal to expire, the premature issuance of an execution does not even give him the right to enjoin.
Soule v. Pollard, 287.
4. The appellees allowed interest in this case during the delay occasioned by the appeal.
Ibid.
5. When the principal, interest and costs of a judgment do not amount to fifty dollars, the Sheriff has no right to sell immovable property to satisfy it.
Zimmerman v. Bartley, 520.

See INJUNCTION—*Todd v. Fisk*, 13.

Wallis v. Bourg, 104.

See ATTACHMENT—*Emanuel v. Mann*, 53.

See GARNISHMENT—*Frellsen v. Anderson*, 65.

See PARTNERSHIP—*Pittman v. Robicheau*, 108.

See SALE—*Scully v. Kearns*, 435.

Gleisses v. McHattin, 560.

Dyke v. Dyer, 701.

See INSOLVENCY, &c.—*Lyons v. McRae*, 438.

See SEQUESTRATION—*Trilly v. Clark*, 503.

EXECUTORS AND ADMINISTRATORS.

1. The functions of an executor are not limited to the execution of the legacies contained in the will, but extend also to the payment of the debts of the deceased.
Meissonier v. Laurent, 14.
2. Where the capacity of a testamentary executor has been recognized, and he has been authorized to act as such by the judgment of a competent tribunal, an objection cannot be entertained collaterally, that he is a foreign executor and has not given the security required by the Act of the Legislature of 1842.
Van Wick v. Rist, 56.
3. The appointment of a dative testamentary executor should not be made when there are no debts of the estate to be paid, nor legacies to be discharged.
Succession of Crocker, 94.
4. The surety on the administrator's bond will be held liable for money set down on the inventory as part of the estate, although it is shown that the administrator received it in a fiduciary capacity before his appointment.
Goode v. Buford, 102.

5. An administrator has the capacity to stand in judgment in a suit by a slave, inventoried as part of the succession, to have her freedom established.

Pauline v. Hubert, 161.

6. The heirs and creditors of the estate will be bound by the acts of the administrator, as to the mode of proceeding in the defence of a suit and the reception and rejection of evidence. *Ibid.*

7. There is no law which renders an administrator personally liable for a debt of his intestate, on his mere neglect to comply with an *ex parte* order of the Clerk to file his account. *Lockhart v. Wall*, 273.

8. The dismissal from office of a curator does not involve the forfeiture of his commissions. *Succession of Rice*, 317.

9. An executor is authorized to collect claims until the estate is closed, or he is discharged. *Keane v. Goldsmith*, 349.

10. The administrator is entitled to commissions only on the amount which comes into his hands, and for which he is responsible.

Succession of Powell, 425.

11. The Act of 1855, regulating the duties and powers of administrators, being highly penal, should be strictly construed. *Succession of Toy*, 536.

12. An executor or administrator, if he has funds to distribute before the expiration of a year from his appointment, may be called upon to distribute them after the time of delay provided by law has expired; but if he fails to obey the order of court, he cannot be subjected to the penalties of the Act of 1855, as he does not, under the Act, so far as relates to filing an account, become liable to its penalties until the expiration of twelve months. *Ibid.*

13. The Articles 985 and 986 of the Code of Practice prescribe the form in which a debt due by a succession must be acknowledged by an administrator—*Quere*: Whether such acknowledgment can be made in any other form, to interrupt prescription. *Succession of McAlpin*, 617.

14. The incapacity of an administrator to purchase property on behalf of a succession, is not so absolute as to make his purchases utterly void.

Hicks v. Weems, 629.

15. Where an administrator, in seeking to collect a debt due to the succession, which had its origin in the price of real estate which belonged previously to the succession, and which was subject to the vendor's privilege in favor of the succession, has the property sold, and buys it in for the estate for a small part of the debt, leaving a large balance of the debt to be ranked among the active means of the estate—*Held*: That although such proceedings may have been irregular, they were not absolutely void, and when ratified by the heirs, their title to the property cannot be questioned by any one. *Ibid.*

16. Where an administrator persists in refusing to file his account, after the expiration of the time fixed by law, and fails to tender a good reason for the delay, the Judge shall order him to be arrested and imprisoned until he renders the account. C. P. 1011. *Lobit v. Castille*, 779.

EXECUTORS AND ADMINISTRATORS (*Continued*).

17. The subsequent Article enables interested parties to compel him to render an account, by imprisonment, or distraining his property and income.
Ibid.
18. Upon the neglect of the administrator to pay the amount for which judgment has been rendered, and his failure to prove that he has no funds in his hands belonging to the succession, the creditor may take out an execution against such administrator's individual property; but to do so, it is necessary that the judgment should be notified to him, and a rule taken on him in his official capacity.
Ibid.
19. Where the remedy is resorted to, of having the administrator dismissed from office, and sentenced to pay interest and damages, he settles with his successor in office, and not with the creditor who has provoked the dismissal.
Ibid.
20. The regular mode by which an ordinary creditor is to obtain payment of his judgment against an estate, is concurrently with the other creditors. C. P. 987, 1054; C. C. 1168. This implies that an account and tableau of distribution should be filed, wherein each creditor may be classed, in order that he may receive his portion of the funds in the hands of the administrator.
Ibid.
21. Where a creditor declines to pursue the ordinary remedy, and pursues the administrator personally, by a resort to the penal provisions of the law, he must bring himself within them before he can demand the penalty.
Ibid.
22. "The classification and order of payments" referred to in C. P. 993, is that mentioned in a preceding Article (988), and the case is contemplated, where the administrator has funds, and is ordered to pay the same to the creditors, according to their rights, and not a case where funds are not in the hands of the administrator at the time of such classification. *Ibid.*

See SALE, JUDICIAL—*McCulloch v. Weaver*, 33.

Succession of Gurney, 622.

See SUCCESSION—*Waterhouse v. Bourke*, 358.

Saloy v. Chezmaïdre, 567.

Stale v. Leckie, 641.

Succession of Pool, 677.

Sturges v. Sheriff, 231.

See EVIDENCE—*Edwards v. Daley*, 384.

See WILLS—*Atkinson v. Rogers*, 633.

See PRACTICE—*Succession of Hughes*, 823.

FACTOR.

1. Where a draft is drawn by a planter on his factor, for the benefit of the latter, the former is entitled to commissions at two and a half per cent. for the risk incurred as drawer of the draft, according to the mercantile usage established in such cases.
White v. Jones, 681.

FERRIES.

1. The Act of Congress declaring the Mississippi River to be a common highway, free to all citizens of the United States, was not intended to interfere with the right of the State to create and regulate ferries.

Chiapella v. Brown, 189.

FERRIES (*Continued*).

2. A party who was present at the public sale of a ferry and bid against the purchaser, is estopped from asserting that he had an unexpired lease to the same ferry, and that it had not been properly advertised. *Ibid.*
3. Damages may be recovered for an injury to a right of keeping a ferry, committed by one who crosses passengers gratuitously, but receives compensation in whole or in part by keeping the horses of those crossing. *Ibid.*

GARNISHMENT.

1. When new proceedings of garnishment are commenced, the original proceedings are presumed to be abandoned. *Frellsen v. Anderson*, 65.
2. A seizure made on an execution which has expired, is illegal and void. *Ibid.*
3. The Act of 1855, which authorizes a Sheriff, in cases of garnishment, to retain a copy of the writ and proceed on that in the same manner as though the original was in his hands, does not empower the Sheriff to effect more with the copy than he could with the original execution. He could not, with the copy, make new seizures on expired writs. *Ibid.*
4. The answers of garnishees, when categorical, are conclusive, unless disproved. *Helme v. Pollard*, 306.
5. The record not disclosing any interest in the garnishee, in the result of the suit between plaintiffs and defendants, he is considered a mere stakeholder, and not entitled to demand service of the interrogatories taken out by plaintiffs. *Low v. Proctor*, 373.
6. In an attachment suit, the garnishee has the right, even after the interrogatories have been taken *pro confesso*, to ask of the court, at any time before judgment, that the order taking the interrogatories for confessed may be set aside, and that he may be allowed to answer. And it is within the sound discretion of the court, and also its duty, to grant the request, if the ends of justice would be thereby attained. *Rose v. Whaley*, 374.
7. Where the garnishees answer that they have no property, the court is without jurisdiction. *Ibid.*
8. The answers of a garnishee, when categorical, make full proof of the facts stated against the seizing creditor, until contradicted by other evidence. *Barnes v. Wayland*, 791.
9. The credibility of a garnishee cannot be impeached, by showing him to be unworthy of belief; to contradict his answers, the facts stated in them must be disproved. *Ibid.*

See ATTACHMENT—*Euler v. McAllister*, 821.

HEIRSHIP.

1. By the laws of Mississippi, among collaterals, the kindred of the whole blood are preferred to the kindred of the half blood in the same degree; and by effect of representation, nephews and nieces of the whole blood will exclude a sister of the half blood. *King v. Nedy*, 165.

HUSBAND AND WIFE.

1. The wife has no privilege on the movables of the husband's estate for the restitution of her paraphernal funds. *Succession of Richardson*, 1.
2. Where the husband applied for and obtained insurance on his life, accompanying the application with a transfer of the policy, when issued, to his wife, to whom he was indebted for her paraphernal funds received by him—*Held*: That the wife was entitled to the amount of the policy on the death of her husband. *Ibid*.
3. The acknowledgement by a married woman, in an act of mortgage, of her indebtedness, does not estop her from denying that the debt which her mortgage was given to secure had enured to her separate benefit. *Moussier v. Zunts*, 15.
4. The creditor is bound to show affirmatively that mortgage notes signed by a married woman were given for a debt which had enured to her benefit, in order to render her liable. *Ibid*.
5. The burden of proof in such case rests on the creditor, although the wife is separated in property from her husband. *Ibid*.
6. A married woman, when properly authorized, may become security for any other person than her husband. *Ibid*.
7. One who was not a creditor of the husband at the time of the wife's obtaining a judgment against him, of separation of property, cannot successfully attack such judgment, without proof of fraud on the part of the wife. *Noland v. Bemiss*, 49.
8. Property bought by the husband in his own name, and paid for with the separate funds of his wife, is not the property of his wife; but the fact of his having paid for it out of the separate funds of his wife gives to her a mortgage for the amount thus used, which in a proper form of action, may be enforced on any property of the husband. *Wood v. Harrell*, 61.
9. Where, during the marriage, an undivided interest in a plantation fell to the wife, as paraphernal property, the husband never taking possession, but of which the management and administration was given by the wife and her coproprietor to an agent of their own selection—*Held*: That of this part of his wife's paraphernal estate the husband never had the possession and enjoyment, neither was it administered by him and her indiscriminately. *Dodd v. Orillion*, 68.
10. The fact that the husband was consulted by the wife's constituted agent as to the crops, settlement of accounts, &c., subject always to the ratification of the wife, did not change the character of the administration. *Ibid*.
11. Property was purchased at a Sheriff's sale, under execution against the husband, by *M*; *M* transferred it to *H*, who sold it to the plaintiff, the consideration stipulated being the transfer to her vendor of her rights in the succession of her deceased father. The husband always remained in possession of the property. *Held*: That the property so purchased by the wife became her paraphernal property, and that the character of her title was not affected by the fact that her vendor, subsequently to the sale, made a relinquishment of the consideration stipulated in the act of sale. *Ruys v. Babin*, 95.

12. Where a suit is brought on a promissory note, the property of the wife, in her name conjointly with that of her husband, the husband must be viewed as appearing therein only to assist and authorize his wife, and the judgment rendered in such suit is the property of the wife.
Raiford v. Wood, 116.
13. The prohibition in Article 2412 of the Code, against the wife's binding herself for her husband, or conjointly with him, for debts contracted by him before or during the marriage, is, to a certain extent, one affecting the public order.
Bisland v. Provosty, 169.
14. Neither the acknowledgement of the wife that the debt was contracted for the benefit of her separate estate, nor the fact that the money was actually paid into her hands, will estop her from afterwards denying her indebtedness, and the creditor is then put upon proof that the debt enured to the benefit of the wife's separate estate.
Ibid.
15. The doctrine of estoppels has no application to the contracts of married women, when they or their property are sought to be held liable for the debts of their husbands.
Ibid.
16. An exception to the rule in regard to the wife's incapacity to bind herself for a debt which does not enure to her separate benefit, may exist when she has actually committed a fraud, but not when it has been impliedly or constructively committed.
Ibid.
17. The wife is liable for all debts incurred for the improvement of her separate estate, advances made for the payment of debts and supplies of necessities for a plantation, which is her paraphernal property, whether she has retained the administration of her paraphernal property or entrusted it to her husband.
Succession of Penny, 194.
18. Art. 2377 of the Code has reference only to the settlement of the accounts between husband and wife, and does not control the action of creditors.
Ibid.
19. There is no question of the right of a married woman, above the age of majority, to renounce her mortgage upon the property of her husband, in favor of a third person.
Ibid.
20. Where the wife, as heir of the husband, applied for a patent which was issued to her as his assignee, a title in her, independent of her husband, cannot be inferred, and the patent must enure to the benefit of the husband's vendee.
Beauvais v. Wall, 199.
21. There may be cases in which the husband ought not to be allowed interest on debts of the wife paid by him, as where the payment has been fraudulently deferred by him for the purpose of injuring her; but where the debt has been paid in good faith, the interest, as an incident of the debt, is chargeable to the person who owes the same.
Davis v. Robertson, 281.
22. By giving the husband the administration of her paraphernal property, the wife relieves herself of her portion of the marriage charges.
Ibid.
23. In the absence of proof of the wife's separate administration of her paraphernal estate, it will be presumed to have been under the management of the husband.
Ibid.

HUSBAND AND WIFE (*Continued*).

24. It is impossible to give a defamatory intention and effect to epithets applied by a husband to his wife, when no one was present but the spouses themselves, although such epithets would have had much gravity had they been uttered in the presence of any third person.
Bienvenu v. Her Husband, 386.
25. Facts which might have given ground for a separation from bed and board, are extinguished by a reconciliation. C. C. Art. 149. *Ibid.*
26. It is only where a subsequent cause is proved to have arisen, sufficient for the basis of the action of separation, that Art. 150 C. C. will entitle the plaintiff to urge a cause precedent to the reconciliation. *Ibid.*
27. A reconventional demand on the part of defendant, for a separation on the ground of abandonment, is not admissible. A particular form of procedure is required by the Code for obtaining a decree of separation on this ground, and to that form the defendant must have recourse for relief. *Ibid.*
28. Art. 2409 C. C. declares that "the wife who has obtained a separation of property must contribute in proportion to her fortune and that of her husband, both to the household expenses, and to those of the education of their children. *She is bound* to support those expenses alone if there remains nothing to her husband." Art. 2412 C. C. means that the married woman shall not bind herself above and beyond the obligations imposed upon her by Art. 2409. *Bowers v. Hale*, 419.
29. The husband is prohibited by law from purchasing the property of his wife in a direct sale, and he therefore cannot be permitted to acquire a title to her property indirectly for a price fixed beforehand by the machinery of legal proceedings against the wife, resulting in the sale of her property.
Parnell v. Petrovic, 601.
30. The relationship of the husband to the wife forbids an arrangement by the husband with the creditors of the wife, under which the title of the wife is to be divested by judicial proceedings against her, and the property transferred to the agents of the husband. *Ibid.*
31. The purchaser of the property of the wife, under an agreement between the husband and the purchaser, that when the debts of the wife assumed by the purchaser should be paid off from the revenues of the property, the property should be conveyed to the husband or his heirs, will not divest the wife of her title, or enable the husband or his heirs to hold the property adversely to the wife and her heirs. *Ibid.*
32. The voluntary separation of husband and wife does not prevent their acquisitions during the period of the separation from falling into the community under Art. 2371 of the Civil Code. *Joffrion v. Bordelon*, 618.
33. When the property of the wife described in the marriage contract is not declared to be given in dower, it remains paraphernal. *Ibid.*
34. Where property purchased during the marriage is paid for out of the separate funds of the husband, a charge exists in favor of the separate estate of the husband against the community for the amount of such purchase.
Ibid.
35. A married woman may sign a note or draft in payment of a debt created for the benefit of her individual estate, without the authorization of her husband.
Brooks v. Wigginton, 676.

HUSBAND AND WIFE (*Continued*).

36. A draft given for such a debt by a married woman is an act of administration, and in giving it, she may be considered as having resumed, as she may do at will, the administration of her paraphernal property.
Ibid.
37. A deed of trust is the common law form of securing property to the wife.
Eager v. Brown, 684.
38. Under the common law, a married woman cannot possess personal property independently of her husband, except when a trust is created for her sole benefit.
Ibid.
39. A deed of trust creates for the wife a separate estate, and her husband, as trustee, cannot reduce the property into his possession, so as to make it his own; if he sells it while trustee, he holds the proceeds in trust, and not as owner.
Ibid.
40. A deed of trust executed in Alabama, vesting title in the wife to property is valid after the removal of the parties to this State, and if the husband's affairs become embarrassed, the wife may claim a separation of property and the administration of her separate estate.
Ibid.
41. When property of the wife is sold in a foreign State, and the proceeds thereof are received by the husband in that State, the wife has no privilege upon the property of her husband for the same in this State. *Ibid.*
42. If he receives the proceeds of the sale, while trustee of his wife, he is personally liable for the amount so received by him; but in a contest for the amount received by him, between the wife and his creditors, his personal liability to the wife must yield to the rights of the creditors. *Ibid.*
43. The wife, although separated in property from her husband, cannot be made liable on a note signed by her with her husband, which did not enure to her separate benefit.
Lee v. Cameron, 700.
44. When it is shown that the wife has disposed of property belonging to the community, for the purpose of procuring the necessities of life for herself and children, which her husband failed to furnish them with, his authorization to her to sell will be presumed, under the provisions of Art. 1779 of the Civil Code.
Johnston v. Pike, 731.
45. The right of the wife in this respect is extremely limited, since the husband's authorization is only implied in contracts entered into by her to procure the necessities of life, and only when his neglect to supply them gives rise to that emergency.
Ibid.
46. The object of the law requiring the authorization of the husband, before the wife can be sued, is fully accomplished when the husband joins the wife in an answer to the suit, even when they have not been designated as husband and wife in the petition.
Favaron v. Rideau, 805.
47. When a married woman who had been authorized to defend a suit by her first husband, marries a second time, while the suit is pending, it is not necessary that the authorization of her second husband should be obtained.
Ibid.

HUSBAND AND WIFE (*Continued*).

48. The matters treated of in the law 29 of title 11 of the 4th Partida concern the *forum*, and have no application in the courts of Louisiana.

Morales v. Marigny, 855.

49. Although the parties to a marriage contract have submitted themselves to the laws of a foreign country, as to the interpretation of the contract, the jurisdiction of the tribunals of this State, where they actually reside, must be exercised in accordance with our own rules of law. *Ibid.*

50. The community of acquets and gains between husband and wife did not exist as a part of the general law of Spain; it prevailed in certain provinces of the kingdom, and not in others. *Ibid.*

51. Although by the laws of Spain the ownership of the effects acquired during marriage is governed by the law of the province where the marriage was contracted, and not by that to which the spouses remove, yet this is only to be understood of such effects as are acquired in the former country, and not of such as are acquired in the latter. *Ibid.*

52. The wife, under the laws of Spain, as well as under our laws, is entitled at any time to resume the administration of her paraphernal estate. *Ibid.*

See EXECUTION—*Mock v. Kennedy*, 32.

See EVIDENCE—*Wood v. Harrell*, 61.

See PRESCRIPTION—*Van Wickle v. Garret*, 106.

See MORTGAGE—*Hackins v. McFay*, 339.

Bowers v. Hale, 419.

See PRACTICE—*Robson v. Shellen*, 712.

See COMMUNITY—*Coons v. Stringer*, 726.

INJUNCTION.

1. An injunction cannot issue to stay an execution on grounds which might have been pleaded in defence before judgment. *Todd v. Fisk*, 13.

2. The existence of a privilege or mortgage upon property seized under a *fi. fa.*, will not authorize an injunction to arrest the sale; the remedy is by third opposition. *Wallis v. Bourg*, 104.

3. An injunction will only be perpetuated as issued for some legal cause stated in the petition. *Pittman v. Robicheau*, 108.

4. Where the judgment enjoined bears the highest conventional interest, the court on dissolving the injunction cannot add anything to that interest, but in a proper case will inflict the full penalty of twenty per cent. damages. *Raiford v. Wood*, 116.

5. When there has been an error committed in issuing a writ of *feri facias* for more than the plaintiff is entitled to under the judgment, the right to enjoin is limited to the amount for which it has erroneously issued.

Barrow v. Robichaux, 207.

6. Where the execution of a judgment has been enjoined, and defendant admits, upon being interrogated, a partial payment of such judgment, the injunction should be perpetuated for the amount admitted to have been paid, and dissolved for the remainder still due. *Perry v. Kearney*, 400.

7. The plaintiff and his surety on the injunction bond are bound *in solido* to defendant for damages only on the amount for which the injunction is dissolved. *Ibid.*

INJUNCTION (*Continued*).

8. The plaintiff in an injunction suit cannot claim from the defendant the amount of fees paid his counsel. *Dyke v. Dyer*, 701.
9. On the dissolution of an injunction, the Judge may allow damages to the amount of twenty per cent. on the judgment enjoined, without proof. *Williams v. Cloze*, 737.
10. But when counsel fees are proven and allowed, exceeding twenty per cent., the Judge cannot, in addition to such allowance, award twenty per cent. as damages. *Ibid.*
11. Counsel fees will not be allowed as special damages where an injunction is maintained against a seizure of property, and the case is not a proper one for the allowance of vindictive damages. *Neveu v. Voorhies*, 738.
12. An appeal will lie from an *ex parte* order setting aside an injunction, upon giving bond, under Article 307 C. P. *Knabe v. Fernot*, 847.
13. Where the dissolution of an injunction is calculated to work an irreparable injury, by depriving members of a corporation of privileges, the value of which cannot be estimated in dollars and cents, the injunction cannot be set aside upon giving bond. *Ibid.*
14. Where executory proceedings are enjoined on the allegations of fraud, and payment supported by affidavit, an injunction bond is not required to be given. *Corner v. Zuntz*, 861.

See APPEAL—*White v. Cazemave*, 57,

See CORPORATIONS—*New Orleans v. Lambert*, 247.

See SALE—*Weems v. Ventress*, 267.

Gleisses v. McHaltion, 500.

Davis v. Millaudon, 868.

See JUDGMENT—*Hereford v. Babin*, 383.

See SEQUESTRATION—*Twitty v. Clark*, 503.

See WARRANTY—*Kelly v. Wiseman*, 661.

INN-KEEPERS.

1. The oath of a party cannot be received to prove the deposit of his baggage or other articles of value at an inn. *Pope v. Hall*, 324.
2. When proof *aliunde*, establishes the fact of the possession by the party of the articles alleged to have been stolen, and their deposit in the inn, and that the room had been entered by thieves, the declaration of *such* party at the instant of discovering the theft may be given in evidence as part of the *res gestæ*—not as proof of a deposit, but as a fact to be connected with other facts tending to prove the loss. *Ibid.*
3. The inn-keeper will be liable for the necessary baggage of the traveler, his watch and personal apparel, and for money which he has about him for his personal use when stolen, notwithstanding a regulation of the inn requiring travelers to deposit certain articles of value in the safe at the office. *Ibid.*
4. There is a distinction to be observed between those effects of a traveler, which are not immediately requisite to his comfort, and which the law requires him to deposit with the inn-keeper or his servant, in order to hold such inn-keeper responsible for their loss, and those which are essential to his personal convenience and which it is necessary to have constantly

INN-KEEPERS (*Continued*).

about him. So that if a guest had been personally notified to deposit at the office of the hotel or inn, his watch and other personal effects necessary to his comfort, this would not liberate the inn-keeper from responsibility, if they were not so deposited. *Profiel v. Hall*, 524. X X

5. But where the traveler contributes by his own act or negligence to the loss of such things, the inn-keeper is released from liability. *Ibid.*

INSOLVENCY AND INSOLVENT PROCEEDINGS.

1. Since the statute of 1843, a bare majority of the creditors of an insolvent have the power to grant a respite and thus postpone the payment of the debts of the minority. *Morgan v. Nye*, 30.
2. The vote of a single creditor for a respite, is not a mere offer to make a new contract between the creditor and debtor, but is a *quasi judicial act* by which the rights of other creditors are to be affected. *Ibid.*
3. Any agreement of the debtor to buy the vote of a creditor by giving security for the payment of his debt, must be considered as fraudulent, and the creditor whose vote is thus bought, cannot recover the amount of his debt against the surety furnished by his debtor, as the contract must be considered as a perversion of the course of justice, and a fraud upon the court charged with the homologation of the deliberations of the creditors. *Ibid.*
4. The creditor of an insolvent cannot litigate his demand for a privilege in a separate suit against the syndic. The privilege must be settled contradictorily with all the creditors upon a tableau of distribution filed by the syndic. *Tenny v. Provosty*, 221.
5. A creditor who has a privilege on property surrendered by an insolvent to his creditors, has a right to obtain an order for the sale of the property for cash, to satisfy his debt, but the proceeds of the sale are to be distributed upon a tableau filed and homologated. *McRae v. His Creditors*, 229.
6. Where an insolvent has given an unjust preference to one creditor over the others, it is for the syndic to bring an action to annul the contract by which such preference is obtained. *Keane v. Goldsmith*, 349.
7. A person not a creditor cannot complain. *Ibid.*
8. Where a judgment has been rendered, accepting a surrender made by an insolvent debtor, and granting a stay of proceedings, according to the provisions of the 6th and 7th sections of the Act of 1855, and the Articles of the Civil Code 3051 et seq., the notice given to creditors in compliance with the above mentioned law, cannot, in case of informality in the return of the officer, as to the mode of making the service, prejudice or affect the stay of proceedings granted by the court. *Hanney v. Healy*, 424.
9. If a creditor wishes to question the legality of such proceedings, he cannot do so unless by a direct action to that effect. *Ibid.*
10. The rights of property of an insolvent are vested by law in the syndic of his creditors. *Dubois v. Xiques*, 427.

INSOLVENCY AND INSOLVENT PROCEEDINGS (*Continued*).

11. In a suit brought by a lessor against the syndic of an insolvent lessee, although the lessor's privilege can only be regularly considered upon a tableau of distribution, yet a prayer for general relief in the petition, will enable the court to reserve the rights of all parties interested in the matter. *Ibid.*
12. Where property has been seized and sold under a judgment, for the benefit of certain creditors, the money remaining in the hands of the Sheriff, and the debtor takes advantage of the Insolvent Act, before the decision of the claims of the various parties to the thing seized, the money thus held by the Sheriff will become part of the assets of the insolvent, and is subject, like all the rest of the property, to be litigated *in curso*.
Lyons v. McRae, 438.
13. Where a third opposition has been filed, claiming a privilege upon the proceeds of the thing seized, and there is a surrender before judgment in the suit, this litigation must necessarily be referred to be tried with the other insolvent proceedings. *Ibid.*
14. Article 1983 of the Civil Code, which obliges a creditor who has been preferred, to share the loss ratably with the complaining creditors, gives the right to compel them so to do, only to those creditors whose debts were either due or would fall due before that of which the payment was anticipated by the debtor in insolvent circumstances.
Brother v. Canal Bank, 475.
15. In order to succeed in a suit to make the preferred creditor contribute ratably, the actors must specially allege the nature of their debts, and prove themselves to have been creditors within the meaning of the Article. *Ibid.*
16. The syndic of an insolvent cannot bring such a suit. *Ibid.*
17. Charges of fraud in an opposition to the application of an insolvent to be allowed the benefit of the laws of this State in favor of insolvents debtors, should be clearly enunciated and specifically made.
Beste v. His Creditors, 516.
18. In a suit for the recovery of money, the defendant having made a surrender, his syndic was made a party, and judgment rendered in favor of the plaintiff—*Held*: That it was irregular, that all further proceedings should have been suspended, and the plaintiff's claim cumulated with the insolvent proceedings.
Fabre v. McRae, 648.
19. The syndic of an insolvent may plead in his answer to oppositions filed to his tableau of distribution, any legitimate defence against the claims of the opposing creditors, such as usury and want of consideration, &c.
Walling v. His Creditors, 670.
20. The opposition in such case is a suit to establish a money demand, and the defence cannot be barred by prescription. *Ibid.*

See CONFLICT OF LAWS—*Scott v. Bogart*, 261.

See PRESCRIPTION—*Morgan v. Melayer*, 612.

See SURETY—*Succession of David*, 730.

INSURANCE.

1. Where the insurance is against river risks, and it is shown that the loss was from a peril of the river, and a possible cause is specified, it being also shown that the vessel was sea-worthy, the plaintiff (the insured) has done all in his power and has made out his case.

Marcy v. Sun Insurance Company, 264.

2. The liability of the insurer, except so far as limited by the policy, must be judged of by the nature of the property insured, the risks to which it was subjected, and the natural accidents to which it is liable. *Ibid.*

3. Where the vessel is sea-worthy, and there is no suggestion and proof of fraud, the plaintiff is not bound to establish the identical cause of the loss, but may show a possible cause. *Ibid.*

4. When an open policy of insurance is made out in the name of *D. L. S.* "for account of whom it may concern," and a clause is inserted to the effect, that the "*insurance is on merchandise, to cover all shipments to the address of the assured, from the time of shipments, and risks to be reported as soon as known*"—*Held*: That to recover under such a policy the value of a lost shipment, it must be shown that it was made to the address of the assured, or if made to the address of another person, that the risk was reported by him. *Shearer v. La. Mutual Insurance Co., 797.*

See COMMON CARRIER—*Murrell v. Dixey, 298.*

INTEREST.

1. When a party in settlement of a debt pays, through error, compound interest in addition to the amount and interest really due—*Held*: That he is entitled to recover the difference between the amount really due and the debt at compound interest as collected. *Major v. Tardos, 10.*

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2. In the absence of a written agreement to pay eight per cent. interest on an account, legal interest only can be recovered from judicial demand.

White v. Jones, 681.

See INJUNCTION—*Ratford v. Wood, 116.*

See SALE, JUDICIAL—*Yeatman v. Erwin, 149.*

See BILLS AND NOTES—*Weems v. Ventress, 287.*

See TAXES—*New Orleans v. Fisk, 862.*

INTERROGATORIES.

1. Where defendant, in his answer in the cause, which was sworn to, responded substantially to the interrogatories propounded in plaintiff's petition—*Held*: To be sufficient. *Wade v. Newton, 271.*

2. Where a cause has been previously put at issue, and the object of filing interrogatories is simply to procure proof, and not to bring the party into court, the consent to a continuance by defendant, and the declaration of plaintiff's counsel that he will amend his petition and propound interrogatories accordingly, is not an agreement that binds the party to amend, if he subsequently finds that he has sufficient proof without, he is not bound by such consent to propound interrogatories in order to be permitted to obtain judgment. *McKnight v. Connell, 396.*

INTERROGATORIES (*Continued*).

3. In such a case the want of service of the interrogatories is not one of those vices of form which give rise to the action of nullity. *Ibid.*
4. A party interrogated as to whether there was not a balance due him at a certain time, has a right to add to his acknowledgement of such balance, that it no longer exists, having been discharged by payment.
Bowers v. Hale, 419.
5. Where a party is interrogated on facts and articles, and his answer is ambiguous, but the fact sought to be established is rendered reasonably certain by the circumstances to which the party interrogated refers in his answers, it will be considered as sufficiently proven.

Swan v. Moore, 833.See PRESCRIPTION—*Saundeer v. Carroll*, 27.See PRACTICE—*Hale v. Saunders*, 648.*Pickett v. Vance*, 668.

JUDGMENT.

1. A judgment will be annulled, which was rendered against a party on whom no service of the petition and citation was made, but for whom an answer was filed by an attorney at law without authority. By our law, which differs from the common law, the attorney in such a case is responsible to the plaintiff for having undertaken without authority to represent him in a court of justice.
Marvel v. Manouvrier, 3.
2. A judgment which decrees that a writ of attachment under which property has been seized be quashed, and that the bond given for the release of property attached under the writ be cancelled and annulled, is a judgment in favor of the surety upon the bond thus cancelled and annulled, and will become final and irrevocable by the lapse of two years from its date without any appeal being taken therefrom.
Love v. McComas, 201.
3. A judgment afterwards rendered on appeal, in subsequent proceedings in the same suit, by which the attachment is maintained, will not affect the surety who was not a party to the appeal. *Ibid.*
4. Where a judgment was rendered on an act of mortgage in which it was stipulated that it was to secure the payment of the notes, *and any costs that may be incurred in collecting the same*—*Held*: That a receipt in full of the amount of the judgment, and consent that satisfaction of the judgment should be entered up, was a release from any obligation under the contract to reimburse money paid by the plaintiff to counsel in prosecuting the collection of the debt.
McCaleb v. Fluker, 316.
5. A party has no right to enjoin the execution of a judgment, absolute and unconditional as to the matters it professed to decide, during a litigation as to other matters in controversy reserved by the judgment.
Hereford v. Babin, 333.
6. An unliquidated claim cannot be pleaded, by way of compensation and injunction, against a judgment. *Ibid.*
7. A party acting in good faith cannot be deprived of a judgment on such grounds. *Ibid.*

JUDGMENT (*Continued*).

8. Where the judgment does not liquidate the sum due by the party against whom it is rendered, it wants an essential requisite of a judgment final.
Peet v. Whitmore, 408.
9. A judgment rendered without reasons is unconstitutional.
Selby v. Levee Commissioners, 434.
10. The rendition of a judgment on insufficient evidence is not a cause for which the *action of nullity* will lie, in the absence of all proof of fraud or ill practice on the part of the plaintiff. *Taliaferro v. Steele*, 656.
11. The invalidity of a *bail bond* is not one of the causes for which an action will lie, to annul a judgment rendered on it. *Ibid.*
12. The remedy in both of the above cases is by appeal. *Ibid.*
13. The date of a judgment may be fixed by reference to the record of proceedings in the case, and it is not necessary that the Judge should sign it in open court, or that it should be stated that it was read in open court.
Cooper v. Cooper, 665.
14. When the jury find for the plaintiff "the full amount claimed," the amount must be ascertained from the allegations and prayer of the petition.
Newton v. Ker, 704.
15. A judgment in a petitory action will be received as proof against those who were parties to the suit as warrantors.
Williams v. Leblanc, 757.
16. Relief by amendment of the judgment of the court below cannot be extended to one appellee against another appellee. *Ibid.*
17. When a judgment on a rule passes finally upon the merits of a controversy between parties, it will have the same effect as a decree rendered in any other form of proceeding.
Foss v. Brentel, 798.
18. Judgments are interpreted with reference to the pleadings and the nature of the obligations on which they have been rendered.
Bell v. Massey, 831.
19. When parties are sued on an obligation on which they are jointly and severally bound, judgment will be rendered accordingly against them, without any allegation or prayer in the petition for a judgment *in solido*. *Ibid.*
20. Where a suit is brought against persons bound jointly and severally according to law as commercial partners, a judgment rendered against them carries *solidarity* with it even when not expressed in it. *Ibid.*

See PARTNERSHIP—*Austin v. Vaughan*, 43.
 See PRACTICE—*Noland v. Bemis*, 49.
 See ATTACHMENT—*Story v. Jones*, 73.
 See PRESCRIPTION—*Van Wickle v. Garrett*, 106.
 See EXECUTOR, &c.—*Pauline v. Hubert*, 161.
 See SUCCESSIONS—*Sturges v. Sheriff*, 231.
 See JURY—*Hampton v. Wallerston*, 239.
 See INTERROGATORIES—*McKnight v. Cannell*, 396.
 See INJUNCTION—*Perry v. Kearney*, 400.
 See INSOLVENCY—*Hanney v. Healy*, 424.
 See RES JUDICATA—*Fisk v. Parker*, 491.
 See EXECUTION—*Zimmerman v. Bartsch*, 520.

JURIES AND JURORS.

1. Where an instruction to the jury was asked for, which might have been understood by the jury as intimating the opinion of the Judge upon the facts of the case—*Held*: That such instruction was properly refused; that the instructions of the Judge to the jury should be embodied in a form to avoid instructing the jury upon the facts.
Rivière v. McCormick, 139.
2. The verdict of a jury in these words, "Verdict in favor of plaintiff," is not sufficient to form the basis of the judgment.
Hampton v. Watterson, 239.
3. An opinion formed and expressed by a juror in a criminal case, which is based wholly upon rumor, and when there is no bias or prejudice in the mind of the juror, is not a disqualification. *State v. Burger*, 461.
4. The jurisdiction of the Supreme Court being limited to questions of law in criminal cases, it must appear clearly by a bill of exceptions to the refusal of the Judge to sustain a challenge of a juror for cause, that no question of fact but one purely of law was presented for decision.
Ibid.
5. The statutes regulating the arrest and commitment of persons accused of crimes and misdemeanors, do not require the previous examination of a prisoner before a committing magistrate, in order to authorize the Grand Jury to inquire into the matter and find a bill of indictment. *Ibid*.
6. Where the regular session of a court is adjourned over by order of the Judge at chambers, the jurors summoned for the first week of the court, are bound to attend, and serve for the first week of the actual session of the court thus adjourned over. *Ibid*.
7. The accused, in a criminal case, is not entitled to service of the list of talesmen. *Ibid*.
8. Where a juror can be challenged for cause, the right must be exercised before the juror is sworn, and a verdict cures the defect. *Ibid*.
9. Where the jury cannot be completed by talesmen from among the bystanders, recourse may be had to other persons not within the presence of the court. *Ibid*.
10. The objection was stated in the bill of exceptions to the refusal of the Judge to grant a new trial, that such talesmen were summoned during the time the court was adjourned—*Held*: That there was no error in the ruling of the court below, and that if any complaint was made by the accused against the Sheriff for want of impartiality in summoning such talesman, it was a matter of fact to be submitted to the Judge, and rested in his sound discretion. *Ibid*.
11. The Judge may properly refuse to charge the jury as requested by counsel, on the ground that the charge asked for is the same in substance with that already given, with the only difference of being shaped in a manner calculated to mislead the jury. *Ibid*.
12. In a capital case it is competent for the State to show the disqualification of a juror by interrogating the juror himself as to any conscientious scruples he may have against inflicting the punishment of death.
State v. Mullen, 570.

JURIES AND JURORS (*Continued*).

13. When, in a criminal case, the question was asked a juror, examined on his *voire dire*, "*Have you or not formed or expressed the opinion, from what you have heard of the case, that the defendant is guilty?*"—*Held*: That the question was not in legal form, and that the District Judge in refusing to allow it to be answered, did not abuse the discretionary power to overrule interrogatories not in legal form. *State v. Bennett*, 651.
14. The 3d section of the Act of 1855, relative to the drawing of juries, fully recognizes the right of the court to order talesmen to be summoned after the regular panel has been exhausted; and the prisoner has no right to require that the list of talesmen summoned should be served upon him two days before the trial. *Ibid.*
15. On the examination of a juror on his *voire dire*, the question was asked him, "*In case the defendant was found guilty of murder, have you made up your mind as to what degree of punishment ought to be inflicted upon him?*"—*Held*: That the question was not properly put, and the District Judge did not err in refusing to allow it to be answered. *Ibid.*
16. A list of jurors, headed "List of Jurors for the third and fourth weeks of the October term of the District Court of the parish of Caddo," duly served on the prisoner, held to be a sufficient compliance with the law. *State v. Ward*, 673.
17. An impression entertained by a juror as to the guilt of the accused, is not sufficient to disqualify him. *Ibid.*
18. *Held*: That the court below did not err in refusing to allow the prisoner's counsel to ask a juror whether he had not made up his mind as to what punishment should be inflicted in case the prisoner should be convicted. The question also was properly overruled, whether, if the juror went into the jury-box in his present state of mind, he went there with the belief that the defendant was guilty of murder, as charged in the indictment. *Ibid.*
19. The Act of 1858, making it the duty of the District Judges to empanel the Grand Jury on the *first day* of the term, is merely *directory*, and if any sufficient obstacle exists to prevent the empanneling on the first day, it may be done on a subsequent day. *State v. Davis*, 678.
20. Where the questions involved in a suit regard the relative situation of the lands of plaintiff and defendant, and the natural drainage of the soil, these being matters peculiarly within the cognizance of a jury of the vicinage, their verdict is entitled to great weight. *Williams v. Bridge*, 721.
21. Although the statute has fixed the number of Grand Jurors at sixteen, it is not necessary that sixteen should be in attendance at the time of finding an indictment: that number is not sacramental. *State v. Swift*, 827.
22. An objection to the mode of drawing and empanneling the Grand Jury cannot be made the ground of a motion in arrest of judgment. *Ibid.*

See CRIMINAL LAW—*State v. Lindsay*, 42.

State v. Remondis, 278.

JURISDICTION.

1. Where the proceeding is *in rem* founded on a privilege, the defendant cannot except to the jurisdiction of the court, on the ground of his domicil being in a different parish from that where the seizure was made.
Gauls v. Schooner Osceola, 54.
2. The 9th section of the Act of 1855, relative to District Courts for the parish and city of New Orleans, declaring that all successions shall be opened and administered in the Second District Court, the other District Courts of New Orleans have no jurisdiction over suits instituted against a succession.
Smith v. Adams, 409.
3. On the removal of a tutor from one parish to another, the Judge of the *new domicil* of the tutor is the one having jurisdiction over the affairs of the minor.
State v. Petit, 565.
4. The District Courts out of the parish of Orleans have neither appellate nor original jurisdiction in the trial of slaves accused of crimes or offences, nor can they interfere for the purpose of carrying into effect the sentence of the tribunal established by law for their trial.

Hardy v. Voorhies, 776.

See SUCCESSION—*Herrford v. Babin*, 333.

See GARNISHMENT—*Rose v. Whaley*, 374.

See PROHIBITION—*State v. Judge*, 504.

See CRIMINAL LAW—*State v. Peter*, 521.

See WILLS—*Atkinson v. Rogers*, 633.

See PUBLIC LANDS—*Max v. Hamilton*, 774.

See PRACTICE—*Shiff v. Carprelle*, 801.

JUSTICES OF THE PEACE.

See CRIMINAL LAW—*State v. Peter*, 521.

LETTING AND HIRING.

1. The lessee of mortgaged property holds his lease subject to a dissolution by the judicial sale, which may take place to enforce the mortgage.
Barrelli v. Szymanski, 47.
2. If after the sale such lessee continues to enjoy the property, he will be bound for the rent to the purchaser, notwithstanding he may have paid his negotiable notes, in the hands of third persons, which were given in consideration of the rent at the time the lease was executed.
Ibid.
3. There is nothing inconsistent in a demand for the dissolution of a lease being coupled with a demand for the rent up to the time that possession is delivered to the lessor.
Dubois v. Xiques, 427.
4. The payment of rent in pursuance of the terms of the contract of lease, is an *essential engagement* on the part of the lessee, and his non-compliance with it gives to the lessor a right to sue for the dissolution of the contract.
Kron v. Watson, 432.
5. Where the goods of third persons are placed, with their consent, in a leased house or store, they become subject to the pledge of the lessor.
Twitty v. Clarke, 503.
6. The failure of a lessor to maintain premises leased in a tenable condition dissolves the lease, although such lessor be not at fault.

Coleman v. Haight, 564.

LETTING AND HIRING (*Continued*).

7. Compensation cannot be allowed for services rendered, when the procuration is gratuitous. *White v. Jones*, 681.
8. A party in possession of property as a lessee, when sued in a petitory action for the property, should make his lessor a party defendant to the action, and ask to be discharged; he cannot defend the suit by calling in warranty his lessor's vendor, without making the lessor a party, or entering an appearance for him. *Young v. Chamberlin*, 687.
9. When a party sues on a *quantum meruit*, and the petition discloses an express contract, he can only recover on the contract, although he may be permitted to prove the value of his services. *Ibid.*
10. The date is not of the essence of a contract of letting and hiring, and proof of the fact that it was made on a day different from that alleged is sufficient to sustain it. *Gribble v. McKleroy*, 793.

See NEW ORLEANS—*Hiestand v. New Orleans*, 330.

See NOVATION—*Vignie v. Gouaux*, 344.

See EVIDENCE—*Colin v. Lery*, 355.

See INSOLVENCY—*Dubois v. Xiques*, 427.

See PRESCRIPTION—*Calmes v. Duplantier*, 814.

LEVEES AND ROADS.

1. The report of the jury of freeholders appointed by the Police Jury, under the Act of the Legislature "relative to the building of levees in the parish of Tensas," to estimate the amount of damage that may be done to a proprietor where a new levee is to be built, and also the benefit that may arise from the construction of the levee, is conclusive against the Police Jury, unless it is contested upon the ground of error or fraud. But to render it conclusive, the formalities of the law must be strictly complied with. *Inge v. Police Jury*, 117.
2. The prescription of one year against actions arising from offences and quasi-offences is not applicable to an action for damages for the partial destruction of property occupied by the construction of a levee under legal authority. *Ibid.*
3. Since the Act of the Legislature of 1858, ordering back into the treasury all funds in the hands of Swamp Land Commissioners, proprietors whose levees have caved in or have been destroyed by the action of the current of the river, cannot require the Commissioner to proceed under the 10th section of the Act of the Legislature of the 16th of March, 1854, to construct said levees without a special appropriation by the Legislature for that purpose. *Robertson v. Caldwell*, 864.
4. The general appropriation to the Swamp Land Board, by the Act of the Legislature of 20th of March, 1856, is in contravention of the 94th Article of the Constitution, which declares, "that no money shall be drawn from the Treasury, but in pursuance of a specific appropriation made by law, nor shall any appropriation of money be made for a longer term than two years." *Ibid.*

See PRIVILEGE—*Police Jury v. Crosely*, 104.

See TAXES, &c.—*Selby v. Levee Commissioners*, 434.

See CONSTITUTIONAL LAW—*Wallace v. Shelton*, 498.

LIBEL AND SLANDER.

See DAMAGES—*Harry v. Constantin*, 782.

See EVIDENCE—*Rayne v. Taylor*, 400.

MANDAMUS.

1. A *mandamus* will not be granted by the Supreme Court, to compel a District Judge to rescind an order granting an appeal.

State v. Judge Fourth Dist. Court, 60.

See OFFICE AND OFFICER—*Hommerich v. Hunter*, 225.

MARRIAGE.

1. A marriage which was celebrated in this State while under the dominion of Spain, may be established by reputation. *Cole v. Langley*, 770.

MINORS.

1. In matters relating to the interests of minors much discretion must be exercised by the Judge of the Second District Court, but a judgment of non-suit only, should be rendered in a case where the representative of minors has improperly dispensed with the production of the proof necessary to establish a claim against them. *Haully v. Crozier*, 304.
2. The right of a minor emancipated by marriage, to contract debts within the amount of his annual revenues, is not affected by the fact that the minor ran away and contracted marriage without the consent and against the will of the tutor. *Boyd v. Frantom*, 691.
3. Where a suit is brought by a merchant on an account rendered against minors for supplies furnished, advances, &c., and a privilege claimed upon their crop, and it appears that he had dealt with the tutor in his individual capacity, and the account was made in his name, and no contract is shown to have been made with him as tutor on behalf of the minors—*Held*: That he can only recover so much as is shown to have enured to the benefit of the minors, and then only to the extent of their revenues. *Payne v. Scott*, 760.
4. Article 343 of the Civil Code, which provides that the expenses incurred in the support and education of minors shall not exceed the amount of their revenues, without the authority of the court, on the advice of a family meeting, applies also to expenses incurred in the management and preservation of their estates. *Ibid*.
5. Where the tutor of a minor has created an indebtedness, without authority of law, which exceeds the revenues of the minor, the creditor, to recover, must show that the indebtedness was absolutely necessary, either for the support of the minor, or the preservation of his property, and that the supplies furnished enured to the benefit of the minor.

Sanford v. Waggaman, 852.

See SUCCESSION—*Cuillé v. Gassen*, 5.

See PARTITION—*Shaffet v. Jackson*, 154.

See SALE, JUDICIAL—*Robert v. Brown*, 597.

See APPEAL—*Prigean v. Robin*, 788.

MORTGAGES.

1. The existence of the clause *de non alienando* in an act of mortgage, does not change the rule that a sale of succession property regularly made under a judgment of the Probate Court discharges the mortgages on it given by the deceased. *Michel v. Delaporte*, 91.

MORTGAGES (*Continued*).

2. The wife was bound *in solido* with her husband in an act of mortgage to secure a subscription to the capital stock of the Clinton and Port Hudson Railroad Company, to which mortgage the State of Louisiana was subrogated. The State afterwards caused the property to be sold under execution against the husband, as a defaulting Tax Collector, and the wife, through the intervention of a third person, became the purchaser at the sale. *Held*: That such a sale did not extinguish the mortgage of the State. *Hawkins v. McVea*, 339.
3. Where the production of a certificate of mortgage is waived, notice of mortgages existing of record will be presumed. *Ibid.*
4. Sections second and third of the Act of 1855, require for the validity of acts of mortgage by married women, that the wife should be examined at chambers by the Judge of the district or parish where she resides, separate and apart from her husband, touching the objects for which the debt is contracted, and that the Judge, upon being satisfied that the debt is solely for her separate advantage, or for the benefit of her separate or dotal property, should furnish her with a certificate to that effect, which shall be annexed to the notarial act. *Bowers v. Hale*, 419.
5. A mortgage being indivisible and only accessory to the debt, a decree cannot properly be rendered for the sale of the property mortgaged, in an action *via ordinaria*, without parties before the court against whom a judgment may be rendered for the *whole* debt. *Saloy v. Cheznidre*, 567.
6. A holder of a note given in payment of the price of property sold for the purpose of defrauding creditors, and secured by mortgage upon the property sold, cannot enforce his mortgage to the prejudice of creditors whose right of mortgage originated before the fraudulent sale and execution of the note. *Bowman v. McKleroy*, 587.
7. The recording of a judgment against a debtor, in a parish where he has negroes attached to a plantation, of which he is part owner, creates a judicial mortgage upon the slaves, when the owner is not domiciliated in the State. *Ibid.*
8. Slaves under seizure cannot be hired out by the Sheriff, unless by the consent of parties, and the mortgagee is not entitled to receive hire for the slaves during the time that they may be under seizure. *Ibid.*
9. A deed of trust executed in Mississippi and recorded in this State, which expressed that it was given to secure a certain amount, and also to secure future advances that might be made, cannot be enforced here, against the property mortgaged, to the prejudice of other mortgage creditors, except for the amount specified. *Ibid.*

See HUSBAND AND WIFE—*Moussier v. Zuntz*, 15.
Wood v. Harrell, 61.
Succession of Penny, 194.
 See LEASE—*Barelli v. Szymanski*, 47.
 See SALE, JUDICIAL—*Yeabum v. Erwin*, 149.
Young v. Hays, 664.
 See BANKS—*Haynes v. Harbour*, 287.
 See ATTORNEY AT LAW—*Alexandrie v. Saloy*, 327.
 See BILLS AND NOTES—*Elice v. Davis*, 435.
 See SHERIFF—*Succession of David*, 730.

NEW ORLEANS.

1. Assuming that the tax of \$250 assessed against every person who boards or rents rooms to lewd and abandoned women is legal, the city authorities might be authorized to impose a penalty upon all persons who should set up the occupation or open a house of the description, without first taking out a license. This would be a mere police regulation.
New Orleans v. Costello, 37.
2. The corporation, however, exceeds its powers in imposing imprisonment of not less than one calendar month, by the ordinance of March 10th, 1857.
Ibid.
3. Section 3d of the ordinance authorizing a prosecution before the Recorder, does not violate Article 103 of the Constitution.
Ibid.
4. The fourth section of the ordinance under which this suit is instituted, as amended by the first section of the ordinance of 27th of March, 1857, does appear to violate sections 103 and 105 of the Act of 1856, pp. 158, 159.
Ibid.
5. The ninety-second section of the Act of 1855, p. 144, relative to crimes and offences, does not prevent the city from levying a tax upon boarding houses kept for these people, provided they do not license houses of this class.
Ibid.
6. A proprietor has no right to alter the elevation of the banquette before his house in the city of New Orleans, without having first obtained the consent of the municipal authorities.
Dudley v. Tilton, 283.
7. Where the language of a city ordinance is ambiguous and susceptible of two different significations, one of which is against law, the court will ascertain and give effect to the intent and meaning of the ordinance, provided the same be not contrary to law.
Merriam v. New Orleans, 318.
8. The city ordinance which declares that "a tax of sixty dollars shall be assessed and collected from every keeper of a billiard table, *the whole tax being levied on each and every billiard table*," was intended to impose a license tax upon the particular calling or business of keeping a billiard table, and not a property tax upon the table itself.
Ibid.
9. Such a tax is equal and uniform upon all persons engaged in that kind of business.
Ibid.
10. The city of New Orleans is a political corporation recognized by the Constitution of the State, to which the Constitution has imparted a portion of the executive and judicial functions of the government.
Hiestand v. New Orleans, 330.
11. The Common Council of New Orleans is within the sphere of its constitutional and legal attributions, a Legislature; and in the exercise of its power in relation to the collection of taxes due to the city, may empower a particular individual to collect the same for a fixed compensation, but they have the right at any time to change, modify, or repeal a resolution conferring such power, with the sole condition, that the city shall be liable for any compensation earned under and in pursuance of the resolution before its repeal.
Ibid.

NEW ORLEANS (*Continued*).

12. The repeal of such a resolution is not the violation of a contract. *Ibid.*
13. The commission of five per cent. under the Act of the Legislature of 1852, to the Assistant City Attorney, upon tax bills collected by suit, is due to the officer who obtains the judgment, and not to the one who collects the amount of it. *Ibid.*
14. The law of hiring personal services for a term, has no application to such dealing between parties; if any contract would be thereby created, it would be the contract of mandate, and revocable at the will of the principal. C. C. 2997. *Ibid.*
15. The city, as a corporation, has control over the public places and highways within its bounds, and it is the province of the corporation, and not of a judicial tribunal, to determine what improvements shall be made in the streets and canals of the city.

Inhabitants of Melpomene street v. New Orleans, 452.

16. The streets of an incorporated city are destined for public use, but not for a particular mode of public use. *Brown v. Duplessis*, 842.
17. The city of New Orleans has the right to sell the right of way in the streets to private individuals, for a specified time, with the privilege of laying rails and running horse cars over them, according to a tariff to be fixed by the Common Council; this right is conferred upon the city by the Act incorporating it, and upon all incorporated cities or towns in the State, by the Act of 1855, relative to the organization of corporations for works of public improvement. *Ibid.*

See *APPEAL—New Orleans v. Boudro*, 303.

See *TAXES, &c.,—New Orleans v. Hart*, 803.

NEW TRIAL.

1. Where by due diligence it might have been discovered that a witness in the case, who had been examined on his *voir dire* and had testified that he had no interest, was security for the costs, a new trial will not be granted on the ground of such discovery being made after the trial.

Chiappella v. Brown, 189.

NOVATION.

1. Novation does not take place unless by the terms of the agreement, or a full discharge of the original debt. *Gails v. Schr. Osceola*, 54. X
2. A debt is not novated by a check on a bank given in payment of it. *Bordelon v. Weymouth*, 93.
3. The assumption of a debt by a new firm succeeding to the business of one that has been dissolved, the transfer of the debt to the books of the new firm, and the assent of the creditor to the arrangement, will not novate the debt without an express agreement to discharge the original debtor.

Carrière v. Labiche, 211.

4. The substitution of a new lessee to the old one, accompanied by the discharge of the latter, is a novation, under the second section of Art. 2185 C. C. *Vignié v. Gouaux*, 344.

5. When a party takes accounts from his debtor to be credited if collected, otherwise to be returned, with full power to settle them in any manner he

NOVATION, (*Continued*).

can, taking a note on time for an account, it operates no novation and no payment. *Locke v. Mackinson*, 361.

6. In a transaction by which a draft is substituted in the place of a note, to constitute novation of the debt, it must be established clearly that it was the intention of the parties that the draft should be taken in absolute payment of the note. *Helme v. Middleton*, 484.

See PRIVILEGE—*Succession of Kercheval*, 457.

OFFICE AND OFFICER.

1. The Treasurer of the State is not vested with the same powers as the Auditor to audit, adjust and settle claims against the State. He cannot refuse to pay a warrant drawn upon him in a legal form by the Auditor, if there are funds in the treasury appropriated by law for the purpose specified in the warrant. *Hommerich v. Hunter*, 225.
2. The writ of *mandamus* is the proper remedy to be exercised by the holder of a warrant drawn by the Auditor on the Treasurer, to enforce the performance of the duty imposed by law on the latter officer. *Ibid.*
3. A party cannot recover from a Notary Public, for having neglected to protest a note legally, when, by his own laches, he has put it out of his power to subrogate the Notary to his rights as they existed at the date of protest. *Emmerling v. Graham*, 389.

See CRIMINAL LAW—*State v. Hunter*, 71.

See NEW ORLEANS—*Hiestand v. New Orleans*, 330.

See EVIDENCE—*Sampson v. Noble*, 347.

See LETTING AND HIRING—*Twitty v. Clark*, 503.

See TAXES, &c.—*New Orleans v. Hart*, 803.

OVERSEER.

See CONTRACTS—*Kessee v. Mayfield*, 90.

PARENT AND CHILD.

1. The reputed father of a child, who has introduced the mother as his wife and the child as his son, will not be permitted afterwards to bastardize such issue. *Green v. Green*, 39.

PARTITION.

1. The father, although he has not been confirmed as tutor of his minor children, may provoke a partition between himself and his minor children, by the appointment of a curator *ad hoc* to the minor, under Art. 116 of the Code of Practice. *Shaffet v. Jackson*, 154.
2. The inventory of the property to be divided, may be made after the sale is ordered. *Ibid.*
3. Where minors are sued for a partition, a family meeting is not necessary to authorize the suit, or to fix the terms of sale, and it is not necessary the property should sell for its appraised value to make the sale valid. *Ibid.*
4. A motion to dismiss an opposition filed to an act of partition is not in the nature of an exception, which admits the allegations contained in a petition, and does not dispense with proof on the part of the opponent. *Morris v. Harrell*, 185.

PARTITION (*Continued*).

5. An agreement in the act of partition, that the same shall be irrevocable, is, in the absence of proof of error or fraud, binding on the parties to it.

Ibid.

See SALE, JUDICIAL—*Hache v. Ayraud*, 178.

See PLACING—*Mavor v. Armant*, 181.

See WILLS—*Weber v. Ory*, 537.

See PARTNERSHIP—*King v. Wartelle*, 740.

PARTNERSHIP.

1. The heirs of a deceased partner are not bound by the rigid rules as to notice of dissolution of the partnership applicable to the withdrawal of a partner from the firm, who would still be liable if he permitted his name to remain in the partnership. *Price v. Matthews*, 11.
2. The continuance of the deceased partner's name, as part of the firm name, is not of itself a cause of continuing liability on the part of the heirs. *Ibid.*
3. A partner cannot obtain judgment against his copartners for a debt due him by the partnership, when it is shown that the partnership accounts are unsettled, and that the judgment asked for will not have the effect of a final liquidation of the partnership affairs. *Austin v. Vaughan*, 43.
4. The interest of a partner in a particular thing or piece of property belonging to the partnership, cannot be seized for his individual debt, but the whole share or interest of the indebted partner in the partnership may be seized and sold subject to the payment of the partnership debt. This rule applies to a particular partnership, and is the same rule laid down as applicable to commercial partnerships in the case of *Smith v. McMicken*, 3 An. 322. *Pittman v. Robicheau*, 108.
5. Where a particular item of an account claimed by the defendant in a suit for the liquidation of a partnership is not fully sustained by the evidence, a judgment will be rendered in favor of plaintiff, as in case of nonsuit, upon that particular claim. *McMichael v. Raoul*, 307.
6. The natural tutor who supervises the interest of his minor child in the liquidation of a partnership of which the deceased mother of the minor was a partner, cannot claim for services rendered the partnership; he has only a claim against his ward in his account of tutorship. *Ibid.*
7. Where a party purchases an interest in a commercial house, entitling him "to an equal undivided one-third interest and ownership, and to all stock of merchandize, bills receivable, and debts in book accounts on hand, due or owing to the firm on a given day, (over and above the payment of the liabilities of said firm,)" he is responsible for the debts of the house existing at the time of purchase. C. C. 2782. *Hughes v. Waldo*, 348.
8. The phrase "over and above their liabilities" does not exclude responsibility from those liabilities. *Ibid.*
9. In order to establish that a commercial partnership is not bound by the act of one of the partners, in any particular matter, it is necessary expressly to deny his authority, and to disclose by evidence, the nature of their commercial business. *Vienne v. Harris*, 382.

10. The surviving partner who liquidates the concern, is not entitled to a judgment for any apparent balance in his favor, until he shows a full and entire settlement of the partnership affairs. *Succession of Powell*, 425.
11. The *ordinary partnership creditors* of the owners of a steamboat have no right to be paid by preference to the individual creditors, out of the proceeds of the boat, whether these proceeds result from sales or have been received on policies of insurance. *Whipple v. Hill*, 437.
12. The liability of a partner to a third person is not increased by the fact, that an individual debt of his has been assumed by the partnership of which he is a member. *Bogereau v. Guéringer*, 478.
13. A partner cannot be made liable on a note endorsed by his co-partner with the social name, after the dissolution of the partnership, unless it is shown that he was benefited by the transaction, or authorized the endorsement. *Ibid.*
14. Under the operation of Articles 2203 and 2204 of the Civil Code, compensation does not take place between partnership and individual debts. *Key v. Box*, 497.
15. During the existence of the partnership, suit must be brought against the firm, and not against individual partners. *Ibid.*
16. An exception to this rule has been recognized in the case of a Louisiana creditor, attaching the interest of a non-resident debtor in property belonging to a foreign firm, of which he was a member, for a debt due by him individually. *Ibid.*
17. A community of profits is the criterion by which to determine the contract of partnership; but to render a party liable as a partner, he must share in the profits as *principal*, and not as a mere *agent, factor or servant*. *Hallet v. Desban*, 529.
18. When a suit is brought by the heir of one of the members of a partnership against the heirs of the other member, claiming a certain sum, and giving, in his petition, a detailed statement of the property belonging to the partnership, and of its annual revenues—*Held*: That if plaintiff has any right to the property described in his petition, and is, therefore, entitled to an account from the heirs of the surviving partner, his right, and the rendition of an account of the partnership affairs, can be determined in such a form of action as well as any other. *Held*: That such a suit is in the nature of an action for the settlement of partnership affairs, and a partition and division of the partnership effects. *Atkinson v. Rogers*, 633.
19. A law partnership is an ordinary one, and the partners are bound jointly, and not *in solido*. *Dyer v. Drew*, 657.
20. The liquidating partner of a commercial firm may sue in his own name by representing the claim sued on as arising out of the business of the late firm, so as not to deprive the defendant of any means of defence to which he would be entitled in a suit in the name of all the partners. *White v. Jones*, 681.

21. The liquidating partner, to whom the assets have been assigned, cannot, by a release in favor of his late partner, render him a competent witness in his favor. *Ibid.*
22. In the absence of any allegation or proof of fraud, the acknowledgment of payment and release of a partnership debt by one of the partners, by an act under private signature, during the existence of the partnership, will be binding on the liquidating partner. *Ibid.*
23. The action of one partner, or his representative, against the other partner, for an account, is prescribed in ten years after the dissolution of the partnership. The amendment of a petition for an account by praying for a partition of property held in common between the partners, is allowable. *King v. Wartelle, 740.*
24. The meaning of Article 2861 of the Civil Code is, that the rules of partition among heirs, apply to partitions among partners; not that the rules governing the action of partition among heirs, apply to all actions which may be exercised by one partner against another. *Ibid.*
25. When the action is one for partition of property, and the liquidation of partnership affairs, the settlement of the accounts being an incident to the partition, the prescription of thirty years only is applicable to the case. *Ibid.*
26. Suit being brought against *R. F. and C. W.*, as composing the commercial firm of *R. F. & Co.*, and the petition and citation served on *R. F.* alone—*Held*: That the service of citation was sufficient as to both partners. *Kearney v. Fenner, 870.*
27. Where the name of one of the partners, who is sued on a note of the firm, does not appear either in the firm name or in the return of citation, the fact of his being a partner must be proved, to entitle the plaintiff to confirm the judgment by default against him. *Ibid.*

See APPEAL—*State v. Judge, 240.*

See CONFLICT OF LAWS—*Scott v. Bogart, 261.*

See PRACTICE—*Taylor v. Hancock, 693.*

See BILLS AND NOTES—*Bell v. Massey, 831.*

Helme v. Middleton, 484.

See PRACTICE—*Ridge v. Alter, 866.*

PARTY WALL.

1. A party who exercises his right of making a wall, one in common, cannot resist the demand of his neighbor who erected the same, for one-half of its value, although he may have a claim to the soil upon which more than one-half of the wall was built. *Davis v. Grailhe, 338.*

PAYMENT.

1. The deposit of the money in court, after the institution of a suit on a note, is not a payment of the note to the creditor or to any one authorized to receive it for him. *Alexandrie v. Saloy, 327.*
2. A natural obligation is a valid consideration for payment, and bars a demand for repetition. *Bowers v. Hale, 419.*

See NOVATION—*Locke v. Mackinson, 361.*

PILOTS.

1. No preëxisting commission of Branch Pilot for the port of New Orleans, is vacated by the Act of the 15th of March, 1857, entitled "an Act relative to Pilots," until the Governor has complied with the provision of the second section of the Act, and fixed, by proclamation, the number of Pilots for the port of New Orleans, and appointed the number so fixed, from among the commissioned Branch Pilots, as required by the Act.
Williams v. Payson, 7.
2. Section 15th of this Act is declared unconstitutional, as it relates to an object not expressed in the title.
Ibid.

PLEADING.

1. Where plaintiffs bring a petitory action to recover a slave, alleging that their right of property in the slave was derived by inheritance from their mother, and subsequently attempt to amend their petition by demanding in the alternative, if the court should be of opinion that the slave was the community property of their father and mother, that they be decreed to be the owners of one-half of the slave claimed, and at the same time expressly adhere to their original demand—*Held*: That the two demands are inconsistent, and that the District Court did not err in rejecting the alternative demand.
Wood v. Harrell, 61.
2. In a petitory action, if the title set up by defendant has a common origin with that of the plaintiff, the defendant cannot allege the nullity of plaintiff's title.
Loyd v. Mortee, 107.
3. The cumulation of a demand for the partition of succession property with a demand for the partition of property held in common, where there is no privity of estate between all the parties, plaintiffs and defendants, is not authorized by the rules of pleading.
Mavor v. Armant, 181.
4. An amendment should be presented before going into trial.
Cohn v. Levy, 355.
5. An exception taken by a defendant to a petition, on the ground that his name has been incorrectly stated, will be regarded as frivolous, when his true name is not disclosed.
Broadwell v. Kelly, 456.
6. A frivolous exception cannot prevent a cause from being put at issue, when an answer has been filed with the exception.
Ibid.

See CORPORATIONS—*Bennett v. New Orleans*, 120.

PLEDGE.

1. In the contract of pledge, the mention of the amount of the debt intended to be secured, required by Article 3125 of the Civil Code, is in no sense a formality. It is essential to the contract, and as such not abolished by section 2d of the Act of 1855, relative to pledges.
Cater v. Merrell, 373.
2. A broker to whom a note was given to sell, being in lawful possession of it has the right to pledge it.
Dix v. Tully, 456.
3. The pledgee of the note has the right to demand and receive the money due on it, and to sue for it in his own name.
Ibid.

POLICE JURY.

1. There can be no vested interest in any inhabitant in the public highways and bridges, as that also would imply a right to control the action of the Police Jury. Citizens are subject to the legal ordinances of the Police Jury as they are to the laws. *Stewart v. Police Jury*, 69.

POSSESSION.

1. A person in possession under the first recorded title in the parish where the land is situated, must be quieted in his possession, unless the claimant have a superior title. *Pierse v. Blunt*, 345.
2. Possession under an act of sale not recorded, is not sufficient notice to creditors and subsequent purchasers, to defeat the operation of the registry laws. *Moore v. Jourdan*, 414.

See PRACTICE—*Arrousmith v. Durell*, 849

PRACTICE.

1. A judgment by default having been duly confirmed, and the judgment signed after the lapse of three judicial days, the defendant took a rule on the plaintiff to set aside the judgment, on the ground that an answer had been filed after the submission of the cause and before its decision, which rule was made absolute and a new trial granted. *Held*: That the plaintiff not having appealed from the judgment on the rule, it could not be revised on the appeal taken by the plaintiff from a subsequent judgment in favor of defendant. *Noland v. Bemiss*, 49.
2. Where a total want of consideration is alleged to avoid an act, and only a partial want of consideration is shown by the evidence, without any tender of restitution of what was received, the plaintiff will be nonsuited. *Van Wick v. Rist*, 56.
3. He who seeks equity, must do equity. *Ibid*.
4. The practice of introducing all the *mortuaria* of a succession in mass, when it is only intended to prove a fact or a date, is abusive, inasmuch as it is calculated to create unnecessary costs, and to confuse the issues. *Succession of Broom*, 67.
5. Where a cross-interrogatory which is pertinent and material has not been answered, the deposition should be excluded. *Nicholson v. Desobry*, 81.
6. The party taking the deposition can always protect himself from surprise by taking the rule, or filing the notice allowed by the 17th section of the Act of 1839, which embraces objections of this character. *Ibid*.
7. If the cross-interrogatory which is not answered is not relevant, the deposition should not be excluded. *Ibid*.
8. Where the damages claimed are the consequence of the defective execution of the contract, no formal putting in default is necessary. *Ibid*.
9. It is not necessary that the defendant in execution should be made a party to a third opposition claiming the proceeds of a sale made under a *fi. fa*. *Converse v. Hill*, 89.
10. When the name of the State in which plaintiff is domiciled is alone set forth in the petition—*Held*: That it is a sufficient compliance with Art. 172 of the Code of Practice. *Simpson v. Lombas*, 103.

11. An assignment of errors in the Supreme Court, under Art. 897 of the Code of Practice, is not necessary when the case was decided in the court below on an exception to the sufficiency of the plaintiff's petition.
Hiestand v. New Orleans, 137.
12. The plaintiff is not bound to administer proof of the allegations of his petition which are not denied by the answer.
Ibid.
13. The general rule is, that the defendant must be sued at the place of his domicile or usual residence, and a suit for freedom has not been made by the lawgiver an exception to this rule.
Logan v. Hickman, 300.
14. An affidavit for a continuance is insufficient when it does not disclose the name of any witness, by whom it is expected to prove any particular fact or facts, and does not state within what time the party expects to obtain the testimony of his witnesses.
Borren v. Mertens, 306.
15. In cases where it is admissible to dispense with personal service of a notice, the notice ought in general to be served in the form required for citations and other analogous proceedings.
McDermott v. Cannon, 313.
16. A surety on a sequestration bond cannot be proceeded against by rule or on motion.
Sharp v. Bright, 390.
17. The failure on the part of a surety, against whom a rule has been taken, to answer the rule, cannot be construed as a waiver of his right to except to such proceedings.
Ibid.
18. Where a third opposition has been notified to the Sheriff, only after property has been seized, sold, and the proceeds distributed among the judgment creditors, the third opponent's privilege will not entitle him to be paid out of the proceeds of the sale thus judicially made.
Lyons v. McRae, 423.
19. The judgment of the lower court was not reversed, because the Judge refused to compel experts to report after the expiration of the time appointed for them to report. In a case of this kind, it was a matter of discretion with the Judge whether he would do so, or leave the parties to the benefit of the testimony of the experts before the jury.
Scuddy v. Shaffer, 569.
20. When a supplemental petition is filed, in which a larger amount is claimed than was demanded in the original petition, such amendment is material, and should be served upon the defendant, and regularly put at issue; and when this is not done, it will be presumed that plaintiff has waived or abandoned it.
Clark v. Holbrook, 573.
21. Technical objections to the mode of proceeding in suits, ought to be urged before judgment.
Daily v. Newman, 580.
22. Where the property has been attached and released on bond, a party claiming the property attached and bonded cannot do so by intervening in the suit between plaintiff and defendant; he must enforce his claim to the property against the person who has possession of it.
Wright v. White, 583.
23. Where a suit on an account was commenced by attachment in this State, and for the same cause of action was at the same time carried on and prosecuted to final judgment in the courts of Mississippi—*Held*: That the

PRACTICE (*Continued*).

judgment thus obtained in Mississippi could be substituted by way of amendment, as the cause of action in the Louisiana court, in place of the account, so as to maintain the attachment. *Ibid.*

24. When, after issue joined, one of the defendants dies, and the plaintiff delays or neglects to revive the suit against his representatives, the other defendant cannot have the suit dismissed, but if entitled to a separate trial, may compel the plaintiff to try the case as far as he was concerned.

Whitfield v. Bryan, 600.

25. Where by an evident clerical error, a different name from that of the defendant in the suit has been inserted in the prayer of the petition, the suit should not be dismissed, but leave granted to correct the error by an amendment *instante*.

Hickman v. Boggus, 609.

26. When the defendant sets up in his answer title by authentic act, to the property sued for, the plaintiff is entitled to amend his petition, by putting at issue the validity of such title.

West v. Hickman, 610.

27. Where in a suit to compel the defendant to render an account, an order to file the account has been made, and a judgment by default taken on the petition for want of an answer, the refusal of the defendant to comply with the order, although a good ground for his arrest and punishment, for contempt of the authority of the court, will not deprive the defendant of the right to file his account at any time before the judgment by default is made final.

Ledoux v. Murray, 613.

28. A citation issued and signed by the Parish Recorder in his official capacity, instead of the Clerk, will be fatal to the validity of any judgment which may be rendered against the party on whom it was served.

Anderson v. Joiitt, 614.

29. Creditors having individually the right to institute the revocatory action, they may be joined as plaintiffs to the same suit, to have a fraudulent or simulated conveyance made by their common debtor annulled.

Williams v. Hawthorn, 615.

30. In a revocatory action, all persons charged with colluding for the purpose of defrauding the plaintiffs, may be joined as defendants.

Ibid.

31. When the defendant, in a petitory action, prays for oyer of the title papers under which plaintiff claims, the plaintiff is bound to file them on the day fixed by the order of the court, under the penalty of a dismissal of the suit.

Maillon v. Boyce, 621.

32. An order of survey will not withdraw a case from the consideration of the court during the delay fixed for the return of the survey, as in case of an order of continuance.

Ibid.

33. The State cannot be sued indirectly by way of a reconventional demand set up in the defendant's answer.

State v. Leckie, 636.

34. Where a suit is improperly brought against the beneficiary heir as such, for a debt of the succession, and is dismissed on the exception of the heir, leave should be granted to the plaintiff to amend, by making the proper parties.

State v. Leckie, 641.



PRACTICE (*Continued*).

46. An opposition to the report of auditors must specially mention the items of credit objected to. *King v. Wartelle*, 740.
47. A motion made to order the plaintiff to make a choice of his cause of action, and declare whether he sues on a contract, or a *quantum meruit*, is in its nature dilatory and can only be made *in limine litis*.
Gribble v. McKleroy, 793.
48. District Courts cannot dissolve attachments issued by Justices of the Peace, except on appeal. *Shiff v. Carprette*, 801.
49. When a party has a claim exceeding in amount the jurisdiction of a Justice of the Peace, and bearing a privilege upon property attached by another party in a Justice's Court, his remedy is by a suit in the District Court, claiming his privilege and enjoining the officer having the writ of attachment issued by the Justice from proceeding with its execution, and paying over the proceeds to the attaching creditor; or by a rule taken upon the attaching creditor, to show cause why he should not be paid by preference out of the proceeds of the sale of the property attached. *Ibid*.
50. A bill of exceptions to the refusal of the Judge to grant a trial by jury, cannot be noticed when it contains neither the reasons of the Judge for his refusal, nor the grounds on which the ruling was excepted to.
Davis v. Millaudon, 808.
51. When on the trial a party is taken by surprise, by the introduction of evidence legally admissible, to establish facts not disclosed by the pleadings, he has a right to a continuance on a proper showing. *Ibid*.
52. Where several parties claim a sum of money, to which the party in possession of the money does not assert any right, the court may order the money to be deposited in the hands of the Clerk of the court, until the respective rights of all the claimants are adjudicated upon.
Succession of Thompson, 810.
53. Where an exception is filed with an answer to the merits, what is admitted by the exception for the purpose of testing the plaintiff's petition, may be denied by the answer, and if the exception be overruled, final judgment can only be rendered after a regular trial on the merits.
State v. Crescent M. Ins. Co., 825.
54. Where an exception to the petition in an action of jactitation, on the ground that the plaintiff was not in possession of the land, filed *in limine litis*, had been dismissed by the court, previously to the empanneling of the jury—*Held*: That the question of possession was not before the jury for decision.
Arrousmith v. Durell, 849.
55. When the plaintiff goes to trial without making the objection that issue is not joined on a reconventional demand, he cannot make objection afterwards, supposing even it is necessary to join issue upon a demand in reconvention. *Ibid*.
56. Where a defendant pleads title in general terms, and the plaintiff does not require that the title should be set forth more specifically, nor crave oyer of the defendant's titles before going to trial, evidence of a specific title offered by the defendant cannot be objected to. *Ibid*.

PRACTICE (*Continued*).

57. A reconventional demand, although filed at the same time with the answer, and in the same paper, is not a part of the answer.
Powell v. Graves, 860.
58. The Article 2700 of the Civil Code, declaring that judicial admissions cannot be divided, does not apply to admissions in pleadings. *Ibid.*
59. Where the defendant has set up a reconventional demand and neglects to prosecute it, he cannot allege as error that the judgment of the court below did not pass upon his demand. *Ibid.*
60. Under the prayer for general relief in an opposition to an executor's account, and upon proof received without objection, the court may reject the executor's charge for commissions, although the opposition itself does not present such an issue. *Succession of Hughes*, 863.
61. Where a defendant is sued as silent partner in a commercial firm, service of citation on the clerk of the firm is not sufficient. *Ridge v. Alter*, 866.
62. Where there is no proof of the authorization of an attorney to defend a suit, and such authorization is denied on oath by the defendant who was not legally cited, a judgment against the defendant will be annulled. *Ibid.*

See WITNESS—*Roquet v. Boutin*, 44.

See APPEAL—*White v. Casenave*, 57.

See GARNISHMENT—*Frelle v. Anderson*, 65.

Low v. Proctor, 373.

Rose v. Whaley, 374.

See ATTACHMENT—*Story v. Jones*, 73.

See MINORS—*Hauley v. Crozier*, 304.

See EXECUTORS AND ADMINISTRATORS—*Lockhart v. Wall*, 273.

Lobil v. Castille, 779

See EXECUTION—*Soule v. Pollard*, 287.

See SUCCESSIONS—*Suryt v. Calder*, 336.

See INTERROGATORIES—*McKnight v. Connell*, 396.

See CONTRACTS—*Dubois v. Xiques*, 427.

See WILLS—*Deiondes v. New Orleans*, 552.

See MORTGAGE—*Salcy v. Chemaidre*, 567.

See TUTORS, &c.—*Cailladeau v. Ingouff*, 623.

See SUCCESSIONS—*Ford v. Newcomer*, 706.

See SALE—*McDonald v. Vaughan*, 716.

Davis v. Millaudon, 868.

See BILLS AND NOTES—*Collins v. McDonald*, 735.

See HUSBAND AND WIFE—*Fawaron v. Rideau*, 806.

See INJUNCTION—*Knabe v. Fernot*, 847.

See CONTRACTS—*Brown v. Bark Laura Snow*, 848.

See TAXES, &c.—*New Orleans v. Fisk*, 862.

See BILLS AND NOTES AND PARTNERSHIP—*Kearney v. Penner*, 870.

PRESCRIPTION.

1. A defendant pleading prescription may be interrogated, as to any acknowledgements or promises he may have made, before prescription has been acquired.
Saunders v. Carroll, 27.
2. The Act of 1858, which provides that parol evidence shall not be admitted to prove a promise to pay any written obligation when prescription has already run, but that in all such cases the promise to pay shall be proven

PRESCRIPTION (*Continued*).

by written evidence, is an Act affecting the remedy, and must be held to apply only to the proof of promises made subsequent to its passage.

Ibid.

3. The action of a judgment creditor of the husband to annul a judgment of the wife against the husband, on the ground of fraud, is prescribed by the lapse of one year from the date of the wife's judgment, she having a real demand. *Van Wickle v. Garrett*, 106.

4. The reinscription of a judgment interrupts prescription against the hypothecary action on the judgment. *Ibid.*

5. The prescription of sixty days against ships and vessels, has reference to the time of asserting the privilege by suit. The right of privilege is fixed by the judgment. *Hunter v. Bell*, 142.

6. Where a suit is brought against the surety who is bound *in solido* with the drawer of the draft for its payment, prescription is thereby interrupted as to the principal debtor; it will commence to run again from the date of the judgment against the surety. *Richard v. Butman*, 144.

7. Where the plaintiff has resided out of the State, he is entitled to the benefit of the double term of prescription up to the date of the promulgation of the Act of the Legislature in 1848, placing residents and non-residents on the same footing as to prescription. *Timmons v. White*, 151.

8. A credit endorsed on a bond at a time not suspicious by an officer of the bank in the regular discharge of his duty, is sufficient evidence of the payment to interrupt prescription. *Union Bank v. Bradford*, 159.

9. The law of the forum governs in matters of prescription. *Walworth v. Routh*, 205.

10. The statutes of limitations of the other States are engrafted upon our law as to judgments only when two conditions concur: 1st, where the judgment has been rendered between persons who reside out of the State, and to be paid out of the State. 2dly, where the defendant removes to the State of Louisiana, after he has become entitled to the benefit of the statute of limitations of the place where the judgment was rendered.

Ibid.

11. The prescription of one year is inapplicable to an action for the price of wines sold in casks and boxes by a wholesale dealer. *Carrière v. Labiche*, 211.

12. Prescription against an action for the recovery of money collected by a Sheriff under a writ of *fi. fa.*, will only commence to run from the date of the demand by the judgment creditor, and non-payment by the Sheriff. *Fuqua v. Young*, 216.

13. Those who possess not for themselves, but in the name of another, cannot change the nature of their tenure so as to acquire the legal possession which is the basis of a title by prescription. *Jackson v. Jones*, 230.

14. An action for the recovery of money loaned is prescribed by three years. *Bringier v. Gordon*, 274.



PRESCRIPTION (*Continued*).

28. Prescription does not run on a merchant's account for advances made in the shape of acceptances of drafts, and disbursements for necessary supplies, insurances, freight, &c., upon each separate item of the account, but the account as a whole is prescribed in three years.
Andrew v. Keenan, 705.
29. In regard to an account for goods sold, by the terms of the law, each item of the account is subject to its own prescription.
Ibid.
30. The insufficiency or want of advertisement in a Sheriff's sale is an informality within the purview of the Act of 1834 (reënacted in 1855), and under that Act is prescribed against after the lapse of five years from the date of the sale.
Louaillier v. Castille, 777.
31. The possession of slaves under a contract of hire by the husband in his lifetime cannot be made the basis of a prescriptive title in the wife, who continued in possession of the slaves after her husband's death, and claimed to be the owner of them.
Calmes v. Duplantier, 814.
32. A purchaser who is aware of the defects of the title of his vendor, cannot claim the benefit of the prescription of ten years.
Ibid.

See SALE, JUDICIAL—*Dutillet v. Blanchard*, 97.
Robert v. Brown, 597.
 See LEVEES AND ROADS—*Inge v. Police Jury*, 117.
 See REDHIBITION—*Comaux v. Doiron*, 184.
 See NOVATION—*Taylor v. Simon*, 351.
 See CONTRACTS—*Nimmo v. Walker*, 581.
 See EXECUTORS AND ADMINISTRATORS—*Succession of McAlpin*, 617.
 See INSOLVENCY, &c.—*Walling v. His Creditors*, 670.
 See PARTNERSHIP—*King v. Wartelle*, 740.
 See TAXES, &c.—*New Orleans v. Locke*, 854.
 See CORPORATIONS—*C. & P. H. R. R. Co. v. Eason*, 816.

PRINCIPAL AND AGENT.

1. A mandate is gratuitous, unless there has been a contrary stipulation.
Succession of Rice, 317.
2. Where a party permits a broker to act as principal, in effecting a compromise with his debtor, on a promissory note, and is notified of the broker's act, without repudiating his authority at once, he is bound by the compromise entered into between the debtor and broker.
Barrière v. Peychaud, 370.
3. The agent is a competent witness to prove acts done within the scope of his authority; his liability for damages for falsely representing himself as agent, is an objection to his credibility.
Ibid.
4. Where a broker or agent sells a note, with a forged endorsement upon it, without disclosing the fact of his agency, or the name of his principal, he is responsible for the amount, with legal interest, which was paid for the note.
Parlange v. Faurès, 444.

See PARTNERSHIP—*Hallet v. Desban*, 529.
 See DONATION—*Giannoni v. Gummy*, 632.
 See PRESCRIPTION—*Smith v. Taylor*, 663.
 See BILLS AND NOTES—*Cummings v. Hartsbrauch*, 711.

1. The receipt by the creditor of a check on the bank for the balance due him, it being understood that the drawer of the check had then no money in the bank, but would deposit money within two or three days to meet it, is not a giving of time to the debtor which will discharge his surety.
Bordelon v. Weymouth, 93.
 2. A general and indefinite suretyship extends to all the accessories of the principal obligation and even to the costs of suit. C. C. 3009.
Scully v. Hawkins, 183.
 3. The obligation of the surety on an administrator's bond can be enforced at once without proceedings against the estate of the principal, which is shown to be insolvent by a tableau of distribution filed in the due course of administration.
Succession of Lynch, 235.
 4. The surety of the liquidator appointed to administer the affairs of a commercial partnership which has been dissolved by the death of one of the partners, cannot file an account in the succession of such deceased partner, of the administration of his principal, with the view of obtaining his discharge from liability as surety.
Succession of Twibill, 645.
 5. Where the tutor was bound to furnish another surety, in the place of one who had died or become insolvent, and without any order of court, voluntarily furnished a new bond, with other surety, which was filed and approved by the Clerk of the court—*Held*: That the surety on the new bond was bound, although it was not executed in pursuance of any order of court "*volenti non fit injuria*."
Elam v. Barr, 671.
 6. The stipulation by a surety on a promissory note, that the holder shall exhaust all the legal remedies against the drawer of the note, before having recourse upon such surety, amounts to a simple reservation of the right of discussion, and has no other effect. So that where it is shown that the drawer is and has been for a considerable time insolvent; that he has left the State without leaving any property, and that it is impossible, from the circumstances of the case, that the plaintiffs could make anything by proceeding against such drawer, an action by the holder against the surety will lie immediately.
Sheldon v. Reynolds, 692.
- See ATTACHMENT—*Emanuel v. Mann*, 53.
 See APPEAL—*Wood v. Harrell*, 61.
 See EXECUTORS AND ADMINISTRATORS—*Goode v. Buford*, 102.
 See PRESCRIPTION—*Richard v. Butman*, 144.
 See JUDGMENT—*Love v. McComas*, 201.
 See TUTORS, &c.—*Brown v. Robert*, 259.
Israelier v. Babineau, 764.
 See TAXES &c.—*State v. Hampton*, 679.
 " " 725.
 See PRACTICE—*State v. Fuller*, 726.
 See BONDS—*State v. Badon*, 783.

PRIVILEGES.

1. A creditor whose debt has been secured by a conveyance of property to a trustee, with authority to sell, and pay the debt, cannot claim such property as owner; and when attached, cannot set aside the attachment, upon giving bond, and take possession of it during the pendency of the litigation.
Hughes v. Klingender, 52.

PRIVILEGES (*Continued*).

2. Such a conveyance would only give him the right to enforce the execution of the trust, and make him a creditor with a privilege. *Ibid.*
3. The privilege granted to the vendor by the Article 3194 C. P. is not conditional, or dependent upon the solvency or insolvency of the buyer; it is positive, without condition or limitation, as long as the property sold remains in the possession of the purchaser. *Converse v. Hill*, 89.
4. The recording of the *proces verbal* of adjudication of work to be done on the road and levee, without giving the name of the proprietor or a description of the land, will not create a privilege on the land on which such work is done. *Police Jury v. Crosely*, 164.
5. When there has been no contract of letting and hiring of slaves, a privilege on the crop raised by them cannot be asserted. *Bisland v. Provosty*, 169.
6. A draft taken in part payment of the price of property sold, does not novate the debt so as to cause the seller to lose his privilege upon the property sold. *Succession of Kercheval*, 457.
7. When a shipper has shipped goods to his factor in the usual course of business, and has sent forward with the shipment, or by mail, one of the bills of lading consigning the goods to him, the shipper cannot destroy the lien and privilege that the factor and consignee will have for advances upon the goods, by transferring other bills of lading to secure other debts. *Funkhouser v. Dutcher*, 494.
8. Where cotton, consigned to a commercial house, had been sunk and damaged, and reshipped, the party reshipping paying the freight and charges for salvage, and consigning it to another house, who paid the charges for freight and salvage, the original consignees refusing to pay them, on the ground that they were exorbitant—*Held*: That where there is no evidence of any bad faith on the part of the second consignees, or of a combination to commit extortion by the shippers, the consignees were justifiable in paying the charges, and that the payment of such charges should be considered as advances, for which a privilege is given by Art. 3214 of the Civil Code and the statute of 1841. *Buchanan v. Switzer*, 495.

SEE PRESCRIPTION—*Hunter v. Bell*, 142.

SEE INSOLVENCY—*Tenny v. Provosty*, 221.

McRae v. His Creditors, 220.

SEE PRACTICE—*Lyons v. McRae*, 423.

PROHIBITION.

1. The writ of prohibition is only issued to a court which takes cognizance of a cause that does not belong to it, or which it is incompetent to decide. *State v. Judge*, 504.
2. The writ should not be issued to a court which grants an order of sequestration, only as a conservatory measure to insure the jurisdiction of another court in which the action is to be instituted. *Ibid.*
3. To maintain an application for a writ of prohibition there must be a clear usurpation of jurisdiction. *Ibid.*

1. The decisions of the Register and Receiver of the Land Office, and other federal tribunals, on questions involving the conflict of titles emanating from the federal government, are not subject to the revision of State Courts. *Ford v. Morancy*, 77.
2. The courts can look behind a patent, but not in all cases; and the general rule, that nothing perfects the title to public lands, but a patent, is not without exceptions; it has been held, that where an equitable right originated before the date of the patent, whether by the first entry or otherwise, and was asserted, such right might be examined into. *Ibid.*
3. It cannot be objected to the confirmation of a land claim by Act of Congress, that the Commissioner exceeded his powers by inquiring into and reporting upon a claim not embraced in the instructions of Congress, when it appears that Congress, notwithstanding, accepted the report and confirmed the claim. *Dutillet v. Blanchard*, 97.
4. A party who has made an entry of public land under a preemption law, and obtained the Receiver's receipt for the purchase money, has obtained an equitable right which cannot be defeated by a patent obtained through fraud and misrepresentation. *Knox v. Pulliam*, 123.
5. Where the Commissioner of the Land Office was induced by misrepresentation to cancel an entry so made and to order the land to be entered as school land, under a warrant presented by another party—*Held*: That the patent issued under the last entry enured to the benefit of the party making the first entry as the equitable owner of the land. *Ibid.*
6. A Register of the State Land Office has no authority to review and reverse a decision of his predecessor. *Franklin v. Woodland*, 188.
7. Under the Preemption Act of the Legislature of Louisiana of 1853, it was essential, to constitute a right of preemption, that the land claimed should embrace the settlement or improvements of the preëptor. *Sage v. Cain*, 192.
8. A preemption right on a tract of land cannot be transferred until it be paid for, and a receipt obtained from the Receiver. *Moore v. Jourdan*, 414.
9. A preëptor under the Act of Congress approved March, 1851, entitled "An Act for the settlement of certain classes of land claims within the limits of the Baron de Bastrop Grant, and for allowing preëptions to certain actual settlers, in the event of the final adjudication of the title of the said *De Bastrop* in favor of the United States," may either sell or mortgage the land after its purchase from the General Government, as in ordinary cases, there being in the Act no restriction of his right to do so. *Richardson v. Emswiler*, 638.
10. The title of a party to land purchased from the Government, and for which he has obtained a patent, cannot be defeated by any other claimant, unless he show an equitable or legal title in himself which existed prior to the issuance of the patent, and which could not be defeated by the subsequent action of the Land Department. *Leblanc v. Ludrique*, 772.
11. In a contest of title between such parties, the application to enter, with the accompanying proof of occupancy and cultivation, are admissible in evidence as the muniments of title which form the basis of an equitable right prior to the issuance of the patent. *Ibid.*

PUBLIC LANDS (*Continued*).

12. An endorsement of the Register of the Land Office on the application to enter, to the effect that the applicant, through a duly authorized agent, had tendered payment, and was refused in consequence of the land claimed having been erroneously sold to another, is only proof of the fact that a tender of payment had been made; the Receiver had no authority to certify as to the agency, nor could he make a binding entry as to the invalidity of the previous sale. *Ibid.*
13. The Acts of 1852 and 1855 confer upon the Register of the State Land Office jurisdiction in cases only where conflicting claims arise between parties as to their rights to preëmption; but where one of the parties claims a preëmption right, and the other sets up title to the land by virtue of a patent issued by the State, the District Court has original jurisdiction. *Mast v. Hamilton*, 774.
14. A party who has acquired a preëmption right to swamp land donated to the State by the General Government, may maintain a real action against one to whom a patent has been issued by the State, to annul such patent, when the party bringing the action shows that he has not been able to perfect his title by making payment, because the land had not been conveyed by the General Government to the State, after which time payment could alone be required of him. *Ibid.*
15. When the preëmptor in such a case had complied with the provisions of the Act of 1855, by making application and proof of settlement within six months after the promulgation of the Act; and before the lands selected, upon which he had settled, had been approved and returned to the Land Office of this State, a patent had been issued to another person, over the protest of the preëmptor—*Held*: That the patent issued was null and of no effect. *Ibid.*

See EVIDENCE—*Franklin v. Woodland*, 188.

See HUSBAND AND WIFE—*Beauvais v. Wall*, 190.

See ESTOPPEL—*Hulse v. Dorsey*, 302.

RAILROADS.

See NEW ORLEANS—*Brown v. Duplessis*, 842.

REDHIBITION.

1. Neither a rescission of the sale nor a reduction of the price can be claimed by the purchaser of a slave affected with a redhibitory disease, if he neglects to procure the medical assistance which the situation of the slave requires, until long after the sale. *Roquest v. Boutin*, 44.
2. In a redhibitory action, the plea of prescription will be maintained if the term for bringing the suit has elapsed, although a demand is made in the petition that a note given as part of the price should be cancelled and annulled. *Comaux v. Doiron*, 184.
3. A disease making its appearance within fifteen days after the sale, is presumed to have existed on the day of sale, the slave not having been in the State eight months. *Dohan v. Wilson*, 353.
4. It is incumbent on defendant to rebut this presumption. *Ibid.*

5. In a redhibitory action for disease in a slave, it is necessary that there be an allegation and proof of a tender in order to recover; and that such tender should be made, if practicable, before the institution of the suit.

Lewis v. Morgan, 401.

6. There are two exceptions to this rule. First, when an actual tender is not possible; and second, when defendant has done some act, or made some declaration which demonstrates that a formal offer to return the thing sold would have been fruitless.

Ibid.

7. It is not a sufficient excuse for want of tender, that it was impracticable at the time of instituting the suit, if it was practicable at any time between the discovery of the vice and the institution of the suit, or even before the trial.

Ibid.

8. Where in a redhibitory action, brought to rescind the sale of a slave, and recover back the price paid, it was established by parol evidence received without objection, that upon being informed of the sickness of the slave, the vendor had consented to his return—*Held*: That effect must be given to the evidence, and that after its reception, it is too late to raise the objection, that the fact of such consent on the part of the vendor should have been established by written proof, in order to rescind the sale.

Gaiennie v. Freret, 488.

9. Where the consent of the vendor to take back the slave has been given, and in accordance with it, the slave has been returned to him by the vendee—*Held*: That in a suit brought to rescind the sale, and recover back the price paid for the slave, the consent of the vendor throws the burden of proof upon him, and he cannot be relieved from it, without showing fraud or concealment on the part of the vendee in procuring such consent, or some negligence in returning the slave.

Ibid.

10. The exclusion of warranty in an act of sale, cannot avail the vendor, when it is fraudulently made, as he is bound to disclose redhibitory vices and defects in the thing sold, when he knows of their existence; and the vendee is not precluded by such exclusion, from showing that previous to the date of the sale, the vendor was aware of the existence of redhibitory defects, which he fraudulently concealed from him.

Faulk v. Hough, 659.

11. If a slave sold, dies of a disease which did not exist at the time of the sale, but was produced by the effects of a disease which manifested itself within three days after the sale, the vendor is liable.

Deloach v. Elder, 662.

12. Among the apparent defects which do not, under the Civil Code, give rise to the action of redhibition, must be classed the mental weakness of a slave approaching imbecility.

McLean v. Fulford, 711.

REGISTRY.

See PRESCRIPTION—*Van Wickle v. Garrod*, 106.

See PRIVILEGE—*Police Jury v. Croedy*, 164.

See POSSESSION—*Pierce v. Blunt*, 346.

Moore v. Jourdan, 414.

See SALE—*Dyce v. Dyer*, 701.

Swan v. Moore, 833.

RES JUDICATA.

1. A judgment in an action of boundary cannot form *res adjudicata* as to the right of property. *White v. Purnell*, 232.
2. The plea of *res judicata* is without force, unless the object demanded in the former suit was precisely the same as that demanded in the action pending. *Edwards v. Ballard*, 362.
3. A judgment of dismissal is nothing more than one of nonsuit, and cannot support the plea of *res judicata*, as to any of the matters at issue. *Fisk v. Parker*, 491.
4. The reasoning and opinion of the court upon a subject, on the evidence adduced before it, cannot have the force and effect of the thing adjudged, unless the subject-matter be definitively disposed of by the decree. *Ibid.*
5. In a petitory action, the defendant is bound to plead all the titles under which he claims to be owner, and a final judgment rendered in favor of the plaintiff may be pleaded as *res judicata* against any title which the defendant was possessed of at the time, but omitted to plead. *Shaffer v. Sculdy*, 575.
6. A judgment which has been appealed from cannot be pleaded as *res judicata* while the suit in which it was rendered is pending on appeal. *Byrne v. Prather*, 653.

SALE.

1. A sale made at auction by the Comptroller, and afterwards clothed with the formalities of an authentic act, cannot be annulled on the ground that the adjudication was made by a person who was not regularly licensed as an auctioneer. *Schwartz v. Flatboats*, 243.
2. Where it is stipulated, in an act of sale, that the note given for the price shall remain deposited with the Parish Recorder, until a certificate of non-mortgage is furnished, its possession by the plaintiff is *prima facie* evidence that it was delivered to him by the depository after a certificate furnished. *Weems v. Ventress*, 267.
3. If the plaintiff came into possession of the note improperly, the defendant's remedy would have been by injunction, not by an appeal from the order of seizure and sale. *Ibid.*
4. When the price of property is made payable in installments, the vendor may sue for rescission of the sale at once, upon the failure of the vendee to pay the first installment. *Thompson v. Kilcrease*, 340.
5. The original vendor seeking to rescind the sale, is only compelled to reimburse the value of improvements made by a possessor in good faith. Improvements made after the institution of the suit to rescind the sale must be considered as made by the possessor in bad faith. *Ibid.*
6. Where the buyer refuses to accept goods, the seller is not obliged to let them perish on his hands, and run the risk of the solvency of the buyer. *Judd Oil Co. v. Kearney*, 352.
7. Where the vendor, however, buys the goods offered for sale, or any part thereof, either directly or indirectly, or where, by an arrangement made

by him or his agents, competition at the sale of the goods is prevented, he thereby forfeits his right to recover the deficiency in the amount of the sales. *Ibid.*

8. A boat which has been sold is liable to seizure at the suit of the vendor's creditors, as long as it remains in the possession of the vendor.

Zacharie v. Kirk, 433.

9. Where a debtor has resorted to a simulated sale, for the purpose of defrauding creditors, it is not necessary that a judgment creditor should proceed by the revocatory action, in order to have the sale annulled; he is entitled to consider the sale as without reality and to seize the property thus sold as that of the vendor.

Scully v. Kearns, 436.

10. The right of a party purchasing real estate, in good faith, and for a sound price, from one in whom the legal title is vested, as shown by the records of the country, cannot be impaired or affected by a previous simulated sale.

Delacroix v. Lacaze, 519.

11. Where it appeared that a sale was made for cash, but it is shown that no money was paid, and it was understood between the parties that the property was conveyed in trust to the apparent vendee, he assuming to pay the debts due on the property, and it was agreed that when these debts were paid the property was to be reconveyed—*Held*: That such a sale was a mere simulation, and that creditors of the vendor seizing such property under execution, have a right to maintain the seizures by showing the simulation.

Gleisses v. McHatton, 560.

12. *Held*, also, that where there is a delivery of the property under such a contract, it is a contract of pledge, and the party in whose favor it is made has no right to enjoin the sale of the property under execution, but should proceed by way of third opposition to claim a priority of privilege upon the proceeds of the sale.

Ibid.

13. The surviving widow of *R. W.* sold a tract of land belonging to the community, of which property her minor children owned an undivided half. The sale was made by the mother for herself, and asatrix of her minor children, and with full warranty. In a suit by one of the children to recover his portion of the property from one holding under a title from his mother's vendee—*Held*: That although the defendant had not obtained a subrogation to his vendor's right of warranty against the mother of plaintiff, the action could not be maintained, the fact of the price of the property having gone into the succession of the mother, of which the plaintiff was heir, making it against good conscience for him to recover.

Winn v. Brown, 642.

14. Article 2417 of the Civil Code, which provides that a sale of immovables or slaves by act under private signature, has effect against creditors only from the day of its registry, and the actual delivery of the thing sold controls Article 2242, which declares such sales to be valid from the date of their registry or from the time of the actual delivery of the thing sold.

Dyke v. Dyer, 701.

15. Property cannot be seized by a judgment creditor of the vendor, when the private act has been recorded previous to the issuance of execution.

Ibid.

SALE (*Continued*).

16. If the property remains in the hands of the vendor, the legal consequence resulting therefrom would be a presumption of simulation, which it is incumbent on the vendee to rebut. *Ibid.*
17. After the purchaser has been put *in mora* for the non-payment of the price, his offer to execute his engagement comes too late.
Morrison v. Wimberly, 713.
18. But where there is no danger that the seller may lose the price and the thing itself, in an action of rescission, the Judge may grant to the buyer a longer or shorter time, according to circumstances, provided such time does not exceed six months. *Ibid.*
19. Before the institution of an action for the rescission of a sale, the party seeking relief must offer to place his adversary in the same situation that he was before the act of sale was passed.
McDonold v. Vaughan, 716.
20. The plaintiff, in an action for rescission, must establish the loss of the whole or part of the thing sold; the loss must be certain—it will not suffice if it appears probable. *Ibid.*
21. The loss will be considered as certain, if a perfect outstanding title in a third person is shown to exist. *Ibid.*
22. A statement of the Commissioner of the General Land Office in a letter, to the effect that he has canceled a certificate, does not amount to an eviction which should rescind a sale between third persons. *Ibid.*
23. When in an action for the rescission of a sale, it appears that the plaintiff has not suffered any actual disturbance, but it is shown that he is in danger of being disturbed in his possession—*Held*: That under the prayer for general relief, the court may order the defendant to give security as provided in such cases, by Art. 2535 of the Civil Code. *Ibid.*
24. The heir who purchased at the sale of the succession, has a right to withhold the price, until his share in such succession is ascertained by settlement and partition. *Dyson v. Phelps*, 722.
25. The purchaser of property in good faith from one who is not the owner, is only liable for the fruits from judicial demand. *Ibid.*
26. On eviction, the buyer can only recover from the seller such increased value of the thing since the sale, as the parties had in contemplation at the time of the sale. *Ibid.*
27. The want of belief on the part of one who has been informed of the existence of an unrecorded title to property, does not impair the effect of the notice thus received. *Swan v. Moore*, 833.
28. Creditors are as much bound by the actual knowledge of a prior unrecorded title as subsequent purchasers are, the law having made no distinction between them as to the effect of notice or knowledge derived from the registry of an act of sale or mortgage. *Ibid.*
29. Actual knowledge of an *unrecorded title* on the part of a creditor is equivalent to *knowledge* or *notice* resulting from the registry of such a title.

Ibid.

SALE (*Continued*).

30. A *vente à réméré*, like any other sale, is perfected as to third persons, in the case of movables, by delivery, and the vendee becomes the owner of the fruits and the property absolutely, if it be not redeemed at the time stipulated.
Hughes v. Klingender, 845.
31. An order of seizure and sale may be enjoined on the ground of a deficiency in the quantity of land sold, which would entitle the vendee to a diminution of the price.
Davis v. Millaudon, 868.
32. A tender by the vendor of other lands to supply the deficiency in the quantity of land sold, is an admission of the deficiency, and such admission is not avoided by the declaration in the plea of tender, that the party does not thereby waive the benefit of his plea of the general issues.
Ibid.
33. A claim in *diminution of price* is not a demand in compensation or set off, in the legal sense of the term, and may be set up as a ground of defence by the vendee when sued for the price, without his being obliged to resort to a separate action.
Ibid.
34. The maxim of law "*quæ temporalia, &c.*" has survived the general repealing Act of 1828, and although the action *quanti minoris* be prescribed, the vendee, when sued for the price, may resist the payment on the ground of a claim to a diminution of the price.
Ibid.

See REDIMPTION—*Roquest v. Boutin*, 44.

See EVIDENCE—*Beauvais v. Wall*, 190.

See WARRANTY—*Underwood v. Lacapère*, 276.

See ESTOPPAL—*Hulse v. Dorsey*, 302.

See CONTRACTS—*Sainel v. Duchamp*, 539.

Satterfield v. Keller, 606.

See HUSBAND AND WIFE—*Parnell v. Petroric*, 601.

Johnston v. Pike, 731.

See PRESCRIPTION—*Culmes v. Duplantier*, 814.

SALE, JUDICIAL.

1. Where the purchaser of property at a succession sale had gone into possession of the property and complied with the terms of the sale, by making a cash payment and furnishing his notes for the balance of the price—*Held*: That the administrator could not sue to rescind the sale, on the ground of defects in the title of the purchaser.
McCulloch v. Weaver, 33.
2. When the proceeding was *in rem* under the Act of the Legislature of 1829, relative to proceedings against lands for works done upon the roads and levees of the same—*Held*: That the Act only requires notice to be given "to any person whom it may concern," and that when there has been a sufficient description of the land in the advertisements, and the proprietor by the use of due diligence might have protected himself, the sale will not be annulled on the ground that the property was described as belonging to others than the real owner.
Dutillet v. Blanchard, 97.
3. The prescription of five years, under the Act of the Legislature of 1834, would cure such an irregularity in the description of the property.
Ibid.

SALE, JUDICIAL (*Continued*).

4. A Sheriff's sale, not recorded in the Recorder's office of the parish where the property is situated, is utterly null and void, except between the parties thereto.
Raiford v. Wood, 116.
5. Where the seizing creditor becomes the purchaser of property at Sheriff's sale, retaining in his hands part of the price to pay a prior special mortgage on the property, which mortgage was afterwards discharged by the debtor himself—*Held*: That the seizing creditor, having a privilege on the proceeds of the sale, had a right to apply the amount thus remaining in his hands, to the unsatisfied balance of his own debt.
Yeatman v. Erwin, 149.
6. The purchaser, who is allowed to retain in his hands the amount of prior special mortgages, as a part of the price, is bound for the interest accumulated on such mortgage debts after the sale.
Ibid.
7. In a sale under execution, when all the installments of a debt are not yet due, an appraisement of the property is nevertheless essential.
Foree v. McIntyre, 158.
8. Where the amount of the matured installments is less than the price for which the property is adjudicated, the surplus of the price only becomes exigible at the maturity of the other installments, adding interest to such surplus, so as to correspond with the term of credit allowed.
Ibid.
9. The Civil Code of 1825, does not contain the provisions of the old Code on the subject of licitation.
Hache v. Ayraud, 178.
10. The sale to effect a partition under a decree of court, must be made to the highest bidder at public auction. It is a judicial sale which, under Article 1863 of the Civil Code, cannot be invalidated on account of lesion.
Ibid.
11. Lesion will not invalidate a judicial sale to effect a partition even when the purchaser is one of the heirs of the estate to be divided.
Ibid.
12. Article 1440 of the Code, which says, that *acts of sale* which tend to the division of property between co-heirs, are subject to rescission for lesion beyond a fourth, must be construed to mean an extra judicial sale, and not one ordered by a court of justice, at which strangers as well as heirs may become purchasers for the purpose of affecting a partition.
Ibid.
13. A judicial sale of a lease imposes upon the purchaser the obligation of paying the price of adjudication to the vendor, and also that of paying the rent accruing after the sale to the lessor, according to the terms of the lease.
D'Aquin v. Armant, 217.
14. Where a sale is made *à la folle enchère*, and the property is adjudicated to the vendor himself, he can not recover from the purchaser at the first sale the deficiency in the price.
Ibid.
15. When property is sold at Sheriff's sale, and the party causing the sale to be made is not able to put the purchaser in the enjoyment of the premises, nor of the rents, he has a right to refuse payment of the price.

SALE, JUDICIAL (*Continued*).

16. At a sale of succession property, a creditor of the succession cannot tender, in payment of the price of property adjudicated to him, the claims which he may have against the succession. *Pendarvis v. Wall*, 449.
17. The property of *insolvent corporations*, when sold by a commissioner for cash, must be appraised, and bring two-thirds of its appraised value, as in case of property sold under execution.
Hyde v. Mississippi Sound Company, 492.
18. A commission to sell property of minors issued by the Clerk will not supply the place of the necessary order of sale; nor will it be inferred from such commission that a decree of sale existed, although it recites that it was issued "in pursuance of the order of the District Court."
Robert v. Brown, 597.
19. The facts that a family meeting was convoked, and advised the sale, and that a petition had been presented to the court to homologate the proceedings, will not cure the nullities arising from the sale of property made under such commission. *Ibid.*
20. The prescription of five years, established by the Act of 1855, to cure the informalities growing out of public sales, cannot apply to a case where there is a total want of authority to sell; it cures only those informalities which may occur in the execution of a decree, or other authority to sell. *Ibid.*
21. Irregularities and informalities, which precede the decree of a Probate Court ordering the sale of the property, to pay the debts of the succession, cannot render the decree of the court and the sale under it null and void.
Succession of Gurney, 622.
22. When a court has jurisdiction, its decree protects the purchaser at a probate sale, from all informalities which may have preceded it, in the absence of any charge, or proof of fraud, even though the purchaser be the administrator, or one of the heirs-at-law. *Ibid.*
23. When property is sold under execution, the adjudication is made without reference to the amount of legal and judicial mortgages to which the property may be subject.
Young v. Hays, 654.
24. A forced sale of property, made under execution of a judgment, secured by a judicial mortgage, does not discharge concurrent judicial mortgages. *Ibid.*

See HUSBAND AND WIFE—*Evys v. Babin*, 95.

See BANKS—*Haynes v. Pipes*, 248.

See WARRANTY—*Deloach v. Elder*, 662.

See PRESCRIPTION—*Louaillier v. Castille*, 777.

SEIZURE AND SALE.

1. The authority of an attorney-at-law is presumed, and an affidavit to obtain an order of seizure and sale, made by him in the absence of his principal, is sufficient.
Simpson v. Lombas, 103.
2. The delay within which a suspensive appeal may be taken from an order of seizure and sale is fixed by Article 525 of the Code of Practice, and, as amended, is, in the country, fifteen days, excluding Sundays.

Lombas v. Robichaux, 105.

SEIZURE AND SALE (*Continued*).

3. The delay commences to run from the date of the service of the notice of the order of seizure and sale, which is notice of judgment to the possessor of the hypothecated property. *Ibid.*
4. Parties against whom executory process is issued for an amount which exceeds in some particular the sum shown to be due by the documents filed, ought to address themselves to the Judge who issued the order, to have the error corrected, instead of making such error the pretext for an appeal involving vexatious delays. *Weems v. Ventress*, 267.
5. A promissory note not transferred by endorsement and delivery in the usual mercantile mode, is subject to seizure, under the rule which governs the sale of movables not accompanied with delivery. *Lassiter v. Bussy*, 699.
6. The doctrine of notice is not applicable to the sales of personal or movable property, and the creditors may seize and sell when there is no delivery of possession, although informed of an agreement to sell. *Ibid.*

SERVITUDE.

1. Two lots adjoining each other were sold at public auction according to a figurative plan exhibited at the time, and referred to in the acts of sale which were executed, pursuant to the adjudication; this plan represented an alley way running across the rear of both lots—*Held*: That although the sale conveyed the soil of the alley, which was requisite to make out the depth given to the lots in the title, a right of way was established in the alley as a servitude. *Cahill v. Connelly*, 280.

SEQUESTRATION.

1. To obtain a sequestration, both an affidavit and bond are required, and the lawmaker has made no exception in favor of negroes held in slavery, who may sue for their freedom. *Logan v. Hickman*, 300.
2. Where a Constable has property under seizure, he cannot be deprived of possession by a writ of sequestration, even by a superior court. The proper mode of procedure is by injunction. *Twitty v. Clarke*, 503.
3. A sequestration obtained on the ground of the plaintiffs apprehension, that the slave sued for, will be removed out of the jurisdiction of the court, cannot be set aside by proof of the defendant's long residence in the parish and possession of ample means. *Boatner v. Wade*, 695.

See PRACTICE—*Sharp v. Bright*, 390.

SHERIFF.

1. A deputy Sheriff who has not made the service of a petition and citation, or other proceeding, has no authority to make the return. *McKnight v. Connell*, 396.
2. Where a Sheriff acts as syndic of an insolvent estate, he acts in his official capacity, and the parties in interest, who have been injured by his acts or omissions, when acting in such capacity, have the right to hold all his sureties on his official bond liable for the injuries they may have received. *Succession of David*, 730.



SLAVES AND STATU LIBERI (*Continued*).

regulations upon the subject; and that when the slave, who had acquired this right under the will, did not perfect it under the existing laws, he cannot be a party to the suit, nor have his rights under the will enquired into, since the passage of the Act of 1857. *Ibid.*

11. The law does not justify any one in killing a slave, while in the act of committing a theft on his premises; and any person so killing a slave will be bound to the owner for his value. *Gardiner v. Thibodeau*, 732.
12. The policy of the State since the Act of the Legislature of the 6th of March, 1857, prohibiting the emancipation of slaves, is that the slaves within her borders shall remain slaves, and there is nothing unconstitutional in such legislation. *Deshotels v. Soileau*, 745.
13. Where the testator, by will, directed his residuary legatees, in case his slaves could not be emancipated with permission to remain in the State, to remove them from the State, *after having had them emancipated*, and the Legislature, before the consummation of the emancipation of the slaves according to the forms prescribed by law, passed an Act prohibiting the emancipation of slaves—*Held*: That the slaves had no vested right to freedom under the will, until the formalities required by the laws previously existing, for consummating the emancipation, had been complied with. *Held*, also: That the legacy to the slaves of their freedom, lapsed by the Legislature having passed a law rendering it impossible for them to be emancipated, and they became the property of the heirs-at-law of the testator. *Ibid.*

See PRACTICE AND SEQUESTRATION—*Logan v. Hickman*, 300.

See CRIMINAL LAW—*State v. Peter*, 521.

State v. Charles, 649.

See JURISDICTION—*Hardy v. Voorhies*, 776.

STATUTES.

1. The 34th section of the Act of the Legislature of 1857, which requires that before the sale of school lands there shall be an appraisal, and that in no case shall they be sold for less than one dollar and twenty-five cents per acre, means that the land shall bring its appraised value, but that in no case can it be appraised at less than \$1 25 per acre. *School Directors v. Coleman*, 186.
2. The repeal of a repealing law does not revive the first law, unless it be so particularly expressed. C. C. 22 and 23. And the same rule may be laid down as to the amendment of laws, which is but a partial repeal. *Tallamon v. Cardenas*, 509.
3. Laws in the restraint of trade, or the alienation of property, are strictly construed, and are never extended to cases not within the express will of the law maker. *Richardson v. Emswiler*, 658.

See PRESCRIPTION—*Saunders, v. Carroll*, 27.

See CRIMINAL LAW—*State v. Adams*, 620.

SUCCESSIONS.

1. When the widow in the community, and natural tutrix of her minor children, having the possession and administration of the property of her deceased husband's succession during her life, enters into a partnership

succession are employed and used by the partnership—*Held*: That the minor heirs were not, and could not be made by their natural tutrix, members of the partnership, and consequently, after her death, have the right to sue for, and recover from the surviving partners, a debt due them by the partnership, before a final settlement and liquidation of the partnership affairs. *Held* also: That the hire of the slaves was a debt due the succession by the partnership, and that the minor heirs are entitled to recover from the surviving partners the portion of the hire of the slaves due them, less the portion which was extinguished at the death of their mother by confusion, on their becoming her beneficiary heirs.

Cuillé v. Gassen, 5.

2. An heir who purchases at the sale of the hereditary effects is not obliged to pay the surplus of the purchase money over his portion of the succession, until the portion has been definitively fixed by a partition.

Mavor v. Armant, 181.

3. A judgment against the administrator of a succession recognizing the claim of a creditor, and ordering it to be placed on a tableau of distribution, is binding upon the heirs, unless obtained through fraud or error.

Sturges v. Sheriff, 231.

4. The District Court of the parish where a succession has been opened and is in due course of administration, has exclusive jurisdiction of a claim against the succession.

Hereford v. Babin, 333.

5. In a suit against the curator of a succession, in which a question of title between the succession and a third party is involved, the attorney of absent heirs has no authority to file an answer, making a different issue from the one presented by the answer of the curator.

Surgi v. Calder, 336.

6. Property found among that of the deceased is properly inventoried among his effects.

Waterhouse v. Bourke, 358.

7. The true owner thereof can claim the proceeds only of sales of his property made by an administrator in good faith.

Ibid.

8. Having neglected to claim his property both before and at the time of the inventory, there was nothing to prevent the administrator from selling them according to law. If the requisitions of law, in making the sale, were not complied with, the creditors alone would have recourse against the administrator, if they suffered by his unlawful act. The owner of the property would have no right to complain, particularly when he suffered no damage thereby.

Ibid.

9. An *ex parte* decree, ordering property to be inventoried, is only *prima facie* evidence of title in the decedent.

Wilson v. Smith, 368.

10. The tutrix and widow in community administers the succession only so long as it is not entrusted to an administrator; and when her power over the succession is superseded by the appointment of an administrator, in order to bind the succession for a debt, the new representative of the same should be made a party.

Saloy v. Cheznaïdre, 567.

SUCCESSIONS (*Continued*).

11. A legacy of \$15,000 was made by the testatrix, *E. R. W.*, to the minor children of her son *J. W.* The legacy vested by the testatrix's death while the father and mother of the minors were both living, and a contract was entered into between the father of the minors and one of the forced heirs, who had bought out the whole estate, by which a term of ten years was accorded to the heir to pay the legacy due to the minors, on his obligation to pay the amount with eight per cent. interest, payable semi-annually, secured by mortgage. *Held*: That the children of *J. W.*, on becoming of age or being emancipated, were not divested of their rights by a settlement so made, and could exercise their claims against the succession of *E. R. W.*, unless they chose to avail themselves of the stipulations contained in the settlement with their father.
Lewis v. Williams, 625.
12. A legatee who is not a *forced heir* cannot demand collation, nor even if made derive any benefit from it in settling his rights as legatee under the will. *Ibid.*
13. When a person dies leaving property in two or more States or countries, his property in each State is considered as a separate succession for the purposes of administration, the payment of debts and the decisions of the claims of parties asserting title thereto. And when the property consists of immovables or slaves, it may be considered as a separate estate for the purpose of inheritance.
Atkinson v. Rogers, 633.
14. The beneficiary heir cannot stand in judgment for the succession.
State v. Leckie, 641.
15. Where the succession is accepted with the benefit of inventory, the appointment of an administrator becomes necessary, except when the heirs are all minors represented by a tutor, which case is made an exception to the general rule, the tutor having the right to administer, if the creditors do not require the appointment of an administrator. *Ibid.*
16. The appraisalment of notes and accounts in the inventory of the effects of a succession, is required by law. *Succession of Pool*, 677.
17. An administrator is not bound to attempt the collection of *bad debts*.
Ibid.
18. Where notes and accounts due the succession are numerous and small in amount, and constitute, as it were, a mass of *bad debts*, the discretion of the Judge of Probate, in ordering their sale at public auction, will be considered as legally and properly exercised. *Ibid.*
19. The misnomer in the petition for administration of a succession, by calling it a vacant one, will not affect the proceedings which have been regularly conducted as in a succession not vacant, and administered with the benefit of inventory.
Ford v. Newcomer, 706.
20. Although a judgment of homologation, recognising the verity of claims set up against the succession, may not be technically, as to the heirs, *res judicata*, yet it constitutes *prima facie* proof, and imposes upon the heirs the burden of establishing fraud and deception in obtaining it. *Ibid.*
21. A judgment creditor of an estate cannot sustain a petitory action against one who possesses property alleged to belong to the succession, when there is no administrator to whom delivery of possession of the property can be made.
Louaillier v. Castille, 777.

SUCCESSIONS (*Continued*).

22. The appellate court will judge from the evidence, of the value of the services rendered by the attorney of the succession.

Succession of Hughes, 863.

23. The expenses of litigation between the heirs of an estate as to their respective rights, cannot be made a general charge against the succession.

Ibid.

See MORTGAGE—*Michel v. Delaporte*, 91.

See JURISDICTION—*Smith v. Adams*, 409.

See SALE, JUDICIAL—*Succession of Gurney*, 622.

See EXECUTORS AND ADMINISTRATORS—*Hicks v. Weems*, 629.

Lobit v. Cantille, 779.

See PRINCIPAL AND SURETY—*Succession of Twibill*, 645.

See ATTACHMENT—*Cheatham v. Carrington*, 696.

SUPREME COURT.

1. A re-hearing will not be granted when the evidence relied upon to support the application is only to be found in a different transcript from that of the appeal, which the parties had agreed might be referred to, but to which, by its title or number, no reference was made in the argument of the cause.

Succession of Broom, 67.

2. It is the settled practice of the court not to notice in applications for re-hearing, points which were not made in the argument of the cause.

Ibid.

3. In a criminal case, the Supreme Court cannot assume jurisdiction over questions of fact decided by the court below on a motion for a new trial.

State v. Haase, 79.

4. The Supreme Court cannot inquire into the ruling of a District Judge in refusing to grant a continuance, when no bill of exceptions has been taken to such ruling.

Murphy v. Simonds, 322.

5. The physical and mental condition of the person, whose dying declarations are offered in evidence, is a question of fact over which the Supreme Court has no jurisdiction.

State v. Bennett, 651.

See PRACTICE—*Hestand v. New Orleans*, 137.

See JURIES AND JURORS—*State v. Bunger*, 461.

See EVIDENCE—*Powell v. Hopson*, 606.

SURETY.

See PRINCIPAL AND SURETY.

TAXES, TAX SALES AND TAX COLLECTORS.

1. The Article of the Constitution which declares that the Judges both of the Supreme and inferior courts shall at stated times receive a salary which shall not be diminished during their continuance in office, exempts the salary of a Judge from taxation.

New Orleans v. Lea, 197.

2. The defendant relying on a tax sale is bound to show not only the existence of an assessment, but also its legality.

Sutton v. Calhoun, 209.

3. Where the title of the owner of the land is of record, his name is required by statute, as descriptive of the land assessed, and an error in this respect is fatal to a title by a tax sale.

Ibid.

TAXES, TAX SALES AND TAX COLLECTORS (*Continued*).

4. It is necessary that the land assessed should be designated by its boundaries, and when the boundaries given are confused and erroneous, the assessment does not possess that particularity and certainty necessary for the validity of a tax sale. *Ibid.*
5. Parol evidence is admissible to show a misdescription in the act of sale of the land really sold, there being an error on the face of the act itself. *Ibid.*
6. Wharfage dues charged by a corporation, are not, properly speaking, a tax, like that which is levied for the support of government. *Schwartz v. Flatboats*, 243.
7. An assessment made under the Act of 1857, cannot be aided by the lien or privilege given by the Act of 1858. The Legislature intended to authorize a specific tax by the Act of 1857, a comparison of which Act with the previous Acts, shows that the term "*specifically on each and every acre*," was used in contradistinction to the *ad valorem* tax of former statutes. *Selby v. Levee Commissioners*, 434.
8. It is not necessary that the voters who elect the Levee Commissioners should be equally assessed. *Ibid.*
9. Equality of taxation and representation, in inferior jurisdictions, is not essential under the Constitution. *Ibid.*
10. A party cannot be relieved from the payment of assessments and taxes on the ground that there might be an outstanding title in some one else, it is sufficient that he claims and possesses as owner. *Ibid.*
11. Where lands are not benefited by the levees, they are not within the spirit of the Act of 1857, and should not be taxed to meet them. *Ibid.*
12. In a case where the formalities required by law for the collection of taxes in the city of Jefferson, appear to have been substantially complied with, and a sale of a lot of ground was made by the Sheriff upon a judgment obtained by a proceeding *in rem* against the property upon which the tax was due—*Held*: That the purchaser could not be dispossessed by the owner of the property at the time the tax was levied, on the ground that the property was erroneously assessed in the name of one who was not a proprietor. *Daily v. Newman*, 580.
13. Where taxes are erroneously assessed, it is the duty of the tax payer to have the tableau of assessment corrected, if he so desires. The error in the assessment is a matter of defence of which the tax payer must avail himself, and the complaint comes too late, if made after judgment, and a sale of the taxed property. *Ibid.*
14. Where, by an Act of the Legislature, the State remits a portion of the indebtedness of a Tax Collector, authorizing his bond to be cancelled on the payment of a fixed amount, it is a renunciation of the right to claim the interest at two per cent. per month allowed by statute in the nature of a penalty against defaulting Tax Collectors. *State v. Leckie*, 636.
15. When the sureties on a Tax Collector's bond obligate themselves, each for a specific sum, the State is entitled, in case the Collector becomes a defaulter, to a judgment against each surety for the whole amount for which he is bound, although more than the amount due the State by the principal in the bond cannot be collected from his sureties. *State v. Hampton*, 679.

TAXES, TAX SALES AND TAX COLLECTORS (*Continued*).

16. Under a bond of a Sheriff and Tax Collector, conditioned that he shall collect and pay over "all the State, mill and poll taxes, together with all fines," &c., according to law—*Held*: The surety is liable for the amount of licenses for which the Sheriff is defaulter. *Ibid.*
17. It is not necessary to put a Tax Collector formally in default, to enable the State to recover the two per cent. per month interest, which is the penalty by law for the non-payment of the taxes to the State by the Collector. *Ibid.*
18. In an action against a defaulting Tax Collector and the sureties on his bond, who are bound each for a specific sum, the case may be continued as to some of the defendants. *State v. Hampton*, 725.
19. The principal and sureties on a Tax Collector's bond cannot set up, by way of defence to an action brought on the bond, the fact that it had not been approved, or received by the proper officer, and recorded, as provided by law. *Ibid.*
20. The Act approved March 19th, 1856, entitled "*An Act to authorize the City of New Orleans to tax real and personal property*," is not repealed by the general repealing clause of the Act approved March 20th, 1856, amending the Act incorporating and providing a government, &c., for the City of New Orleans. *New Orleans v. Hart*, 803.
21. The formalities of assessment and collection of City Taxes, as prescribed by the Act of the 20th of March, 1856, did not apply to the taxes for that year, as the Act of 19th of March, 1856, authorized an assessment for the year which had not then expired, in accordance with its provisions. *Ibid.*
22. The meaning of the word *income*, under the Act of 19th of March, 1856, is money received in compensation for services, such as wages, commissions, brokerage, &c., and is totally different from the fruits of capital invested in merchandise, stocks, &c. *Ibid.*
23. The Act of 1856 makes no allowance for commissions or compensation to be paid by the tax payer to the Assistant City Attorney; the Act of 1853, which allowed him a commission of five per cent., has been repealed. *Ibid.*
24. A tax bill is not an open account; there is no provision of law fixing the period of prescription of a tax bill at five years. *New Orleans v. Locke*, 854.
25. By the Act of 1852, all suits for unpaid taxes due to the city are brought by filing in court the tax bill and citing tax payers by advertisement. The tax bill must be considered as the petition, containing all the demands to which the plaintiff is entitled by law, and consequently, in such a suit, eight per cent. interest under the statute must be allowed in the judgment, as if prayed for. *New Orleans v. Fisk*, 862.
26. The profits realised from the use of a cotton press, drays and slaves, in carrying on the business of a cotton press, are not subject to taxation as "income," under the 3d and 4th sections of the Act of the Legislature of 1856, authorizing the city of New Orleans to tax real and personal property. *New Orleans v. Fassman*, 865.

See NEW ORLEANS—*New Orleans v. Costello*, 37.

See APPEAL—*New Orleans v. Boudro*, 303.

Merriam v. New Orleans, 318.

See CONSTITUTIONAL LAW—*Wallace v. Shelton*, 498.

TRANSFER.

1. An agreement to transfer personal effects vests the property in the transferee, but the effect of the transfer is strictly confined to the parties to it until the actual delivery of the object.
Marshall v. Parish of Morehouse, 689.
2. Personal property transferred by contract, but not delivered, is liable in the hands of the transferor to seizure and attachment by his creditors.
Ibid.
3. An assignment without delivery is conclusive against the assignor and his legal representatives.
Ibid.

See EVIDENCE—*Edwards v. Daley*, 384.
See BILLS AND NOTES—*Rice v. Davis*, 435.

TRESSPASS.

See ACTION—*Gardiner v. Thibodeau*, 732.

TUTORS AND TUTORSHIP.

1. The mother wishing to contract a second marriage may, by the advice of a family meeting, be retained in the tutorship of her minor children on giving security, and her application may be acted on before the marriage is celebrated. Her rights in this respect are not impaired by the refusal of a previous family meeting to retain her in the tutorship without security.
Gaudet v. Gaudet, 112.
2. The surety on a tutor's bond cannot require that payments made by the latter to his ward, shall be imputed to the amount that may be due upon the bond, on a breach of its conditions. The doctrine of imputation of payments does not apply to such a case.
Brown v. Roberts, 259.
3. Where the tutor makes a surrender of his property, and the parties in whose favor the bond was executed, consent to, and vote for its sale on terms of credit, such sale is a granting of time, which will have the effect of discharging the liability of the surety.
Ibid.
4. The validity of a judgment confirming the mother as natural tutrix of her minor children, cannot be called in question collaterally.
Cailleteau v. Ingouf, 623.
5. The under-tutor of a minor may resign his office, without being compelled to allege and prove his excuses.
Under-Tutor of Walker, 631.
6. A judgment against the tutor upon the account of tutorship, does not conclude the tutor's surety, although *prima facie* evidence against him.
Fuselier v. Babineau, 764.
7. The surety on a tutor's bond is not liable for what came into the tutor's hands before signing the bond.
Ibid.
8. The tutor is bound to pay interest on all sums of money of the minor, which come into his hands.
Ibid.

See APPEAL—*Moodie v. Cambot*, 153.
See PARTITION—*Shaffet v. Jackson*, 154.
See JURISDICTION—*State v. Petit*, 565.
See SUCCESSION—*State v. Leckie*, 641.
See PRINCIPAL AND SURETY—*Elam v. Barr*, 671.
See MINORS—*Payne v. Scott*, 760.
Sanford v. Waggaman, 852.
See APPEAL—*Préjean v. Robin*, 788.
See PARTNERSHIP—*McMichael v. Raoul*, 307.

USUFRUCT.

1. Where an usufruct of community property is constituted by last will in favor of the wife, and there are no descendants, the usufructuary is compelled to give security according to Art. 552 C. C., unless it has been dispensed with by the terms of the will. *Succession of Cardona*, 356.

See COMMUNITY—*Saloy v. Cheznaidre*, 567.

See DONATIONS—*Tillman v. Morely*, 710.

WARRANTY.

1. In a sale of a slave mother and her infant child, where it appeared by the evidence that the child was only sold with the mother on account of its tender age, and added nothing to the value of the mother—*Held*: That the vendor was not liable in warranty for the value of the child, which his vendee had been compelled to pay as warrantor in a subsequent sale of both mother and child. *Underwood v. Lacapère*, 276.
2. Costs follow the judgment, and an exception to the rule cannot be made in the case of a warrantor called in to defend the title of his vendee, and who is decreed not to be liable for the return of any part of the price he had received. *Ibid.*
3. Where a slave has been purchased with warranty, and is afterwards sequestered while in the possession of a lessee, against whom suit is brought for his recovery, and immediate notice is given by the lessee to the vendee, who likewise gives immediate notice to the vendor, of the institution of said suit, with a request that he defend it, or furnish the vendee the necessary means for maintaining his title to the slave, and the vendor promises to defend the action himself, which he fails to do, and the suit goes by default against the lessee, if neither the vendee nor the vendor is a party to the suit, it is the fault of the latter, and as against his vendee he cannot protect himself by claiming, "that an eviction of property can only be on final judgment, where the vendor or vendee is a party to the suit, and where the title to the property is directly drawn in question." *Vienne v. Harris*, 382.
4. The vendor cannot enjoin the seizure and sale of the property of his vendee, when it is seized under execution as the property of a third person, on the grounds that his obligation in warranty may attach. *Kelly v. Wiseman*, 661.
5. In such a suit the question of title to property is involved, and it, therefore, partakes of the nature of a petitory action, which can only be maintained by the party in whom the legal title is vested. *Ibid.*
6. The vendor is only liable on this warranty for causes anterior to the sale, and if the vendee should be evicted without calling him in warranty, and he can establish the fact that he had a good defence, which he lost, in consequence of the neglect and failure of the vendee to call him in warranty, the vendee cannot recover from him. *Ibid.*
7. All warranties to which vendors are subject in private sales, exist against the heir, in judicial sales of the property of successions. *Deloach v. Elder*, 662.
8. The warrantor is not liable for counsel fees paid by the party calling him in warranty. *Williams v. Leblanc*, 757.

WARRANTY (*Continued*).

9. The warrantor is not liable for the fees of the attorney employed by the party evicted. *Late v. Armorer*, 826.
10. The warrantor cannot object to the admissibility of evidence regularly taken by commission, previous to his being made a party to the suit. *Ibid*.

See ATTORNEY AT LAW—*Sarpy v. New Orleans*, 311.

See APPEAL—*Suddy v. Shaffer*, 569.

See EVIDENCE—*Jackson v. Hays*, 577.

See SALE—*Winn v. Brown*, 642.

See REDEMPTION—*Faulk v. Hough*, 659.

WILLS.

1. The testatrix, *E. H.*, made a will and died in Louisiana, the place of her domicile. By her will she gave to one of her children the whole of certain immovable property situated in Jackson county, Mississippi, and one-third of the remainder of her estate. The balance of her estate she directed to be divided among her other four children. *Held*: That the right of the testatrix to make such a disposition of immovable property situated in another State, is to be determined by the *lex rei sita*.
Hughes v. Hughes, 85.
2. That the laws of Louisiana, the domicile of the testatrix, making her children forced heirs for a certain proportion of her estate, being in conflict with the *lex rei sita*, the latter must govern. *Ibid*.
3. *Held*, further, that an *express declaration* in the will, of the intention of the testator to give the one-third of the estate to one of the children as an extra part over and above the legitimate portion, was not indispensable, the intention being apparent on the face of the will. *Ibid*.
4. The instrument set up as a last will was in these words; "Due *Mrs. Sarah E. Andrews* the sum of two thousand five hundred dollars, payable to her order, out of the proceeds of my estate, after my death. New Orleans, June 15th, 1855. *J. A. BEARD*."—*Held*: That such an instrument being negotiable in its form, cannot be viewed as a legacy, for want of a legatee.
Succession of Beard, 121.
5. Where it was established that the plaintiff was the concubine of a married man, who executed an obligation in her favor, payable at his death—*Held*: That a *prima facie* case was created, which threw upon the plaintiff the burden of proving a legal consideration. *Ibid*.
6. The cause which hinders a testator from signing his name when he knows how to sign, must be a physical cause. The existence of such a mental cause as delirium, incapacitates the testator from completing the will.
Jackson v. Moore, 213.
7. A nuncupative will by public act is null, if dictated in a language not understood by one of the attesting witnesses.
Breaux v. Gallusseau, 233.
8. The want of capacity of one of the witnesses to attest what was done, could not be supplied by the testimony of the notary and the two other witnesses, that the dispositions of the will were explained by the notary to the witness, who was not able to understand them from the dictation of the notary. *Ibid*.

WILLS (*Continued*).

9. The testator provided for the emancipation of a number of his slaves as follows : " As soon as possible after my decease, I wish all my negroes freed that I will name, and sent to Pennsylvania, and bread and meat found them for one year, all at the expense of my estate." *Held* : That it was the intention of the testator that the negroes should be freed in this State, and then be removed to Pennsylvania, and that it was not competent for the court here to grant an order authorizing the executor to remove them and to pay the expenses of their transportation and maintenance, after the Act of March 6th, 1857, preventing their emancipation here.
Succession of Woodruff, 295.
10. Article 1481 C. C., which declares that " donations *inter vivos* or *mortis causa*, cannot exceed two-thirds of the property, if the disposer, having no children, leave a father or mother, or both," would clearly govern in cases where the ascendant, whether father or mother, was the sole heir at law to the inheritance.
Barbet v. Roth, 381.
11. Articles 899 and 900 which make the disposable portion three-fourths, apply to cases where the testator leaves other heirs who would be entitled to a share in the inheritance, in the absence of a will. *Ibid*.
12. The right of action of an heir, to compel a partition of the immovables and slaves belonging to the succession, in order that his portion may be set off to him, as owner, is an immovable—and when such a right is conveyed by last will, the instrument must conform to our laws, or it cannot have any effect.
Weber v. Ory, 537.
13. Where such a right was sought to be conveyed by a will made in the State of Missouri, in these words : " *I do hereby give and bequeath, absolutely and unconditionally, to M. G. and to A. J., to have and to hold the same, unto them jointly and severally, that is to say, as joint tenants, so that all and singular, the property hereby devised and bequeathed shall, upon the death of either of them, the said M. G. and A. J., descend, pass and belong to the survivor of them, and to the heirs of such survivor forever,—Held* : That such a disposition is a conditional substitution prohibited by our law. *Ibid*.
14. The formal probate of a will cannot be disregarded by parties claiming as heirs of the testator, but never in possession, and they cannot institute a petitory action without seeking to annul such probate.
Deslondes v. New Orleans, 552.
15. When heirs-at-law have once acquiesced in a will, by accepting some bequest under it, neither they, nor those claiming under them as heirs, are at liberty afterwards to contest its provisions or assert its nullity. *Ibid*.
16. The will of A. C., made in the State of Mississippi, where he died, and where his estate was situated, contained the following clause : " *I give and bequeath to my grandson, White Turpin Petit, and his heirs lawfully begotten, all the balance of my estate, real, personal, and mixed, together with the rest and residue of which I may die possessed, to enure to and vest in the said White Turpin Petit, on the day on which he shall have attained the age of twenty-one years, and not before, and in the event of the said White Turpin Petit dying before he shall have arrived at lawful age, as aforesaid, and*

WILLS (Continued).

leaving no heir of his own body, or in the event of his death at any time thereafter, without lawful issue, then, and in such contingency or contingencies, I give, devise and bequeath, all the real and personal and mixed estate aforesaid, to Rebecca S. M. Wailes, daughter, and only surviving child of my brother, Leonard Covington, and wife of Benjamin L. C. Wailes, and to her heirs forever." Held: That such a clause in a will is a substitution prohibited by our laws, and that negroes forming a part of the bequest having been removed to this State and sold here before the happening of the contingency, by which the title was to vest in the testator's niece, the title of the purchaser here could not be disturbed.

Wailes v. Daniell, 578.

17. An heir-at-law may sue in our courts for the recovery of immovable property, and its revenues, even when his ancestor, who was domiciliated in another State, had made a will which had been probated, and ordered to be executed in a foreign jurisdiction, and which here may not be valid and sufficient to defeat his inheritance. *Atkinson v. Rogers*, 633.
18. If immovable property in this State is in the possession of a foreign executor, and a testamentary disposition has been made of it, not in accordance with our laws, the legal heir may sue such executor directly for its recovery in the courts of this State, and is not obliged to resort to the tribunals of the testator's domicile, to ascertain the validity of the disposition intended to deprive him of his right to immovable property within our jurisdiction. *Ibid.*
19. Where a nuncupative will under private signature is made, out of the presence of the witnesses, the testator must distinctly declare, in the presence and hearing of all the witnesses necessary in this form of testament, that it contains his last will. *Babineau v. Leblanc*, 729.

See *USFRUCT—Succession of Carlota*, 356.

See *SUCCESSION—Lewis v. Williams*, 625.

See *SLAVES—Price v. Ray*, 697.

Deshotele v. Soileau, 745.

WITNESS.

1. Where the answer of a witness is not responsive to the question asked, or is a voluntary statement made by him, the court may order it to be stricken out. *Roquest v. Boutin*, 44.
2. The son-in-law of one of the parties to a suit is a competent witness. The interest of the mother of the witness in the property in dispute, as belonging to the marriage community, she not being a party to the suit, is too remote to exclude her son's testimony. *King v. Neely*, 165.
3. A witness may be permitted to refer to accounts or memoranda made by himself to refresh his memory. *Chiapella v. Brown*, 189.
4. A witness cannot be permitted to state his belief as to the correctness of an account, he must testify to his knowledge of facts and not to his belief of them. *Succession of Penny*, 194.
5. A witness is properly excluded on account of interest, where he has a hope of gain, although it be uncertain whether any advantage can arise to him, even if the decision be favorable. *Gilkinson v. Sbt. Scotland*, 417.

WITNESS (*Continued*).

6. In a cross-examination of a witness for the State, the question was asked the witness "*if he was not anxious that the defendant should be convicted.*"
Held: That the question was a proper one, and might be asked to show bias on the mind of the witness, and that it was competent for the jury to decide from his answer to what extent his credibility may have been affected by it. *State v. Adams*, 620.
7. A defendant named in the petition, but not cited, is not in reality a party to the suit, so as to render him incompetent as a witness.
Taylor v. Hancock, 693.
8. A witness cannot be objected to on the ground of interest, because he is liable to the defendant as warrantor, if he has not been cited in warranty in the suit in which he is called to testify. *Arrowsmith v. Durell*, 849.

Arrowsmith v. Durell

112-41



